

PREFACE TO THE THIRD EDITION

IN preparing the present edition I had the unique assistance of the notes of Sir Lawrence Jenkins—the eminent and illustrious lawyer who filled the office of Chief Justice of the High Court of Bombay with great ability and distinction for well nigh ten years. The notes above referred to were prepared by Sir Lawrence Jenkins while he was on the Special Committee which met at Simla in June 1907 and modelled the Code of Civil Procedure in its present form. That the Code of 1908 is a considerable improvement upon its predecessor is beyond all question. The arrangement, though novel, is scientific. It proceeds upon the lines of the Judicature Acts and the Rules framed under those Acts. It consists of two parts—the first containing provisions of a substantive character and the second containing provisions which relate to “matters of mere machinery.” The 158 sections which form the body of the Code constitute the first part. The Rules and Orders comprised in Schedule I constitute the second part. The provisions of the Code of 1882 relating to arbitration have been transferred to a separate schedule, being Schedule II, the object being to facilitate the repeal of these provisions on the passing of a new and comprehensive Arbitration Act. Sections 321 to 325 C of the same Code, which relate to execution of decrees by Collectors, have been transferred to Schedule III. Schedule IV contains a list of enactments amended and Schedule V a list of enactments repealed by the new Code.

The arrangement of the present work is a simple one. Long familiarity with the section numbers of the Code of 1882 has rendered it necessary to give a comparative table of the sections of the old and the new Code. Such a table has accordingly been given, and to facilitate reference to it, which is likely to be constant, the table portion has been marked off by a piece of tape attached to the volume. At the same time we have given at the beginning of each section and rule of the new Code references to the corresponding sections of the Code of 1882 in thick black types enclosed in square brackets. There are, besides, a large number of rules comprised in the First Schedule which have been borrowed from the Rules made under the Judicature Acts. References to the latter rules also have been given in square brackets at the beginning of the corresponding rules of this Code, and are indicated by the letters “R.S.C.,” being an abbreviation of the words “Rules of the Supreme Court of England:” see, for instance, Order 1, rule 1, at p. 304.

There have been numerous alterations and additions introduced into the new Code, of which the following require the immediate attention of practitioners :—

1. S. 2, cl. 2,—definition of decree.
2. S. 2, cl. 11,—definition of legal representative.
3. S. 7, O. 50,—Provincial Small Cause Courts.
4. S. 8, O. 51,—Presidency Small Cause Courts.
5. S. 20, cl. (c),—arising of *part* of cause of action within jurisdiction.
6. S. 21,—objections to jurisdiction.
7. S. 24,—general power of transfer and withdrawal of suits.
8. S. 25,—power of Governor-General in Council to transfer suits.
9. S. 35,—costs.
10. S. 37,—definition of Court which passed a decree.
11. S. 40,—transfer of decree to Court in another province.
12. S. 46,—precepts.
13. S. 47,—questions to be determined by the Court executing decree.
14. S. 48,—execution barred in certain cases.
15. S. 53,—liability of ancestral property in execution.
16. S. 55, sub-s. (1), second proviso and sub-s. (4),—arrest and detention.
17. S. 60, sub-s. (1), cls. (a), (b), (h) and (k),—property liable to attachment and sale in execution of decree.
18. S. 61, O. 21, rr. 44-45, rr. 74-75, O. 38, r. 12,—agricultural produce.
19. S. 62, sub-s. (2),—seizure of property in dwelling house.
20. S. 64, *Explanation*,—private alienation pending attachment.
21. S. 65,—execution purchaser's title.
22. S. 73,—sub-s. (2), rateable distribution.
23. S. 88,—interpleader.
24. S. 91,—public nuisances.
25. S. 92, sub-s. (2),—public charities.
26. S. 96, sub-s. (3),—appeal from original decree.
27. S. 97,—appeal from preliminary decree.
28. S. 99,—material irregularity.
29. S. 103,—power of High Court to determine issues of fact in second appeal.
30. S. 104, O. 43,—appeal from orders.
31. S. 105, sub-s. (2),—appeal from order of remand.
32. Ss. 121-131,—Rules. See also Index, under the head "Rules."
33. S. 141,—application of procedure provided in Code to miscellaneous proceedings.
34. S. 144,—application for restitution.
35. S. 145,—enforcement of liability of surety.
36. Ss. 146 to 153,—these sections are new.
37. O. 1, rr. 1 to 5, r. 7,—joinder of parties.
38. O. 2, r. 2, *Explanation* r. 4, r. 7,—frame of suit.
39. O. 5, r. 17,—procedure where defendant refuses to accept service or cannot be found.
40. O. 6,—pleadings. The whole of this order is new.
41. O. 7, rr. 7-9,—plaint.
42. O. 8, rr. 2-5, rr. 7-8,—written statement.
43. O. 9, r. 13,—setting aside decree *ex parte*.
44. O. 11, r. 12, r. 15, r. 19,—discovery and inspection.
45. O. 12,—admissions and judgment on admissions.

46. O. 16, r. 1,—witness-summons.
47. O. 20, r. 11, r. 12, r. 17, r. 19,—decrees.
48. O. 21, r. 3, r. 11, r. 22, sub-r. (2), r. 32, sub-r. 5, rr. 47-48, rr. 49-50, r. 53, r. 56,
r. 57, r. 90,—execution.
49. O. 22, rr. 3, 4, r. 6,—abatement.
50. O. 23, r. 3,—compromise of suit.
51. O. 30, suits by or against firms.
52. O. 33, r. 4,—next friend and guardian.
53. O. 33, r. 5, cl. (d),—rejection of petition for leave to sue as a pauper.
54. O. 34,—suits relating to mortgages of immoveable property.
55. O. 37, r. 3,—leave to appear in summary suit.
56. O. 40, r. 1,—appointment of receiver.
57. O. 41, r. 2, r. 5, sub-r. 1, r. 6, r. 11, r. 22, sub-r. 4, r. 33,—appeal from original
decrees.
58. O. 43, r. 1, cl. (m),—appeal from orders.
59. O. 45, rr. 4-5, appeal to the Privy Council.
60. Schedule II, para. 1, para. 15, cl (c), para. 18, para. 21, arbitration.

The High Courts Act and the Charters of the High Courts have been set out respectively in Appendix I and Appendix II.

D. F. M.

26th October, 1908.

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5	S. 7.	38	O. 3, r. 3.
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10	Omitted.	44	O. 2, rr. 4, 5.
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17	S. 20.	53	O. 6, r. 17; <i>cf.</i> O. 7, r. 11.
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19	S. 17.	55	O. 7, r. 12.
20	Omitted.	56	O. 7, r. 13.
21	Omitted.	57	O. 7, r. 10.
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24, para. 2 ..	Omitted.	60	O. 7, r. 15.
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78	O. 5, r. 15.			120	O. 10, r. 4.		
79	O. 5, r. 16.			121	O. 11, r. 1.		
80	O. 5, r. 17.			122	<i>Cf.</i> O. 48, r. 2.		
81	O. 5, r. 18.			123	O. 11, r. 3.		
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325		377	O. 24, r. 2.
325A		378	O. 24, r. 3.
325B		379	O. 24, r. 4.
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327	S. 67.	382	O. 25, r. 1 (2).
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329	O. 21, r. 98.	384	O. 26, r. 2.
330	O. 21, r. 98.	385	O. 26, r. 3.
331	O. 21, r. 99.	386	S. 76; O. 26, r. 4.
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333	O. 21, r. 102.	388	O. 26, r. 6.
334	O. 21 rr. 97, 98.	389	O. 26, r. 7.
335	O. 21, rr. 97, 99, 103.	390	O. 26, r. 8.
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337	O. 21, r. 38.	392	O. 26, r. 9.
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412	O. 33, r. 11.	455	O. 32, r. 14.
413	O. 33, r. 15.	456	O. 32, rr. 3 (2), (3) 4 (4).
414	O. 33, r. 9.	457	O. 32, r. 4 (1).
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417	O. 27, r. 2.	460	Omitted.
418	O. 27, r. 3.	461	O. 32, r. 6.
419	O. 27, r. 4.	462	O. 32, r. 7.
420	O. 27, r. 5.	463	O. 32, r. 15.
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425	Omitted [See s. 55, sub-sec. (2)].	468	O. 5, rr. 28, 29.
426	O. 27, r. 8 (1).	470	S. 88.
427	O. 27, r. 8 (2).	471	O. 35, r. 1.
428	S. 81.	472	O. 35, r. 2.
429	S. 82.	473	O. 35, r. 4.
430	S. 83.	474	O. 35, r. 5.
431	S. 84.	475	O. 35, r. 6.
432	S. 85.	476	O. 35, r. 3.
433	S. 86.	477 } ..	O. 38, r. 1.
434	S. 87.	478 }	
435	O. 29, r. 1.	479	O. 38, r. 2.
436	O. 29, rr. 2, 3.	480	O. 38, r. 3.
437	O. 31, r. 1.	481	O. 38, r. 4.
438	O. 31, r. 2.	482	Omitted.
439	O. 31, r. 3.	483 }	
* 440	O. 32, rr. 1, 4 (2).	484 }	O. 38, r. 5.
441	O. 32, r. 5 (1).	485	O. 38, r. 6.
442	O. 32, r. 2.	486	O. 38, r. 7.
443	O. 32, rr. 3 (1), 4 (2).	487	O. 38, r. 8.
444	O. 32, r. 5 (2).	488	O. 38, r. 9.
		489	O. 38, r. 10.

Comparative Table of the Sections of the Old and the New Code—contd

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
490	O. 38, r. 11.	535	O. 37, r. 5.
491	S. 95.	536	O. 37, r. 6.
492	O. 39, r. 1.	537	O. 37, r. 7.
493	O. 39, r. 2.	538	O. 37, r. 1.
494	O. 39, r. 3.	539	Ss. 92 and 93.
495	O. 39, r. 5.	540	S. 96.
496	O. 39, r. 4.	541	O. 41, r. 1.
497	S. 95.	542	O. 41, r. 2.
498	O. 39, r. 6.	543	O. 41, r. 3.
499	O. 39, r. 7.	544	O. 41, r. 4.
500	O. 39, r. 8.	545	O. 41, r. 5.
501	O. 39, r. 9.	546	O. 41, r. 6.
502	O. 39, r. 10.	547	O. 41, r. 7.
503	O. 40, rr. 1 to 3.	548	O. 41, r. 9.
504	O. 40, r. 5.	549	O. 41, r. 10.
505	Omitted.	550	O. 41, r. 13.
506	The Second Schedule.	551	O. 41, r. 11.
507		552	O. 41, r. 12.
508		553	O. 41, r. 14.
509		554	O. 41, r. 15.
510		555	O. 41, r. 16.
511		556	O. 41, r. 17.
512		557	O. 41, r. 18.
513		558	O. 41, r. 19.
514		559	O. 41, r. 20.
515		560	O. 41, r. 21.
516		561	O. 41, r. 22.
517		562	O. 41, r. 23.
518		564	Omitted.
519		565	O. 41, r. 24.
520		566	O. 41, r. 25.
521		567	O. 41, r. 26.
522		568	O. 41, r. 27.
523		569	O. 41, r. 28.
524		570	O. 41, r. 29.
525		571	O. 41, r. 30.
526		572 } ..	Cf. S. 135.
527	O. 36, r. 1.	573 }	
528	O. 36, r. 2.	574	O. 41, r. 31.
529	O. 36, r. 3.	575	S. 98.
530	O. 36, r. 4.	576	O. 41, r. 34.
531	O. 36, r. 5.	577	O. 41, r. 32.
532	O. 37, r. 2.	578	S. 99.
533	O. 37, r. 3.	579	O. 41, r. 35.
534	O. 37, r. 4.	580	O. 41, r. 36.

Comparative Table of the Sections of the Old and the New Code—concl'd.

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
581	O. 41, r. 37.	620	O. 46, r. 4.
582	S. 107 (2); O. 22, r. 11.	621	O. 46, r. 5.
582A	Cf. S. 146.	622	S. 115.
583	Cf. S. 144 (1).	623	S. 114; O. 47, r. 1.
584	Cf. S. 100.	624	O. 47, r. 1.
585	Cf. S. 101.	625	O. 47, r. 3.
586	S. 102.	626	O. 47, r. 4.
587	S. 108; O. 42, r. 1.	627	O. 47, r. 5.
588	S. 104; O. 43, r. 1.	628	O. 47, r. 6.
589	S. 106.	629	O. 47, rr. 7, 9.
590	S. 108; O. 43, r. 2.	630	O. 47, r. 8.
591	S. 105.	631	S. 116.
592	O. 44, r. 1.	632	S. 117.
593	O. 44, r. 2.	633	S. 122.
594	O. 45, r. 1.	634	S. 118.
595	S. 109.	635	S. 119.
596	S. 110.	636	O. 49, r. 1.
597	S. 111.	637	S. 128 (2) (i).
598	O. 45, r. 2.	638	S. 120 (1); O. 49, r. 3
600	O. 45, r. 3.	639	S. 120 (2).
601	O. 45, r. 6.	640	S. 132.
602	O. 45, r. 7.	641	S. 133.
603	O. 45, r. 8.	642	S. 135.
604	O. 45, r. 9.	643	Omitted.
605	O. 45, r. 10.	644	O. 48, r. 4.
606	O. 45, r. 11.	645	S. 137.
607	O. 45, r. 12.	645A	S. 140.
608	O. 45, r. 13.	646	Omitted.
609	O. 45, r. 14.	646A	O. 46, r. 6.
610	O. 45, r. 15.	646B	O. 46, r. 7.
611	O. 45, r. 16.	647	S. 141.
612	} Omitted.	648	S. 136.
613		649	Ss. 36, 37.
615		650	Omitted.
616	S. 112.	650A	S. 29.
617	S. 113; O. 46, r. 1.	652	Ss. 122, 129, 130 and 131.
618	O. 46, r. 2.	653	S. 59.
619	O. 46, r. 3.		

THE
CODE OF CIVIL PROCEDURE

ACT V OF 1908

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 21ST MARCH 1908

*An Act to consolidate and amend the laws relating to the
Procedure of the Courts of Civil Judicature.*

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—

Preliminary.

Short title, commencement and extent.

1. [S. 1.] (1) This Act may be cited as the Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 155 to 158 extend to the whole of British India: the rest of the Code extends to the whole of British India, except the Scheduled Districts.

Interpretation of the Act.—The first Code of Civil Procedure was passed in the year 1859, and it was repealed by the Code of 1877. The Code of 1877 was repealed by the Code of 1882 which, in its turn, has been repealed by the present Code. It will be seen from the Preamble that the present Act not only defines and amends but also *consolidates* the law of civil procedure. The object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidation Act is passed. When a question, therefore, arises as to the construction of a section in such an Act, the proper course is in the first instance to *examine the language of the Act and to ask what is its natural meaning*. If the meaning is plain it is not proper to have recourse to the *previous state of the law*, and the language of the Act must be interpreted uninfluenced by any considerations derived from the *previous*

- S. 1. *state of the law.* But if the meaning be doubtful, resort may be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Act (a).

The following are some of the leading rules relating to the interpretation of statutes :

1. Proceedings of the Legislature in passing an Act are to be excluded from consideration on the judicial construction of the Act (b). These proceedings include Reports of Select Committees, Statements of Objects and Reasons attached to Bills, and debates of the Legislature (c).

2. Marginal notes to the sections of an Act are not to be referred to for the purpose of construing an Act (d).

3. Illustrations in Acts of the legislature ought never to be allowed to control the plain meaning of the section to which they are appended, especially when the effect would be to curtail a right which the statute in its ordinary sense would confer (e).

4. The essence of a Code is to be exhaustive on the *matters in respect of which it declares the law*; in respect of such matters the Court cannot disregard or go outside the letter of the enactment according to its true construction (f). In cases, however, where there is no specific provision in a Code, the Court has the power, and, it would seem, it is its duty, to act according to justice, equity and good conscience (g). See s. 151.

5. Every statute which takes away or impairs vested rights acquired under existing law must be presumed to be intended not to have a retrospective operation. But this presumption does not apply to enactments affecting *procedure or practice*, such as the Code of Civil Procedure. The reason is that no person has a vested right in any course of procedure. The general principle, indeed, seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it (h). The right of appeal, however, is in the nature of a vested right, and hence the provision in s. 154 of the Code declaring that nothing in this Code shall affect "any present right of appeal which shall have accrued to any party at its commencement." See also s. 97.

6. "The Code consists (i) of that which is termed 'the body of the Code' and (ii) of the rules. The body of the Code is fundamental and is unalterable except by the Legislature; the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, and it has to be read in conjunction with the more particular provisions of the rules" (i).

British India.—The expression "British India" is not defined in the Code. In the absence of any definition of a particular expression in an Act, we are to turn to the definition of it in the General Clauses Act X of 1897. There are several terms of frequent or general occurrence in several Acts, and these are defined in the General Clauses

(a) *Bank of England v. Vagliano* [1891] A. C. 107, 144-145; *Administrator-General v. Premal* (1895) 22 Cal. 788, 22 I. A. 107; *Norendra v. Kamal Basini* (1898) 23 Cal. 568, 23 I. A. 18; *Kandappa v. Narasimulu* (1897) 20 Mad. 97, 103; *Lala Suraj Prasad v. Golab Chand* (1901) 23 Cal. 517.
(b) *Administrator-General v. Premal* (1895) 22 Cal. 788, 22 I. A. 107; *Queen-Empress v. Sri Churn* (1895) 22 Cal. 1017.
(c) *Queen-Empress v. Tylak* (1898) 22 Bom. 112.
(d) *Thakurda Bhai v. Jagatpal* (1904) 8 O. W. N. 985, 8 I. A. 132.
(e) *Koyla v. Sonatun* (1881) 7 Cal. 182; *Mahomed v. Yeoh* (1916) 43 I. A. 256, 263.

(f) *Gokul Mandar v. Pudmanund* (1902) 29 Cal. 707, 715.
(g) *Hukum Chand v. Kamalanand* (1906) 33 Cal. 927, 931-932.
(h) Maxwell on the Interpretation of Statutes, Chap. viii, sec. iv.; *Crales on Statute Law*, pp. 327-328; *Hajrat Akramnissa v. Vali-unissa* (1894) 18 Bom. 429; *Balkrishna v. Bapu* (1895) 19 Bom. 204; *Girish Chandra v. Aparao* (1894) 21 Cal. 940, 955; *Bisesswar v. Jasoda Lal* (1913) 40 Cal. 704.
(i) *Mani Mohan v. Ramratan* (1916) 43 Cal. 148, 152, per Jenkins, O. J.

Act. "British India" is one of them, and it is defined in that Act (s. 3, cl. 17) as meaning "all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India (j). The question whether a particular place is within the limits of British India is often of importance in relation to the provisions of O. 25, r. 1 [Code of 1882, s. 380]. Aden is within British India (k), but Singapore is not (l), nor the Civil Station at Wadhwan (m).

Scheduled Districts.—A list of Scheduled Districts is given in Schedule I to the Schedule Districts Act XIV of 1874. The sections of this Code, except s. 1 and ss. 155 to 158, do not extend to any of the Scheduled Districts. Section 5, however, of the Scheduled Districts Act empowers the Local Government, with the sanction of the Governor-General in Council, to extend to any of the Scheduled Districts any enactments in force in British India, and the whole of the Procedure Code has accordingly been extended to several Scheduled Districts including Sindh, Ajmere, Merwara and the Scheduled Districts of the Punjab (n).

2. [S. 2.] In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

(1) "Code" includes rules :

See notes on p. 2, para. No. (8).

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final :

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made :

(j) See *Hemchand v. Azam Sakeral* (1905) 33 I. A. 1.

(k) Aden Laws Regulation, 1891, s. 2.

(l) Straits Settlement Act, 1866, s. 1.

(m) *Emperor v. Chhimanlal* (1912) 14 Bom. L. R.

876.

(n) See Unrepealed General Acts, Vol. II., p. 579. See also *Kashi Mohun v. Bishnoo* (1888) 15 Cal. 365, and *Prabhu Narain v. Saligram* (1907) 34 Cal. 576.

S. 2. Definition of "decree" in the Code of Civil Procedure, 1882.—
 The term "decree" was defined in the Code of 1882 as follows:—

"'Decree' means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. An order rejecting a plaint or directing accounts to be taken, or determining any question mentioned or referred to in section 244, but not specified in section 588, is within this definition; an order specified in section 588 is not within this definition."

Importance of the definition of decree.—The adjudications of a Court of law may be divided into two classes, namely, (1) decrees, and (2) orders. Orders again may be divided into appealable orders and non-appealable orders. The expression "order" is defined in cl. (14) of the present section as meaning "the formal expression of any decision of a Civil Court which is not a decree."

Where a decision amounts to a decree, it is invariably appealable unless it is expressly provided that no appeal shall lie from it (s. 96). Further, where an appeal is preferred from a decision which amounts to a decree and a decree is passed in appeal, an appeal will lie to the High Court from the decree passed in appeal if the case comes within the provisions of s. 100 below. This is called a second appeal. In the case, therefore, of an adjudication which amounts to a decree the law permits an appeal, and in some cases also a second appeal.

Where an adjudication amounts to an order, no appeal lies from it unless it is enumerated in the list of appealable orders given in s. 104 or in the list given in O. 43, r. 1.

We have thus seen that an appeal lies from a decree. We have also seen that an appeal lies from an order specified in s. 104 or in O. 43, r. 1. What then is the distinction between a decree and an appealable order? The distinction is this—that while in the case of an adjudication which amounts to a decree the law permits a second appeal in some cases, no second appeal is allowed at all in the case of an adjudication which amounts to an appealable order. That is to say, if an appeal is preferred from a decree and a decree is passed in appeal, an appeal will in certain cases lie from the decree passed in appeal. But if an appeal is preferred from an appealable order and an order is passed in appeal, no appeal lies at all from the order passed in appeal [s. 104, sub-section (2)]. To take an instance: A appeals from a decision of a Subordinate Judge to a District Judge. The appellate Court decides against A. A prefers a second appeal to the High Court from the decision of the District Court. If the decision of the Subordinate Judge amounts to a decree a second appeal will lie provided the case comes within s. 100. But if the decision amounts to an appealable order, no second appeal will lie.

The definition of decree is important not only for determining the right of second appeal but for determining whether an appeal lies at all in the first instance. If an adjudication is an appealable order, there is no difficulty whatever in determining whether an appeal lies from it. All that has to be done in such a case is to refer to s. 104 and to O. 43, r. 1, and to ascertain whether the order is enumerated in the lists there given. The real difficulty in determining the right of appeal arises when the adjudication from which an appeal is preferred is not an appealable order. In such a case the adjudication may be either a decree or a non-appealable order, and an appeal can lie only if the adjudication amounts to a decree. The appellant would in this class of cases endeavour to show that the adjudication appealed from is a *decree*, while the respondent would endeavour to show that the adjudication is *merely an order*. Instances of this class of cases are given in the next following paragraph.

Essential elements of a decree.—The term “decree” is defined in the Code as meaning “the formal expression of an adjudication which, so far as regards the Court expressing it, *conclusively determines the rights of the parties* with regard to all or any of the *matters in controversy in the suit*.” The words italicized above indicate the distinguishing marks of a decree. To constitute a decision a decree, the following conditions must be present :—

I.—The decision must have been expressed in a *suit*.

II.—The decision must have been expressed on the *rights* of the parties with regard to all or any of the *matters in controversy* in the suit.

III.—The decision must be one which *conclusively determines* those rights.

If all the elements set forth above concur in a decision, the decision is a decree; if not, it is an order, for decisions which are not decrees are orders (see definition of “order,” cl. 14, below).

Illustrations of Condition I.

1. A applies for leave to sue in *formâ pauperis*. The application is rejected on a finding that A is not a pauper. This decision is not a decree, for it is not a decision in a *suit* (o). [The application is for leave to sue, which shows clearly that there is yet *no suit*. Every suit is commenced by a *plaint* (p) and an application for leave to sue in *formâ pauperis* does not become a *plaint* until the application is granted (see O. 33 r. 8).] Similarly an order under s. 18 of the Religious Endowments Act 20 of 1863 granting or refusing leave to *institute* a suit for accounts of a religious endowment is not a decree and is not therefore appealable (q).

2. There are several Acts relating to special subjects, under which proceedings have to be commenced by a *petition* and *not* by a *suit*. Decisions on petitions under those Acts would not, therefore, be *decrees*. Thus a decision on a petition under the Religious Endowments Act appointing a new member to fill a vacancy in a committee of trustees of an endowment is not a decree (r).

Illustrations of Condition II.

1. In a suit by A against B an application is made by X to be added as a plaintiff to the suit on the ground that he is interested in the subject-matter of the suit. The application is rejected. The decision is not a decree, for it is not a decision on any *right* which X might have claimed in the suit had he been made a party-plaintiff (s).

2. A plaintiff in a suit, finding that the suit must fail by reason of some formal defect, applies for leave to withdraw from the suit with liberty to bring a fresh suit (O. 23, r. 1). The leave is granted. This decision is not a decree, for it is not an adjudication determining the *rights of the parties with regard to any matter in controversy* in the suit. These rights still remain open for determination in a subsequent suit (t).

Note.—In all the cases cited above there was an appeal preferred from the decision. The decision not being an appealable order in any of them, it was contended on behalf

(o) *Secretary of State v. Jillo* (1899) 21 All. 133.
(p) *Venkata v. Venkatarama* (1899) 22 Mad. 256;
Upadhyaya v. Persidh Singh (1896) 23 Cal.
725; *Ram Kirpal v. Rup Kuari* (1884) 6
All. 269, 274, 11 I. A. 37.
(q) *Mozaffer Ali v. Hedayet* (1907) 34 Cal. 584;
Kazem Ali v. Azim Ali (1891) 18 Cal. 382.
(r) *Minakshi v. Subramanya* (1888) 11 Mad. 26,

35, 14 I. A. 180.
(s) *Abirunnissa v. Komurunnissa* (1886) 13 Cal.
100.
(t) *Genda Mal v. Pirbhu Lal* (1895) 17 All. 97;
Jogodindro v. Sarut Sunduri (1890) 18 Cal.
322; *Abdul Hossein v. Kasi Sahu* (1900) 27
Cal. 362. See also *Palloji v. Gamu* (1891)
15 Bom. 370.

- S. 2. of the appellant that it amounted to a decree, and was therefore appealable. But it was held in all of them that the adjudication did not amount to a decree, and that it was not therefore appealable.

Points of distinction between the definition of "decree" in this Code and that in the Code of 1882.—The definition of decree as it stood in the Code of 1882 has been modified in the following two respects :—

1. Under the Code of 1882, no adjudication came within the definition of a decree unless it decided *the suit*. Under this Code, an adjudication which conclusively (*u*) determines the rights of the parties with regard to all or any of the matters in controversy in the suit is a decree, *though it does not completely dispose of the suit*. But the decree in that case is called a preliminary decree as distinguished from a final decree. The present definition is wider than that in the Code of 1882 in that it includes preliminary decrees within its scope, the object being to permit an appeal from preliminary decrees. "See notes below under the head "Preliminary decree."

2. Under the Code of 1882 there was a conflict of decisions as to whether an order of dismissal for default was a decree. The present section expressly declares that an order of dismissal for default is not within the definition of decree, the object being to exclude the right of appeal from such order. See notes below under the head "Order of dismissal for default."

Two other alterations, both of a minor character, may also be noted here. They are as follows :—

(i) An adjudication directing accounts to be taken is no longer to be deemed to be a decree as under the Code of 1882; it is a decree by the very terms of the present definition, though a preliminary one. Under the Code of 1882 such an adjudication was appealable, for it was to be deemed to be a decree. Under this Code it is appealable for it is a decree. This distinction, however, is of no practical importance. See notes to s. 97 below.

(ii) The word "within" has been substituted for "mentioned or referred to in" with a view to bring within the definition of decree orders against sureties (s. 145) and orders as to court-fees in pauper suits (O. 33, r. 13), and thus providing for appeals therefrom. See notes to s. 145 and O. 33, r. 13.

It has been seen that the importance of the definition of decree rests on the fact that by reference to it the right of appeal is determined. Hence every material change made in the definition of that term must be taken to have been made for the purpose either of permitting an appeal from adjudications which were not appealable before or excluding a right of appeal from adjudications from which an appeal was permitted under the old law. It is from this standpoint that the new definition must be examined and that is what we have attempted to do above.

Preliminary decree.—A decree may be preliminary or final or it may be partly preliminary and partly final. A decree is preliminary when the adjudication, though it determines the rights of the parties with regard to the matters in controversy in the suit, *does not completely dispose of the suit* and further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit (*v*). As to appeals from decrees, see ss. 96 and 97.

(u) The addition of the word "conclusively" is in accordance with the decision in *Lekha v. Bhauna* (1896) 18 All. 101, 104.

(v) *Khushi Ram v. Tula Ram* (1917) P. R. no. 7, p. 25, at pp. 26-27.

S.

The question whether a decision amounts to a preliminary decree is one of considerable importance in view of the provisions of s. 97, by which it is provided that if a party aggrieved by a preliminary decree does not appeal therefrom within the period of limitation allowed for appeals, he shall be precluded from disputing its correctness in an appeal from the final decree. It was held at one time by the High Court of Bombay that a decision that a suit is *not* bad for misjoinder, or that it is *not* barred by limitation, or a decision that the Court *has* jurisdiction to entertain a suit, was a preliminary decree (w). But these decisions have since been overruled by a Full Bench of the same High Court (x). In the last-mentioned case it was held that a decision that the matters in dispute are *not* caste questions, and are not therefore outside the jurisdiction of Civil Courts, does not amount to a preliminary decree from which an appeal can lie (x). Similarly, it has been held that a decision that a matter is *not res judicata*, and that therefore the trial can proceed, is not a preliminary decree (y). Nor is a decision that the plaintiff is competent to maintain the suit brought by him (z). Nor is a decision that a suit is *not* barred by limitation (a). A finding on a preliminary issue, whether a party is or is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, 1879, is a preliminary decree, if it necessarily involves the result that the accounts should be taken under s. 13 of that Act despite the terms of the contract to the contrary. But it is not a preliminary decree, if there are other questions yet to be determined before the party claiming relief can be held entitled to have accounts taken under that section (b). An interlocutory order that a plaint should be stamped with a higher court-fee than what it is stamped with does not amount to a preliminary decree (c).

Illustrations.

1. A sues B for cancellation of a document, and a decree is passed in the suit. This is a final decree, for the suit is completely disposed of.

2. A suit is brought by one partner against another for a dissolution of the partnership and for the taking of partnership accounts. Here the Court may pass a *preliminary* decree declaring the proportionate shares of the parties, and directing such accounts to be taken as it thinks fit, and, after the accounts are taken, it may pass a *final* decree directing payment of debts due by the partnership, the costs of the suit, and to the parties the amount found due to them on taking the accounts. See O. 20, r. 15.

3. A sues B for the recovery of possession of certain immovable property and for mesne profits. The Court may pass a decree for possession of the property, and direct inquiry as to mesne profits. Here the decree is partly final and partly preliminary. It is final so far as it directs delivery of possession to A. It is preliminary so far as it directs an inquiry as to mesne profits. After the inquiry is completed, the Court has to pass a final decree in respect of mesne profits in accordance with the result of the inquiry. See O. 20, r. 12.

(w) *Sidhanath v. Ganesh* (1912) 37 Bom. 60;
Narayan v. Gopal (1914) 38 Bom. 392, 398.
(x) *Chanmalewami v. Gangadharappa* (1914) 39 Bom. 339.
(y) *Bharma v. Bhanagavda* (1915) 39 Bom. 421;
Genna v. Khuda Bakhsh (1913) P. R. no. 16, p. 56.

(z) *Kamini Devi v. Promoka* (1914) 19 O.W. N. 755.
(a) *Khushi Ram v. Tulsa Ram* (1917) P. R. no. 7, p. 25.
(b) *Gulabchand v. Baliram* (1915) 39 Bom. 423.
(c) *Mir Umar Ali v. Nasib-un-nissa* (1911) P. R. no. 82, p. 303.

S. 2. The following is a list of suits in which a preliminary decree may be passed under this Code :—

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Suits for recovery of possession of immovable property and for rent or mesne profits (O. 20, r. 12). 2. Administration suits (O. 20, r. 13). 3. Suits for pre-emption (O. 20, r. 14). 4. Suits for dissolution of partnership (O. 20, r. 15). 5. Suits for account between principal and agent (O. 20, r. 16). | <ol style="list-style-type: none"> 6. Suits for partition of property or separate possession of a share therein (O. 20, r. 18). 7. Suits for foreclosure of a mortgage (O. 34, rr. 2-3). 8. Suits for sale of mortgaged property (O. 34, rr. 4-5). 9. Suits for redemption of a mortgage (O. 34, rr. 7-8). |
|---|--|

Rejection of plaint.—As to an adjudication rejecting a plaint it has been expressly provided by the present clause that it shall be deemed to be a decree. Such adjudication, therefore, is appealable as a decree. An appeal, however, is not the only remedy open to a party whose plaint is rejected, for he may cure the defect for which the plaint was rejected and present a fresh plaint (O. 7, r. 13). As to the cases in which a plaint “shall” be rejected, see O. 7, r. 11.

Order returning plaint.—A plaint may be returned for amendment (O. 6, r. 17) or to be presented to the proper Court (O. 7, r. 10). In either case the decision returning the plaint is an order as distinguished from a decree. An order returning a plaint to be presented to the proper Court was appealable under the Code of 1882 [s. 588, cl. (6),] and it is also appealable under this Code [O. 43, r. 1, cl. (a)]. An order returning a plaint for amendment was appealable (of course, as an order) under the Code of 1882 [s. 588, cl. (6)]; it is no longer appealable under this Code (d).

Rejection of memorandum of appeal.—It is provided by the present section that a decision *rejecting a plaint* is to be deemed to be a decree. The provisions of this and other sections relating to suits apply to appeals so far as such provisions are applicable (s. 108). Hence a decision rejecting a memorandum of appeal on the ground that it is barred by limitation (e) or that it is insufficiently stamped (f), or that it was not duly presented (g), is appealable as a decree.

Order returning memorandum of appeal.—No appeal lies from an order returning a memorandum of appeal to be presented to the proper Court (h). Nor does an appeal lie from an order returning a memorandum of appeal for amendment.

Adjudications appealable as orders.—An adjudication which is appealable as an order is not a decree. See s. 104 and O. 43, r. 1.

Order of dismissal for default.—It is provided by O. 9, r. 8, that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. Such an order, it is enacted by the present section, is not within the definition of decree, and is not therefore appealable. Under the Code of 1882 there was a conflict of decisions as to whether the decision of a Court under the corresponding section 102 dismissing a suit for default was a decree or merely an order. It was held by the High Court of Madras that the

(d) *Gurdas v. Bhag* (1911) P. R. no. 96, p. 334.
 (e) *Gulab Rai v. Mangli Lal* (1885) 7 All. 42;
Raghunath v. Nilu (1885) 9 Bom. 452;
Gunga Das v. Ramjoy (1880) 12 Cal. 30.
 (f) *Rup Singh v. Mukhras* (1885) 7 All. 1887.

(g) *Ayyanna v. Nagabhooshanam* (1898) 16 Mad. 285.
 (h) *Raghunath v. Shamo Koeri* (1904) 31 Cal. 344.
 See *Mahabir v. Behari* (1891) 13 All. 320.

decision was an order and not a decree and that there was no first or second appeal therefrom (i). On the other hand, it was held by the other High Courts that the decision was a decree and appealable as such (j).

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Again, it is provided by O. 41, r. 17, that where on the day fixed the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. Such an order, it is enacted by the present section, is not within the definition of decree, and is not therefore appealable. Under the Code of 1882 it was held by the High Courts of Bombay and Calcutta that a decision under the corresponding section 556 dismissing an appeal for default was a decree and was therefore appealable (k). In an Allahabad case it was assumed that the decision was not a decree (l).

Further, it is provided by O. 41, r. 11 (2), that if on the day fixed for the hearing of the appeal the appellant does not appear, the Court may make an order that the appeal be dismissed. Such an order, it is enacted by the present section, is not within the definition of decree, and is not therefore appealable. Under the Code of 1882 it was held by the Calcutta High Court that a decision under the corresponding s. 551 dismissing an appeal for default was a decree and was therefore appealable (m).

Lastly, we may refer to the provisions of O. 9, r. 3, by which it is provided that when neither party appears when the suit is called on for hearing the Court may make an order that the suit be dismissed. Such order, it is enacted by the present section, is not within the definition of decree, and is not therefore appealable.

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court:

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council:

Foreign Court.—The Privy Council is not within this definition, for though it is situate beyond the limits of British India, it is invested with judicial authority within it (n). But the High Court of Justice in England, whether it be the Chancery Division (o) or the King's Bench Division (p), is a foreign Court. As to suits on judgments of the High Court of Justice in England, see notes to s. 13, "A British Indian Court will not give effect to a foreign judgment, etc."

The Ceylon Court is a foreign Court (q).

(6) "foreign judgment" means the judgment of a foreign Court:

(i) *Gilkinson v. Subramania* (1899) 22 Mad. 221.
(j) *Gosto Behary v. Hari Mohan* (1903) 8 C. W. N. 313; *Ramchandra v. Madhav* (1892) 16 Bom. 23; *Ablakh v. Bhagirthi* (1887) 9 All. 427.
(k) *Ramchandra v. Madhav* (1892) 16 Bom. 23; *Radha Nath v. Chand Charan* (1903) 30 Cal. 660.

(l) *Pokkar v. Gopal* (1892) 14 All. 361.
(m) *Uma Sundari v. Bindu* (1897) 24 Cal. 759.
(n) *Bowles v. Bowles* (1884) 8 Bom. 571.
(o) *London Bank v. Hormasji* (1871) 8 B. H. C. 200.
(p) See *Deep Narain v. Dieterl* (1904) 31 Cal. 274.
(q) *Shah Adam v. Darud* (1909) 32 Mad. 469, 471.

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(7) "Government Pleader" includes any officer appointed by the local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader :

(8) "Judge" means the presiding officer of a Civil Court.

No judge can act in any matter in which he has any pecuniary interest, nor where he has any interest, though not a pecuniary one, sufficient to create a real bias (r).

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order :

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made.

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued :

Legal representative.—The expression "legal representative" occurs in several places in the Code. It was variously interpreted by the High Courts as would appear from reported cases which are not easily reconcilable with one another. See the undermentioned case (s), in which almost all the earlier cases are reviewed. See also notes to s. 50, s. 52, and O. 22, r. 3.

"Where a party sues in a representative character."—A suit by a Hindu reversioner for a declaration that an alleged adoption is not valid is a suit by him in a "representative character," that is, as representing, in his reversionary right, the estate of the last male owner, and on his death such right devolves on the next reversioner so as to entitle him to be substituted as plaintiff under O. 22, r. 3 (t).

A surviving coparcener is not a "legal representative" of the deceased coparcener within the meaning of this clause (u). See notes to O. 22, r. 3, "Legal representative."

"Intermeddles with the estate."—One who intermeddles with the estate of a deceased person, even though it may be with *part* thereof, is a "legal representative" within the meaning of this clause and is liable to the extent of the property taken possession of by him (v).

(r) *Aloo v. Gagubha* (1895) 19 Bom. 608.
(s) *Dinamoni v. Elahadut Khan* (1904) 8 C. W. N. 843.
(t) *Venkatanarayana v. Subbammal* (1915) 38 Mad. 406, 42, I. A. 125. See also *Mahadeo v. Sheo Karan* (1913) 35 All. 481 [suit by daughter to recover her father's estate]; *Jadubans v. Mahpal Singh* (1915) 38 All.

111 [suit by unmarried daughter to recover her father's estate]; *Ramaswami v. Padamunayya* (1916) 89 Mad. 382 [suit by daughter to recover her father's estate].
(u) *Chunilal v. Bai Mani* (1918) 42 Bom. 504.
(v) *Daropdi v. Sada Kuar* (1913) P. R. no. 115, p. 436.

(12) “mesne profits” of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession : s.

See notes to O. 20, r. 12.

(13) “moveable property” includes growing crops :

(14) “order” means the formal expression of any decision of a Civil Court which is not a decree :

(15) “pleader” means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court :

“Pleader.”—The term “pleader” is here used in a much larger than its ordinary signification as a convenient term to designate all persons who are entitled to *plead* for another in Court. “Pleader,” in its ordinary sense, is synonymous with vakil (*w*).

Authority to compromise.—An attorney or solicitor is entitled in the exercise of his discretion to enter into a compromise on behalf of his client, if he does so in a *bona fide* manner (*x*). And so is counsel (*y*). But a pleader cannot enter into a compromise on behalf of his client without his client's *express* authority (*z*). The reason is that both counsel and solicitor have an *implied* authority to compromise, the former by reason of his *retainer*, and the latter by virtue of his position of *agent* in relation to his client (*a*).

The result is that the consent of the client is not needed for a matter which is within the ordinary authority of counsel, and if a compromise is entered into by counsel, it binds the client though his consent was not taken (*b*). But what if the authority of counsel has been expressly limited by the client, and counsel has consented to an order or decree in spite of the dissent of the client, or on terms differing from those which the client authorized ? In such a case, if the limitation of authority is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect (*c*). If the limitation is not communicated to the other side, the question arises whether, having regard to the fact that the other side entered into the compromise believing that the opponent's counsel had the ordinary unlimited authority, the Court has power to interfere. It has been recently held by the House of Lords that it has, and that it is not prevented by the agreement of counsel from setting aside or refusing to enforce a compromise ; that it is a matter for the discretion of the Court, and that when, in the particular circumstances of the case, grave injustice would be done by allowing the

(w) *Pleader of the High Court, in re* (1884) 8 Bom. 145.

(x) *Fray v. Voules* (1859) 1 E. & E. 839; *Jagannathdas v. Ramdas* (1870) 7 B. H. C., O. C. 79.

(y) *Kempshall v. Holland* (1895) 14 R. 336; *Jang Bahadur v. Shankar* (1891) 13 All. 272.

(z) *Jagapatt v. Ekambara* (1898) 21 Mad. 274; *Thenal v. Sakkammal* (1917) 41 Mad. 233.

(a) Counsel is not his client's agent, but a solicitor is : *Mattheus v. Munster* (1888) 20 Q. B. D. 141, 142; *Jang Bahadur v. Shankar* (1891) 13 All. 272.

(b) *Mattheus v. Munster* (1887) 20 Q. B. D. 141; *Jang Bahadur v. Shankar* (1891) 13 All. 272; *Carrison v. Rodrigues* (1886) 13 Cal. 115.

(c) *Strauss v. Francis* (1866) L. R. 1 Q. B. 379, 382.

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compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side (d). The authority of counsel and solicitor to compromise a suit is limited to the issues in the suit; a compromise will not therefore be binding on a client if it extends to matters outside the scope of the particular case in which the counsel or solicitor is retained (e). And since a compromise is no more than an agreement, it can be set aside at the instance of the client if it has been made by the counsel or solicitor under a misrepresentation or mistake to the same extent as any other agreement entered into under similar circumstances by the client would be (f): see Indian Contract Act, 1872, ss. 17-22. The application to set aside a consent decree should be made before the decree is sealed (g).

Power to refer to arbitration.—The law is the same as regards reference to arbitration. Counsel has an implied power to consent to a reference and so has a solicitor on the record (h). But the authority does not extend to referring the case to arbitration on terms different from those which the client has authorised (i). A pleader or vakil has no power to refer a case without the express authority of his client (j).

Authority to withdraw suit.—Counsel has an implied power to withdraw an action (k). As regards vakils or pleaders it has been held that a vakalatnama couched in general terms suffices *prima facie* to authorize him to apply on behalf of his client for leave to withdraw a suit, and in the absence of anything to show that the vakil had acted contrary to the client's instructions, or otherwise was guilty of misconduct in making the application, the client is bound by the act of his vakil (l).

Power to bind client by admissions.—Counsel (m), solicitors (n), and pleaders or vakils (o) have an implied authority to bind their clients by admissions of fact, provided such admissions are made during the actual progress of litigation and not in mere conversation (p). Thus an admission of liability by a vakil is sufficient to warrant a decree against his client in the suit (q). The result is that the client will be bound by the admission even though it may be erroneous. But neither counsel nor solicitor nor vakil can bind his client by an admission on a point of law. Hence if the admission be erroneous, the client is free to repudiate it (r). It may here be observed that the omission of a pleader or counsel either to argue a question of law, or his abandoning a question of law, does not disentitle the Court to go into the question (s).

Power to abandon issue.—A pleader's general powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press (t).

(16) "prescribed" means prescribed by rules :

- (d) *Neale v. Gordon Lennox* [1902] A. C. 465, 470.
 (e) *Nundo Lal v. Nislarini* (1900) 27 Cal. 428;
Swinjen v. Lord Chelmsford (1859) 29 L. J. (Ex.) 382.
 (f) *Hickman v. Berens* [1895] 2 Ch. 638; *Wilding v. Sanderson* [1897] 2 Ch. 534; *Indersfield Banking Co. v. Lister* [1895] 2 Ch. 273; *Ribbee Solomon v. Abdool Szees* (1881) 6 Cal. 687, 706.
 (g) *Berry v. Mullen* (1871) 5 Ir. Rep. 368; *Jang Bahadur v. Shankar* (1891) 13 All. 272; *Carrison v. Rodrigues* (1886) 13 Cal. 115.
 (h) *Smith v. Tromp* (1849) 7 O. B. 757; *Fariell v. Eastern Counties Ry. Co.* (1848) 2 Ex. 344.
 (i) *Neale v. Gordon Lennox* [1902] A. C. 465.
 (j) *Thatur Persad v. Kalka* (1874) 6 N. W. P. 210.
 (k) *Chambers v. Mason* (1858) 5 O. B. N. S. 59; *Straw v. Francis* (1868) L. R. 1 O. B. 379.
 (l) *Ram Coomar v. Collector of Beerhoom* (1866) 5 W. B. 80.
 (m) *Haller v. Worman* (1860) 2 F. & F. 165;

- Van Wart v. Volley* (1823) Ry. & Mov. 4; *Stracy v. Blate* (1836) 1 M. & W. 168.
 (n) *Wagstaff v. Watson* (1833) 4 B. & Ad. 339; *Petch v. Lyon* (1846) 9 Q. B. 147.
 (o) *Kower Narain v. Sreenath* (1868) 9 W. R. 485; *Rajunder v. Bijai* (1830) 2 M. I. A. 253; *Hingul Lal v. Mansa Ram* (1896) 18 All. 384; *Venkata v. Bhashyakarlur* (1899) 22 Mad. 538.
 (p) *Young v. Wright* (1807) 1 Cam. 139; *Parkins v. Hawkshaw* (1817) 2 St. 239; *Patch v. Lyon* (1846) 9 Q. B. 147.
 (q) *Sreemuttu Dossee v. Pitambar* (1874) 21 W. B. 332.
 (r) *Dwar Buz v. Fati* (1898) 3 O. W. N. 222 (pleader); *Beni Parshad v. Dudhnath* (1900) 27 Cal. 156, 26 I. A. 216 (counsel); *Krishnaji v. Rajmal* (1899) 24 Bom. 800, 363.
 (s) *Beni Parshad v. Dudhnath* (1900) 27 Cal. 156.
 (t) *Venkata v. Bhashyakarlur* (1902) 25 Mad. 367, 377 [P. C.]

(17). "public officer" means a person falling under any S. 2.
of the following descriptions, namely :—

- (a) every Judge ;
- (b) every member of the Indian Civil Service ;
- (c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government ;
- (d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties ;
- (e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;
- (f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;
- (g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government ; and

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(h) every officer in the service or pay of the Government, or remunerated by fees, or commission for the performance of any public duty :

(18) " rules " means rules and forms contained in the First Schedule or made under section 122 or section 125 :

As to the relation of the body of the Code to the rules, see notes to s. 1, p. 2, para. No. 6.

(19) " share in a corporation " shall be deemed to include stock, debenture stock, debentures, or bonds : and

(20) " signed," save in the case of a judgment or decree, includes stamped.

3. [S. 2.] For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

Subordination of Courts.

Different rulings of different High Courts—Where there are different rulings of different High Courts on a particular point, a Subordinate Judge should follow the decision in law of a Bench of the High Court to which he is subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council, or unless the law has been altered by a subsequent Act of the Legislature (u).

4. [S. 4.] (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

Savings.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land..

(u) *Puttu Lal v. Parbati* (1915) 42 I. A. 155, 160, 87 All. 859, 366; *Korban Ally v. Sharada Proshad* (1884) 10 Cal. 82; *Swamirao v. Kashinath* (1891) 15 Bom. 419; *Balaft v.*

Sakharam (1893) 17 Bom. 555; *Kamla Prasad v. Pandey Ram* (1919) 4 Pat. L. J. 565.

"Any special form of procedure."—Having regard to these words, it was held in a Bombay case where two Judges differed in an appeal from the Original Side of the High Court that the special procedure laid down in cl. 36 of the Letters Patent should be followed in preference to the procedure laid down in s. 98 of the Code (*v*).

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5. [S. 4 A.] (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the local official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government, with the sanction aforesaid, may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

6. [S. 6.] Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

Pecuniary jurisdiction. Pecuniary limits of jurisdiction.—See notes to s. 15 under the head "Court of lowest grade competent to try a suit."

Pecuniary jurisdiction in passing decrees.—The jurisdiction of a Munsif in Bengal, N.W.P. and Assam extends to suits of which the value does not exceed Rs. 1,000. It has been held by the High Court of Calcutta that if in a suit for accounts or mesne profits instituted in a Munsif's Court, the plaintiff values the claim at Rs. 900, that is, at an amount within the pecuniary limits of that Court [see O. 7, r. 2], and the Munsif finds on the taking of accounts that Rs. 6,000 are due from the defendant to the plaintiff, the Munsif cannot pass a decree for more than Rs. 1,000, that being the limit of his pecuniary jurisdiction (*w*). The same view has been taken by the High Court of Bombay (*x*). On the other hand, it has been held by the Allahabad (*y*) and

(*v*) *Surajmal v. Horniman* (1918) 20 Bom. L. R. 185, 217.

(*w*) *Golap Singh v. Indra Coomar* (1903) 13 Cal. W. N. 493; *Rhupendra Kumar v. Purna Chandra* (1910) 48 Cal. 650. But see *Rameswar v. Dulu* (1894) 21 Cal. 550;

Panchuram v. Kinoo (1912) 40 Cal. 56.

(*x*) *Hirjibhat v. Jamshedji* (1913) 15 Bom. L. R. 1021.

(*y*) *Sudarshan Das v. Ram Prasad* (1910) 33 All. 97; *Madho Das v. Ramji* (1894) 16 All. 286.

Ss. 6, 7. Madras (z) High Courts, that the Munsif can pass a decree for any amount in such a case. The Patna High Court is inclined to the same view as the Allahabad and Madras High Courts (a). See notes to s. 38, "Jurisdiction of Court executing decree," and notes to s. 96, "Forum of appeal."

A sues B for possession of land valued at Rs. 686-8-0 and for mesne profits up to the date of the suit valued approximately at Rs. 200 and for mesne profits subsequent to the date of the suit not valued at all. The suit is brought in the Court of a Munsif whose pecuniary jurisdiction is limited to Rs. 1,000. A decree is passed in the suit for the plaintiff for possession and for mesne profits. Subsequently the plaintiff applies to the Munsif for assessment of mesne profits, claiming about Rs. 60,000 for such profits. According to the Calcutta High Court, the Munsif has no jurisdiction as regards mesne profits up to the date of the suit to pass a decree for more than Rs. 313-8-0, that being the difference between Rs. 1,000 and Rs. 686-8-0 (the value of the land). As regards mesne profits subsequent to the date of the suit, the proper course for the Munsif is to direct the return of the plaint in so far as it embodies a claim for such profits to be presented to the Court of competent pecuniary jurisdiction, that is, the Court of the Subordinate Judge (b). According to the Allahabad, Madras and Patna High Courts, the Munsif can pass a decree in such a case for a sum exceeding his jurisdiction and hence no question can arise as regards the return of the plaint. See the cases cited in the preceding paragraph.

7. [S. 5] The following provisions shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

(a) so much of the body of the Code as relates to—

- (i) suits excepted from the cognizance of a Court of Small Causes ;
- (ii) the execution of decrees in such suits ;
- (iii) the execution of decrees against immoveable property ; and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 so far as they relate to injunctions and interlocutory orders, and

sections 96 to 112 and 115.

(a) *Arogya v. Appacht* (1902) 25 Mad. 543.
Kannayya v. Venkata (1917) 40 Mad. 1, 7-8.
 (a) *Sheikh Mohammad v. Mahtab* (1917) 2 Pat.

L. J. 304.
 (b) *Bhupendra v. Purna Chandra* (1910) 43 Cal. 650 [a case under the Code of 1882].

Attachment before judgment by Provincial Small Cause Court.—A Provincial Small Cause Court has the power to attach movables before judgment. An attachment before judgment is not one of the interlocutory orders referred to in cl. (b) of the section. The only interlocutory orders excluded are those specifically mentioned in s. 94 of the Code, being those comprised in O. 39, rr. 6 to 10 (c). **Ss. 7, 8.**

8. S. 8.] Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

Provided that—

- (1) *the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notification in the local official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882. and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court.*
- (2) *All rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.*

The provisos were inserted in the section by the Code of Civil Procedure Amendment Act I of 1914, s. 2.

(c) *Kumud v. Hari* (1918) 46 Cal. 717.

PART I.

Suits in General.

JURISDICTION OF THE COURTS AND RES JUDICATA.

9. [S. 11.] The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Courts to try all civil suits unless barred.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Alterations in the section.—The words “either expressly or impliedly barred” have been substituted for the words “barred by any enactment for the time being in force” which occurred in s. 11 of the Code of 1882. The latter words were held to mean *expressly* barred (d).

Onus.—A party seeking to oust the jurisdiction of ordinary Civil Courts must establish his right to do so (e).

Suits of a civil nature.—Suits may be divided into two classes—(1) those which are of a civil nature, and (2) those which are not of a civil nature. It is suits only of a civil nature which a civil Court has jurisdiction to entertain. A civil Court has no jurisdiction to try suits which are not of a civil nature. A suit is *not* of a civil nature if the principal or only question in the suit is a caste question or a question relating to religious rites or ceremonies. But when (1) a caste question or a question relating to religious rites or ceremonies is not the principal question in the suit, but is merely a subsidiary question, and (2) *the principal question is of a civil nature, e.g.,* a question as to a right to property or to an office or to any other civil right, and (3) the principal question which is of a civil nature cannot be determined without deciding the caste question or question relating to religious rites or ceremonies, the Court will in such a case decide the caste question or the question relating to religious rites or ceremonies *to enable it to decide* the principal question (f). It is upon this principle that the Explanation to the section is based. We may therefore say that a suit is of a civil nature if the *principal* question in the suit relates to a civil right. The mere fact that the determination of such a question depends entirely on the decision of caste questions or questions as to religious rites or ceremonies does not take the suit out of the category of suits of a *civil* nature (see the Explanation to the section). We now proceed to consider the leading cases in which the Courts have refused to try suits on the ground either (1) that the principal question in the suit is a caste question, or (2) that it relates to religious rites or ceremonies.

(d) *Kishori Mohun v. Chundra Nath* (1887) 14 Cal. 644, 648.

(e) *Srimath Jagannatha v. Kutumbarayudu* (1916)

39 Mad. 21, 22.

(f) *Lalji v. Walji* (1895) 19 Bom. 507; *Pragji v. Govind* (1887) 11 Bom. 534.

Suits in which the principal question is a caste question are not suits of a civil nature.—A caste is any well defined native community (be it Hindu or Mahomedan) governed for certain internal purposes by its own rules and regulations (g). A caste question is one which relates to matters affecting the internal autonomy of the caste and its social relations (h).

To determine whether or not a question is a caste question, the test is—Would the cognizance of the matter in dispute by the Court be an interference with the autonomy of the caste? Would the Court be deciding the question which the caste as a self-governing body is entitled to decide for itself? If yes, the question is a caste question and no civil Court has jurisdiction to entertain it (i). Thus a caste may pass a resolution depriving a member of *man-pan* invitation or invitation to dinner or to *munj* or other ceremonies for an alleged breach of a caste rule. The excluded member has no remedy in law, for all that he has lost is a *social* privilege, and not a *legal* right, and the caste is the only tribunal to which a casteman deprived of that privilege could resort. A civil Court has no power by its decree to compel the members of a caste to invite a casteman to dinner or to any ceremony (j). Similarly a Court has no power to compel barbers belonging to a certain caste to shave a casteman or to pare his nails though the party aggrieved may allege that he would lose caste by the loss of service at the hands of the barbers (k). On the same principle a member of a caste is not entitled to any remedy in law if the other members refuse to go to his house on the occasion of a death in his family and assist him in the removal of the dead body, though they may have in so doing broken a rule of the caste. It is not for a Court of law to enforce a caste rule or resolution: it is for the caste itself that makes the rule or passes the resolution to do so (l). And so a Court will not compel a defaulting member to pay to the caste a sum of money which by a resolution of the caste every casteman is liable to pay, on the occasion of a marriage in his family (m).

Expulsion from caste.—To exclude a member of a caste from invitation to caste dinners or ceremonies is, as stated above, to deprive him of a *social* privilege. But to *expel* him from the caste is to deprive him of a *legal right* which forms part of his *status*. Hence a suit will lie for a declaration that the plaintiff is entitled to be re-admitted into the caste and also for damages for expulsion from the caste (n). But to entitle the plaintiff to a decree, it must be shown that the excommunication is wrongful, and the Court will in such cases enquire into the validity of the sentence of excommunication. Excommunication is wrongful, if a member is expelled from the caste without opportunity of explanation being offered to him (o). It is also wrongful if a member is expelled for an alleged breach of a caste rule which, as a matter of fact, he has not broken (p). In the mufassal of Bombay, however, a suit does not lie for *restoration* to caste, the cognizance of such a suit being expressly barred by Bombay Regulation II of 1827, s. 21 (q). But a suit is maintainable for “*damages*” on account of an alleged injury to the caste and character of the plaintiff arising from some illegal act or unjustifiable conduct of the other party.

(g) *Abdul Kadir v. Dharma* (1896) 20 Bom. 190.
(h) *Appaya v. Padappa* (1899) 23 Bom. 122, 130; *Jethabhai v. Chapsey* (1909) 34 Bom. 407, 481.

(i) *Murari v. Suba* (1882) 6 Bom. 725, 727.
(j) *Raghunath v. Janardhan* (1891) 15 Bom. 599; *Sudharani v. Sudharani* (1869) 3 B. L. R. A. J. 91; *Mayashankar v. Harishankar* (1886) 10 Bom. 661.
(k) *Raj Kisto v. Nobae* (1864) 1 W. R. 351.

(l) *Kanji v. Arjun* (1894) 18 Bom. 115.

(m) *Abdul Kadir v. Dharma* (1896) 20 Bom. 190.

(n) *Jagannath v. Akali* (1894) 21 Cal. 463.

(o) *Appaya v. Padappa* (1899) 23 Bom. 122; *Keshavlal v. Bai Gira* (1900) 24 Bom. 13, 22-23; *Vallabha v. Madhusudan* (1889) 12 Mad. 495; *Ganapati v. Bharati* (1894) 17 Mad. 222.

(p) *Krishnasami v. Virasami* (1887) 10 Mad. 133.

(q) *Nathu v. Keshawji* (1902) 26 Bom. 174.

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Suits in which the principal question relates to religious rites or ceremonies are not suits of a civil nature.—Thus a suit will not lie to establish a right to parade bullocks on certain days (r), or to compel *punjaris* to adorn an idol at certain seasons (s) or to instal it in a particular temple instead of in another (t). There is no right of a civil nature involved in these cases.

Suits for vindication of a mere dignity attached to an office are not suits of a civil nature.—A claim by a *Swami* (arch-priest) that he is entitled to be carried on the high road of a town or village in a palanquin on ceremonial occasions will not be entertained by a civil Court (u). What is claimed by the plaintiff in such a case is a mere mark of honour appended to the office of a *Swami*. Civil Courts should discourage as much as possible claims of so unsubstantial and objectionable a nature and they ought not to be involved in the determination of trivial questions of dignity and privilege, although connected with an office. For the same reason a suit will not lie for a declaration that the plaintiff as *gurukkal* or spiritual leader is entitled to be received at a pagoda by the wardens of the pagoda with the honours and emoluments due to his rank on the occasion of the annual festival of the pagoda. “The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practices of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature. Of such obligations the present civil Court cannot take cognizance” (v). Following this rule, the Courts have declined to entertain claims made by holders of religious office to precedence in worship, such as a claim to be the first to worship the deity and to receive gifts of rice and cocoanuts on certain public religious ceremonies (w). They have likewise declined to decide disputes as to precedence or privilege between purely religious functionaries (x). It is important to note that the suit in each of the above cases was not to establish a right to an office, but for a declaration that the plaintiff was, by virtue of his office, entitled to certain tokens of dignity or to votive offerings. In other words, the suit was not for a claim to an office but to vindicate an alleged dignity attached to an office. A suit for an office is of a civil nature, but a suit for vindication of a mere dignity, though connected with an office, is not. But if honours be attached to an office by way of remuneration, in other words, as part of its emoluments, a civil Court can entertain a suit for such honours (y).

“Office.”—Suits in which the principal question is as to a civil or legal right are suits of a civil nature. The right to an “office” is a right of a civil nature. Therefore suits in which the principal question relates to the right to an “office” are suits of a civil nature; and they are not the less so because the right claimed may depend on the decision of caste questions or questions as to religious rites or ceremonies or even religious tenets (z). See the Explanation to the section.

Suits for secular office.—When no remuneration attaches to the office of the secretary of an Association (registered under Act 21 of 1860), a suit for a declaration that the plaintiff is the secretary of the Association and that his dismissal from the office was not justified by the rules of the Association, is not maintainable by a civil Court, especially if the Association has powers to alter its rules from time to time. The reason is that in such a case no decree which any civil Court could pass in plaintiff's favour could prevent the Association from altering its rules and then dispensing with the plaintiff's services and employing some one else (a).

(r) *Rama v. Shivram* (1882) 6 Bom. 118.(s) *Vasudev v. Vamnaji* (1881) 5 Bom. 80.(t) *Loke Nath v. Dasarathi* (1905) 32 Cal. 1072.(u) *Sri Sunkar v. Sida* (1843) 3 M. I. A. 198; and *Shankara v. Hanma* (1878) 2 Bom. 474.(v) *Striman Sadugopa v. Kristna* (1863) 1 Mad. H. C. 301.(w) *Narayan v. Krishnaji* (1886) 10 Bom. 233;*Karuppa v. Kobanthayan* (1884) 7 Mad. 91;*Sangapa v. Gangapa* (1878) 2 Bom. 476.(x) *Madhusudan v. Shankaracharya* (1909) 33 Bom. 278.(y) *Rungachariar v. Rungasami* (1909) 32 Mad. 291.(z) *Krishnasami v. Krishnamacharyar* (1882) 5 Mad. 313.(a) *Maharaj Narain v. Shashi* (1915) 37 All. 313.

Suits for religious office.—*Quære whether every suit for a religious office is a suit, of a civil nature?* The Explanation to the section assumes that a suit in which the right to an “office” is contested is a suit of a civil nature. Now an office may be either secular or religious in its character. We are here principally concerned with an office of a religious character, for the question as to *religious* rites and ceremonies contemplated by the Explanation can only arise when the right to a *religious* office is contested. Religious offices may be divided into two classes, namely,—

I.—Those to which *fees* are appurtenant as of right; such as the office of the *Kazi* of Bombay, or of the *Joshi* of a village.

II.—Those to which no fees are attached, but which entitle the holder thereof to receive such *gratuities* as may be paid to him; such as the office of *pujaris* or officiating priests in a temple, or of the *Aya* of a *math*.

Fees are to be distinguished from *gratuities*. When fees are attached to an office, the holder of the office is entitled on performance of the services to the stipulated or customary fees. Thus a *Kazi* or *Joshi* is entitled on performing a marriage ceremony to the marriage fee, and if the fee is not paid to him, he may enforce payment by a suit. In fact, a fee is a sum which the holder of an office is entitled to demand as payment for the execution of functions attached to the office. Besides fees paid to a *Kazi* or to a *Joshi* on the occasion of a marriage, there may be gratuities paid to him which are entirely voluntary in their character. If a person invites a *Joshi* for performing a marriage ceremony at his place, and pays him the fees, but no gratuity, a suit will not lie at the instance of the *Joshi* for payment to him of any sum by way of gratuity though it may be usual to pay gratuities on such occasions; the reason being that there is no obligation in law on the part of the person inviting a *Joshi* to make any payment by way of gratuity (b). The same remark applies to holders of religious offices referred to in class II above.

The question which concerns us at present is whether a suit will lie at the instance of the holder of a *religious office* for disturbing him in the exercise of his *office*? If the office is wrongfully usurped, can the person claiming to be the rightful holder of the office sue the intruder in a civil Court for a declaration that he is entitled to the office? Will a civil Court entertain such a suit? To answer these questions we must deal with the two classes of religious offices separately.

As regards religious offices of the first class, that is, offices to which fees are attached, there is no doubt that a suit will lie against an intruder for a declaration that the office is vested in the plaintiff. Such a suit is a suit of a civil nature, and it will be tried by a civil Court (c).

Turning now to religious offices of the second class, the question that faces us is, whether a suit will lie for an office to which no fees are attached? Different views have been held on this point by different Courts. It has been held by the High Court of Calcutta that a suit by a person claiming to be entitled to a religious office against a usurper for a declaration of the plaintiff's right to the office is a suit of a civil nature, and will therefore be entertained by a civil Court though no emoluments are attached to the office at all. This conclusion is based upon the reasoning that a religious office, though no fees are attached to it, is an “office” within the meaning of the Explanation to this section and that the section assumes that a suit for an “office” is a suit of a civil nature. The office in that case was that of musicians who chanted holy songs in a

(b) *Muhammad v. Sayad Ahmed* (1861) 1 Bom. H. C. App. xxxvii.

(c) *Muhammad v. Sayad Ahmed* (1861) 1 B. H. C. App. xviii; *Ghelabhai v. Hargovan* (1911) 36 Bom. 94.

S. 9. *satra* at a certain village (d). In another case, the office was that of a *shebail*, and the suit was by one member of a family against another for a declaration of a hereditary right to officiate as *shebail* at the worship performed by votaries at the foot of a certain tree. It was held that the suit was maintainable. In this case also there were no fees attached to the office, but voluntary offerings were made by the votaries (e). It is worthy of note that in both these cases the office was one attached to a place as distinguished from an *absolutely personal* office.

On the other hand, it has been held by the High Court of Madras that a suit does not lie for a religious office to which no fees are attached. According to that Court, a religious office to which no fees are attached is not an "office" within the meaning of this section (f). The office in one of these cases was that of priest of Samayacharm, of which the duties were to exercise spiritual and moral supervision over a certain class of persons.

As regards Bombay decisions, if we are to reconcile them all, we must divide them into two classes, namely, (1) those in which the religious office is attached to a temple, shrine, or sacred spot, and (2) those in which the office is entirely personal in its character. And it may be safely said that a suit will lie for a religious office which is attached to a place, though no fees are appurtenant to it, such as the office of officiating priests in a temple or of *Aya* of a *math* (g). But a suit will not lie for an office to which no fees are attached, if the office be personal in its character, such as the office of *Chalwady* (h) (bearer on public occasions of the insignia of a caste), or the office of *Guru* (i). The distinction between offices that are attached to a place such as a temple or a *math* and offices that are in their nature personal is our own, and it must be said that none of the Bombay decisions turns expressly on any such distinction. This distinction has been devised to harmonize what would otherwise be a mass of conflicting decisions, though it must be observed that even then there remains one Bombay decision in which the office was a personal one and there were no fees attached to the office and yet it was held that a suit would lie for the office. The principal question in that case was whether a suit lies for the office of *Khatib* (preacher), regard being had to the fact that no fees were attached to the office, and it was held that the suit would lie. The Court said: "Had it been the intention of the legislature that such a suit should not lie, the same would have been clearly provided for" (j). But if it is a question of the intention of the legislature, it may be said that the *Explanation* to the section, which did not occur in the Code of 1877, appears to have been suggested directly by a passage in a judgment in a Madras case decided in 1871 (k), which was approved in a subsequent case by the Privy Council (l), and the religious office in both the cases was one to which fees were attached.

It has been held by the High Court of Allahabad that a mere right to perform *Ram Lila* (religious pageants), which does not carry with it any right to emoluments nor is attached to a shrine or temple or sacred spot, cannot be enforced in a Court of law (m).

The Patna High Court has held that a right to officiate at funeral ceremonies performed upon the banks of the Ganges between certain points, which did not carry any fees with it but merely gratuities, cannot be enforced in a Civil Court (n).

(d) *Mamat Ram v. Bapu Ram* (1888) 15 Cal. 159.

(e) *Dino Nath v. Pratap Chandra* (1900) 27 Cal. 30.

(f) *Tholappala v. Venkata* (1896) 19 Mad. 62; *Subbaraya v. Vedantachariar* (1905) 28 Mad. 23.

(g) *Limba v. Rama* (1889) 13 Bom. 548; *Gur-sangaya v. Tamana* (1892) 16 Bom. 281.

(h) *Shankara v. Hanma* (1878) 2 Bom. 471.

(i) *Murari v. Suba* (1882) 6 Bom. 725; *Uadigeya*

v. Basaya (1910) 34 Bom. 455.

(j) *Sayad Hashim v. Husseinsha* (1889) 13 Bom. 429.

(k) *Narasimma v. Kristna* (1871) 6 M. H. C. 449.

(l) *Krishnama v. Krishnasami* (1879) 2 Mad. 62, 65, 61 L. A. 121.

(m) *Chunnu Datt v. Babu Nandan* (1910) 32 All. 527.

(n) *Hira v. Bachu* (1916) 1 Pat. L. J. 381; *Lutan v. Prayag* (1919) 4 Pat. L. J. 53.

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Suits for recovery of fees attached to an office are suits of a civil nature, but not suits for recovery of gratuities.—It is settled law that if a person usurps an office to which another person is entitled and receives the fees of the office, he is bound to account to the rightful owner for them, and the rightful owner may sue the *usurper* to recover the *fees* properly payable to him. But the case is different where the payments are merely *voluntary*, and a suit will not lie to recover *voluntary gratuities* that may have been received by the usurper (c). The reason is that where *voluntary* offerings are made they must be taken to have been intended for the very person who was then *actually* performing the ceremony, whether rightfully or wrongfully, and, further, that it is quite possible that no gratuities would have been given at all if the rightful owner officiated at the ceremony instead of the usurper (p). The same principles apply when a suit is brought by the lawful holder of an office against a *member* of the caste for employing the usurper for performing ceremonies which the rightful holder was entitled to perform. Thus a village priest may be entitled by hereditary right to officiate and take fees in the families of a particular caste in the village, and if a member of the caste employs an intruder in the office to perform the ceremonies, the village priest is entitled to recover from the casteman the *fees* which would properly be payable to him if he had been employed to perform those ceremonies (q). But a suit will not lie against a casteman for a *gratuity* which the party might have refused to give if he had pleased (r). If for determining the plaintiff's right to the *fees* claimed it becomes necessary to determine incidentally the right to perform the ceremonies, the Courts should try and decide that right (s).

The cases in which a suit by the rightful owner of a religious office against a *usurper* for recovery of voluntary gratuities has been held not to be maintainable must be distinguished from those where a suit is brought by a sharer in a religious office against his *co-sharers* for recovery of his share of the voluntary gratuities. In the latter class of cases it has been held that a suit will lie, for the basis of the claim in such cases is an *agreement*, express or implied, that all the sharers should have a share in the gratuities (t).

Dues paid by *baggals* and shopkeepers to *chowdharis* of *barars* are in the nature of *voluntary* payments; hence a suit will not lie to recover such dues or for a declaration of the right to recover them (u).

Suits relating to caste property.—Suppose that a caste is divided into two factions, *F1* and *F2*, and that *F1* owns certain property which stands in the names of some of its members. If these members secede from faction *F1* and go over to faction *F2*, a suit will lie to recover property from them at the instance of faction *F1* (v). Here the subject-matter of the suit is property belonging to *one section* of the caste, and the claim is against persons *outside* that section. Suppose, next, that a caste owns some property purchased out of the *caste* funds, and that it is *subsequently* divided into two factions *F1* and *F2*. If faction *F2* happens at the time of the division to be in possession of the *caste* property, faction *F1* cannot maintain a suit against faction *F2* for recovery of one half of the *caste* property, or its value (w). Here the subject-matter of the suit is *caste* property, and the claim is not against an outsider, but against *another section* of the caste.

(c) *Sitaram Bhat v. Sitaram Ganesh* (1869) 6 B. H. C. 250; *Raja Valad v. Krishnabhat* (1879) 3 Bom. 232; *Hira v. Bachu* (1916) 1 Pat. L. J. 381.

(p) *Kashit Chandra v. Kailash Chandra* (1899) 20 Cal. 356.

(q) *Dinanath v. Sadashiv* (1879) 3 Bom. 9; *Ghelubhai v. Hargovan* (1911) 30 Bom. 94; *Kali Kanta v. Gouri* (1890) 17 Cal. 906.

(r) *Murari v. Suba* (1882) 6 Bom. 725: the suit was by a *guru* to recover gratuities from his disciples.

(s) *Krishnama v. Krishnasami* (1879) 2 Mad. 62, 6 I.A. 120.

(t) *Dino Nath v. Pratab Chandra* (1900) 27 Cal. 30; *Bheema Charyulu v. Kothakota* (1907) 17 Mad. L. J. 493.

(u) *Barsati v. Chamru* (1907) 29 All. 683.

(v) *Mehta Jethalal v. Jamintram* (1888) 12 Bom. 225; *Pragji v. Govind* (1887) 11 Bom. 534.

(w) *Girdhar v. Kalya* (1881) 5 Bom. 88; *Nemchand v. Savaichand* (1866) 5 Bom. 84 (foot-note).

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As regards user of caste property, it has been laid down that a majority of a caste has the right to regulate the use of the property, and the minority is bound by the resolution of the majority, provided the resolution is not so subversive of the interests of the minority as to amount to a complete denial of their rights. Thus if the majority of a caste passes a resolution that the caste oart should not be used for feasting any Brahmans, and the minority invites Brahmans to a feast in the oart, a suit will lie to restrain the minority from using the oart in contravention of the resolution (x).

Suits for inspection of accounts of caste property.—Such a suit relates purely to a caste question, and it cannot therefore be entertained by a Civil Court (y).

Interference with temple property.—Removal or alteration of namams or religious marks in a temple, which are recognized as the badges of a particular religious denomination, amounts to an interference with *property*, and is a ground of action in Civil Courts (z).

Interference with right of worship.—Suits for a declaration of the right to worship or to offer prayers at a certain place are suits of a civil nature. It often happens that the members of a particular class are alone entitled to worship in the sanctuary of a temple, and to perform certain portions of the religious worship. Such a right is one of a civil nature, and it may be enforced by a suit in a civil Court (a). Similarly the right of burial is a civil right; and it has accordingly been held that an interference with the rights of the relatives of a deceased Mahomedan to recite prayers over his body before burial in front of a particular mosque, being an invasion of a civil right, may be enforced by suit (b).

Suit against Official Assignee.—A person claiming rights to property taken possession of by the Official Assignee as belonging to an insolvent and whose claim has been disallowed by the Insolvency Court may bring a regular suit to establish his rights notwithstanding that under the Insolvency Act he had a right of appeal from the order of that Court and has not availed himself of that right (c).

Suit to administer the estate of a living Hindu debtor.—Such a suit is not cognizable by a civil Court (d).

Suits expressly barred.—The section provides *inter alia* that suits, though of a civil nature, are not triable by civil Courts, if the cognizance of such suits is *expressly* barred, that is, barred by any enactment for the time being in force. Thus it is provided by the Income Tax Act, s. 39, that “no suit shall lie in any civil Court to set aside or modify any assessment made” under that Act (e). Similarly, it is provided by the Pensions Act 23 of 1871, s. 4, that except as provided by that Act, no civil Court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government (f). But the provision must be *express* to exclude a suit of a civil nature from the cognizance of ordinary Courts. The mere fact that an enactment provides a summary remedy in a certain case does not constitute a bar to a regular suit. We may turn for an instance to O. 21, r. 95 (Code of 1882, s. 318). That rule provides a summary remedy to which a purchaser at a sale in execution of a decree may resort to recover possession from a judgment debtor. But it does not say

(x) *Lalji v. Walji* (1895) 19 Bom. 507.(y) *Jeebhait v. Chapey* (1909) 34 Bom. 467.(z) *Krishnasami v. Samaram* (1907) 30 Mad. 158.(a) *Anandav v. Shankar* (1883) 7 Bom. 323;*Krishnasami v. Krishnana* (1882) 5 Mad.

313.

(b) *Kooni Meera v. Mahomed* (1907) 30 Mad.15; *Ram Rao v. Rustumkhan* (1902) 26

Bom. 198.

(c) *Duni Chand v. Muhammad* (1917) P. R. no.22, p. 83; *Nagindal v. Official Assignee*

(1911) 35 Bom. 473.

(d) *Gangaram v. Nagindas* (1908) 32 Bom. 881.(e) *Forbes v. Secretary of State* (1914) 42 Cal. 151.(f) *Balkrishna v. Dattatraya* (1918) 42 Bom. 257.

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9, 10.

that no suit shall lie to recover possession. The purchaser may therefore resort to the remedy provided by that section, or he may at his option bring a regular suit (g). Further, the jurisdiction of a civil Court is not excluded unless the cognizance of the entire suit as brought is barred (h). The general rule is that statutes affecting the jurisdiction of Courts are to be construed so far as possible to avoid the effect of transferring the determination of rights and liabilities from the ordinary Courts to executive officers (i).

It has been held by the High Court of Bombay that the jurisdiction of civil Courts to try suits by superior holders to recover their dues from inferior holders is not barred by s. 85 of the Bombay Land Revenue Code [Bombay Act 5 of 1879] (j). It has been held by the same Court that s. 4 (c) of the Bombay Revenue Jurisdiction Act is not a bar to a suit in which there is a claim arising out of the alleged illegality of proceedings taken for the realization of land revenue (k).

Suits impliedly barred.—Besides suits of which the cognizance is expressly barred, there are suits which are barred by general principles of law, such as suits relating to acts of State and public policy. Thus a suit will not lie against the Secretary of State for damages for publication of a Government resolution in the Government Gazette respecting the conduct of a public servant, though it may amount to a libel. Such a publication is an act of State in respect of which no action lies (l). Similarly a suit will not lie for damages for defamatory statements made in the course of a judicial proceeding by a party or by a witness. The ground of this principle is, "that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur, if they give evidence falsely, should be an indictment for perjury" (m). See notes to s. 79 below. See also notes, "Alterations in the section," p. 18 above.

Criminal Procedure Code, 1898, ss. 523-524.—A civil Court has jurisdiction to entertain a suit for the recovery from Government of the proceeds of the sale of property attached and sold under ss. 523 and 524 of the Criminal Procedure Code (n).

Political questions.—The Courts of British India may determine the title of property situated within their jurisdiction belonging to a Native Prince, though a political question is involved (o). But where the real object of the suit is to settle the right of succession to the throne, and the property right involved is only contingent, the Court should decline jurisdiction (p).

10. [S. 12.] No Court shall proceed with the trial of any suit in which the matter in issue is also

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directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the

- (g) *Kishori v. Chunder Nath* (1887) 14 Cal. 644.
- (h) *Antu v. Ghulam* (1883) 6 All. 110.
- (i) See *Winter v. Attorney-General* (1875) L. R. 6 P. C. 380.
- (j) *Vishwanath v. Kondaji* (1918) 42 Bom. 49.
- (k) *Gangaram v. Dinkar* (1913) 37 Bom. 542.
- (l) *Jehangir v. Secretary of State* (1903) 27 Bom. 189.
- (m) *Baboo Gunnesh Dutt v. Mungneeram* (1873) 11 B. L. R. 321; *Mugnee Ram v. Ganesh* (1865) 5 W. R. 134; *Chidambara v. Thiru-*

- mani* (1887) 10 Mad. 87; *Nathji v. Lal-bhai* (1890) 14 Bom. 97; *Templeton v. Laurie* (1901) 25 Bom. 230; *Dawan Singh v. Mahip Singh* (1897) 10 All. 125; *Bhikumber v. Becharam* (1888) 16 Cal. 261.
- (n) *Queen-Empress v. Tribhuvan* (1884) 9 Bom. 131; *Wasappa v. Secretary of State* (1910) 40 Bom. 200.
- (o) *Neel Kristo Deb v. Beer Chandra* (1869) 12 M. I. A. 523.
- (p) *Samarendra v. Birendra* (1908) 12 C. W. N. 777

- S. 10. relief claimed, or in any Court beyond the limits of British India established or continued by the Governor-General in Council and having like jurisdiction or before His Majesty in Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

Alterations in the section.—The words “proceed with the trial” have been substituted for the word “try” The words “except where a suit has been stayed under section 20,” which occurred at the commencement of the corresponding section of the Code of 1882, the words “for the same relief” which occurred after the words “previously instituted suit,” and the words “whether superior or inferior” which occurred after the words “any other Court,” have been omitted. The words “litigating under the same title” are new.

Scope and object of the section.—The present section provides that where a suit is instituted in a Court to which the Code applies, the Court shall not proceed with the trial of the suit, if—

firstly, the matter in issue in the suit is also directly and substantially in issue in a previously instituted suit between the same parties ;

secondly, the previously instituted suit is pending—

- (a) in the same Court in which the subsequent suit is brought, or
- (b) in any other Court in British India (whether superior, inferior or co-ordinate), or
- (c) in any Court beyond the limits of British India established or continued by the Governor General in Council, or
- (d) before His Majesty in Council ; and

thirdly, where the previously instituted suit is pending in any of the Courts mentioned in cl. (b) or cl. (c) such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit (g).^e

The object of the section is to prevent Courts of concurrent jurisdiction from *simultaneously* trying two parallel suits in respect of the same matter in issue. *B*, residing in Calcutta, has an agent *A* at Calicut employed to sell his goods there. *A* sues *B* in Calicut claiming a balance due upon an account in respect of dealings between him and *B*. During the pendency of the suit in the Calicut Court, *B* institutes a suit against *A* in Calcutta for an account and for damages caused by *A*'s alleged negligence. Here the matter in issue in *B*'s suit is directly and substantially in issue in *A*'s suit ; further both the suits are between the same parties; therefore, if the Court at Calicut is a Court of jurisdiction competent to grant the relief claimed in *B*'s suit, the Calcutta Court must not proceed with the trial of *B*'s suit, and the suit in the Calicut Court, being the one instituted *prior in point of time*, should alone be proceeded with (r). But if *A* was *B*'s agent at Pondicherry instead of at Calicut, and the suit was brought by him in the Pondicherry Court, the Calcutta Court would not be precluded from proceeding with the trial of *B*'s suit, the Pondicherry Court being a “foreign” Court. See the *Explanation* to the section.

(g) *Paira Mal v. Rajnarain* (1919) P. R. no. 114, | (r) *Padamsee v. Lakhmasee* (1916) 43 Cal. 144;
p. 298. | *Meckjee v. Kasowji* (1879) 4 C. L. R. 232.

The provisions of this section apply though the relief claimed in the second suit may not be the same as that claimed in the first suit.—The corresponding section of the Code of 1882 (s. 12) contained the words “for the same relief” after the words “previously instituted suit.” Hence it was necessary to the application of the section not only that the matter in issue in the second suit should also be directly and substantially in issue in the first suit, but that the second suit must be *for the same relief* as that claimed in the first (s). Those words have been omitted in the present section. The effect of the omission is to render the provisions of this section applicable, even though the relief claimed in the subsequent suit may not be the same as that claimed in the first suit. What is now essential is the identity of the matter directly and substantially in issue. The identity of the relief claimed is immaterial.

It has been held by the High Court of Patna (t), following a decision of the Calcutta High Court (u), that this section does not apply to a claim relating to a period subsequent to the claim in the former suit. In the Patna case *B* sued the Maharaja of Dumraon for arrears of pension from 1908 to 1911. The Maharaja denied his liability to pay the pension. The suit was dismissed by the trial Court, but was decreed by the High Court. The Maharaja preferred an appeal to the King in Council. Pending the appeal *A* instituted another suit against the Maharaja claiming arrears of pension from 1912 to 1918. The Maharaja applied under the present section for a stay of the trial of the second suit pending the decision by the Privy Council of the first suit. It was held that the section did not apply and that the second suit should not be stayed. The ground of the decision was that in order to attract the operation of the present section it was necessary that every matter in dispute in the second suit should be directly and substantially in issue in the first suit, but that that condition was not satisfied in the case before the Court as the pension claimed in the second suit was for a period subsequent to that claimed in the first suit. This decision, it is submitted, is not correct. There were only two “matters in issue” in the first suit, namely,—

- (1) whether *B* was entitled to the pension;
- (2) if so, what was the annual amount of the pension?

These and only these two matters would also be in issue in the second suit. If the Privy Council found in the first suit that *B* was entitled to the pension and that the amount of the pension was Rs. 5,000 per annum, those findings would be sufficient to dispose of also the second suit. No doubt, the *reliefs* claimed in the two suits were different (the pension claimed being *for different periods*), and this would be a ground under the old section for refusing to stay the trial of the second suit (v). But the test under the present section is not the identity of the *relief* claimed, but the identity of the *matter or matters in issue*, and the matters in issue in both the suits were, it is submitted, the same.

Previously instituted suit.—Note that it is the pendency of the previously instituted *suit* that constitute a bar to the trial of the subsequent suit. The word “suit” includes “appeal.” That it includes an appeal to His Majesty in Council is clear from the very words of the section. But it does not include an *application for leave to appeal* to His Majesty in Council, for the application may not be granted at all, and, if granted,

(s) *Balkishan v. Kishan Lal* (1889) 11 All. 148; *Ramalinga v. Ragunatha* (1897) 20 Mad. 418, 420; *Bissessur v. Gunput* (1880) 8 C. L. R. 113; *Raja Ransingh v. Bhagabutti* (1900) 7 C. W. N. 720.

(t) *Maharaja Kesho Prasad v. Shiva Saran* (1919) 4 Pat. L. J. 557.
(u) *Bapin v. Jogendra* (1910) 24 Cal. L. J. 514.
(v) *Balkishan v. Kishan Lal* (1889) 11 All. 148, 165.

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the applicant may not prefer any appeal (w). It seems that it does not also include applications under s. 47 (x).

Shall not proceed with the trial.—These words clearly indicate the action to be taken by the Court under this section. The second suit is not to be *dismissed* as barred; it is only the *trial* of the suit that is not to be proceeded with. That may render the institution of the subsequent suit unnecessary in a large majority of cases; but the section is *no bar to the institution of such suit*. Nay, there are cases in which it is necessary for a party to institute a regular suit to establish a right claimed by him, and failure to institute the suit within the period prescribed by the law of limitation precludes the party from asserting the right in any other suit or proceeding. Suits referred to in O 21, 163 (Code of 1882, s. 283) are of this character. This section does not dispense with the necessity of instituting such suits (y).

11. [S. 13.] No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Res judicata.

Explanation I.—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

(w) *Nainappa v. Chidambaram* (1898) 21 Mad. 18.

(x) *Venkata v. Venkatarama* (1899) 22 Mad. 256.
(y) *Nemagauda v. Puresha* (1898) 22 Bom. 640.

Explanation VI.—Where persons litigate *bonâ fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. S. 11.

Alterations in the section.—

1. Explanation I is new. See notes under the head "Former suit," p. 37 below.
2. Explanation II is also new. See notes under "Condition IV," p. 53 below.
3. Explanation IV to s. 13 of the Code of 1882 has been omitted. The reason of the omission is stated to be that it was liable to misconception, and that the law was well established apart from the Explanation. The words of the Explanation if literally interpreted, would relieve parties from the bar of *res judicata* whenever there existed a latent power of alteration: see s. 149, O. 20, r. 3, and O. 20, r. 11.
4. The words "public right" have been added into Explanation VI in view of the provisions of section 91 relating to public nuisances.

References to Notes.—As the commentary on this section does not follow the order of the expressions used in the section and of the Explanations thereto, the references to pages given below may be found useful:—

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| 1. "Court," p. 53. | 9. "Court competent to try such subsequent suit," p. 54. |
| 2. "Suit," p. 38. | 10. "Heard and finally decided," p. 58. |
| 3. "Issue of law," p. 46. | 11. <i>Explanation I</i> , p. 37. |
| 4. "Matter directly and substantially in issue," p. 31. | 12. <i>Explanation II</i> , p. 57. |
| 5. "Former suit," p. 37. | 13. <i>Explanation III</i> , p. 30. |
| 6. "Same parties," p. 47. | 14. <i>Explanation IV</i> , p. 39. |
| 7. "Parties under whom they or any of them claim," p. 47. | 15. <i>Explanation V</i> , p. 58. |
| 8. "Litigating under the same title," p. 52. | 16. <i>Explanation VI</i> , p. 49. |
| | 17. Decree <i>er parte</i> , p. 35. |
| | 18. Execution proceedings, p. 64. |

Res Judicata.—The present section deals with the doctrine of *res judicata*. The leading case on the subject is the *Duchess of Kingston's* case (z). Contrasting the present section with s. 10, it may be said that the rule in s. 10 relates to *res sub judice*, that is, a matter which is pending judicial inquiry; while the rule in the present section relates to *res judicata*, that is, a matter adjudicated upon or a matter on which judgment has been pronounced. Section 10 bars the trial of a *suit* in which the matter directly and substantially in issue is *pending* adjudication in a *previous* suit. The present section bars the trial of a *suit* or an issue in which the matter directly and substantially in issue *has already been* adjudicated upon in a previous suit. If *A* sues *B* for damages for breach of a contract, and the suit is decided against *A*, no Court will try a subsequent suit by *A* against *B* for damages for breach of the same contract. This is the doctrine of *res judicata* stated in its simplest form. The question of *A*'s right to claim damages from *B* having been *decided* in the previous suit, it becomes *res judicata*, and it cannot therefore be retried in another suit. It would be useless and vexatious to subject *B* to another suit for the same cause. Moreover, public policy requires that there should be an end of litigation. The rule of *res judicata* may thus be put upon two grounds—the one,

- S. 11.** the hardship of the *individual* that he should be vexed twice for the same cause, and the other, public policy, that it is in the interest of the *State* that there should be an end of litigation (a). Looking at the matter from the side of jurisprudence it may be said, that every suit must be sustained by a cause of action, and there is no cause of action to sustain the second suit of *A*, it being *merged* in the judgment in the first (b). For what is *A*'s cause of action in the subsequent suit? It is that he has sustained damages by reason of failure on the part of *B* to perform a contract with him. But this cause of action is the same as that in the first suit, and there being a judgment pronounced upon it in that suit, it is merged in that judgment. The cause of action having *merged* in the judgment, it is *extinct* in the eye of the law, and incapable of sustaining the subsequent suit. And the doctrine of *res judicata* has been carried so far as to hold that the plea of *res judicata* will prevail even where the result of giving effect to it will be to sanction what is prohibited by statute (c).

• Conditions of Res Judicata.—It is not every matter decided in a former suit that can be pleaded as *res judicata* in a subsequent suit. To constitute a matter *res judicata* the following conditions must concur :

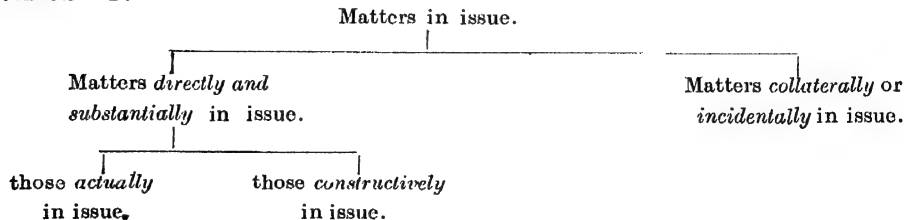
- I.—The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was *directly and substantially in issue*, either actually (*Explanation III*) or constructively (*Explanation IV*) in the former suit.
- II.—The former suit must have been a suit between *the same parties or between parties under whom they or any of them claim*. *Explanation VI* is to be read with this Condition.
- III.—The parties as aforesaid must have *litigated under the same title* in the former suit.
- IV.—The Court which decided the former suit must have been a Court *competent to try the subsequent suit* or the suit in which such issue is subsequently raised. *Explanation II* is to be read with this Condition.
- V.—The matter directly and substantially in issue in the subsequent suit must have been *heard and finally decided* by the Court in the first suit. *Explanation V* is to be read with this Condition.

We proceed to consider the above Conditions in order.

CONDITION I.

A.—Matter directly and substantially in issue: herein of Explanation III.

The following table sets forth the several matters which we have to consider under Condition I:—



(a) *Lockyer v. Ferryman* [1877] L. R. 2 A. C. 519.

(b) *King v. Hoare* [1844] 13 M. & W. 494, 504;
Kendal v. Hamilton [1879] L. R. 4 A. C.

504, 526.

(c) *Chhaganul v. Bai Harkha* (1909) 33 Bom. 479.

Matter in issue and herein of pro forma defendant.—It is only a matter directly and substantially in issue that can constitute *res judicata*. In other words, to constitute a matter *res judicata*, it must have been, in the first place, *in issue in the former suit*; and, in the next place, it must have been in issue in that suit *directly and substantially*. If a matter was *not in issue at all* in the former suit, it is clear that it could not constitute *res judicata* in the subsequent suit. If *A* sues *B* for damages for breach of a contract, and *B* denies the contract, the *factum* of the contract is *in issue* between *A* and *B*. This is an illustration of the case in which a matter *is* in issue between the parties to a suit. There is one class of cases in which a matter put in issue by a plaintiff in a suit *can never be in issue* as between him and a defendant in that suit. Those are cases in which there are two or more defendants, and there is no relief sought by the plaintiff against a *particular* defendant or set of defendants.* A defendant against whom no relief is claimed is called *pro forma* defendant; he is merely a *formal* party to the suit. For it must be remembered that a person may be joined as defendant in a suit, though no relief is claimed against him, if his presence before the Court is necessary to enable the Court effectually and completely to adjudicate upon the question involved in the suit [sec O. 1, r. 10 (2). Code of 1882, s. 32]. *A*, claiming to be entitled to possession of a certain tank as tenant of *X*, sues *B* to recover possession thereof from him. *X* is joined as defendant, but there is no relief claimed against him. The suit is dismissed on a finding that *B*, and not *X*, is the owner of the tank. Subsequently *X* sues *B* to recover possession of the tank. *B* contends that the suit ought to be dismissed, on the ground that the matter of the ownership of the tank was in issue in the former suit, and it was decided in his favour; in other words, that the suit is barred as *res judicata*. The suit is not barred as *res judicata*, for the matter of the ownership of the tank in the former suit was in issue between *A* and *B*, and not between *X* and *B*, *X* being merely a formal party to that suit (*d*).

Matter directly and substantially in issue and herein of Explanation

III.—It is not enough to constitute a matter *res judicata* that it was *in issue* in the former suit. It is further necessary that it must have been in issue *directly and substantially*. A matter cannot be said to have been “directly and substantially” in issue in a suit, unless it was *alleged* by one party *and denied or admitted*, either expressly or by necessary implication, by the other. It is not enough that the matter was *alleged* by one party (*e*). At the same time it is not necessary to constitute a matter “directly and substantially” in issue that a *distinct* issue should have been raised upon it; it is sufficient if the matter was in issue *in substance* (*f*). *A*, claiming as the adopted son of *X*, sues *B* to recover possession of certain property forming part of the estate of *X*. Here the question of adoption would not be a matter “directly and substantially” in issue, unless *B* either *admitted* or *denied* the adoption. For *B* might neither admit nor deny the adoption, and might resist *A*’s claim on the ground of adverse possession, or on the ground that he is entitled to the property as a devisee under the will of *X*. In that case, the question of adoption would not be a matter “directly and substantially” in issue.

Matter collaterally or incidentally in issue.—Every suit *must* involve a matter “directly and substantially” in issue. It *may* also involve a matter “collaterally or incidentally” in issue. To constitute a matter *res judicata* it is necessary that it must be in issue “directly and substantially” in the suit under trial, and that it must have been in issue also “directly and substantially,” as distinguished from “collaterally or incidentally,” in a former suit.

(d) *Brojo Behari Mitter v. Kedar Nath* (1886) 12 Cal. 580; *Ramdas v. Vazirsaheb* (1901) 25 Bom. 589; *Malhi v. Imam-ud-din* (1905) 27 All. 59. (e) *Sheo Ratan v. Sheo Sahai* (1884) 6 All. 358, 362. (f) *Soorjomonee v. Suddanund* (1874) 12 B. L. R. 304, 315, Sup. Vol. I. A. 212.

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All matters involved in a suit may be "directly and substantially" in issue, but they cannot all be "collaterally or incidentally" in issue. A *collateral* or *incidental* issue is one that is ancillary to a *direct and substantive* issue; the former is an *auxiliary* issue, the latter the *principal* issue. When we speak of a matter as being "collaterally or incidentally" in issue in a suit, it is understood that there is another matter which is "directly and substantially" in issue in that suit. A matter "collaterally or incidentally" in issue is *ancillary* or *auxiliary* to a matter "directly and substantially" in issue.

Distinction between matter "directly and substantially" in issue and matter "collaterally or incidentally" in issue.—The leading case on the subject is *Barrs v. Jackson* (g). Every suit *must* involve a matter or matters in respect of which relief is claimed by the plaintiff. It *may* also involve a matter or matters which, though there is no relief claimed in respect of them, are brought in issue for the purpose of deciding on the matter or matters in respect of which relief is claimed.

Matter directly and substantially in issue.—Every matter in respect of which relief is claimed in a suit is necessarily a matter "directly and substantially" in issue.

Illustrations.

1. A sues B for the rent due for the year 1907. The defence is that no rent is due. Here the claim for rent is the matter in respect of which relief is claimed. This therefore is a matter "directly and substantially" in issue.

2. A sues B (1) for a declaration of title to certain lands, and (2) for the rent of those lands. B denies A's title to the lands, and contends that no rent is due. Here there are two matters in respect of which relief is claimed, namely, (1) the matter of title, and (2) the claim for rent. Both these are matters "directly and substantially" in issue.

Matter collaterally or incidentally in issue.—A matter is in respect of which no relief is claimed, but which is put in issue for the purpose of enabling the Court to adjudicate upon a matter in respect of which relief is claimed, may be either "directly and substantially" in issue or it may be in issue "collaterally or incidentally." It will be a matter "directly and substantially" in issue, if the parties to the suit and the Court have dealt with the matter *as if* there was a relief claimed in respect of that matter also; that is to say, though the matter was, in the first instance, brought in issue as *auxiliary* or *incidental* to the matter in respect of which relief is claimed, it is dealt with and decided *as if* it formed a *direct and principal* issue in the suit. If the matter has not been dealt with by the parties to the suit and the Court in that way, it will be a matter "collaterally or incidentally" in issue.

Examination of pleadings and judgment.—Whether a matter has been dealt with in manner aforesaid is to be determined by a reference to the plaint, the written statement, the issues, and the judgment. The decree may also be referred to, but it is not enough to refer to the decree *without* the judgment, for a decree states merely how a suit is disposed of, and it is in the judgment that the findings on the issues are recorded (h). The judgment is admissible under s. 40 of the Evidence Act. See O. 20, rr. 5 and 6 (Code of 1882, ss. 204 and 206).

(g) [1842] 1 Y. & C. Ch. Cas. 580.

(h) *Kali Krishna v. Secretary of State* (1880) 10 Cal. 173, 183, 15 I. A. 186, 193; *Ran Bahadur's case* (1885) 11 Cal. 301, 310, 12 I. A. 23; *Soorjomonee v. Suddanund* (1872) 12 Beng. L. R. 304; *Girdhar v. Dayabhai* (1882) 8 Bom. 174, 180; *Gheta v. Sankal-*

chand (1894) 18 Bom. 597, 601; *Amriteswari v. Secretary of State* (1897) 24 Cal. 504, 519, 24 I. A. 33; *Jalasntram v. Bommadevara* (1906) 29 Mad. 42; *Kurrukulain v. Nuzbat-ul-Dowla* (1906) 33 Cal. 116, 32 I. A. 224; *Mittar Poddar v. Jadab Chandra* (1917) 2 Pat. L. J. 159.

"In *Sheoparsan v. Ramnandan* (i), the Judicial Committee, referring to the rule of *res judicata*, observed that "the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

The above topic considered with reference to reported decisions.—

We now turn to cases in which the distinction between a matter "directly and substantially" in issue and a matter "collaterally or incidentally" in issue arises most frequently. Those cases may be divided into the following three classes :—

A.—Where the first suit is for *rent*, and the subsequent suit is for *title*.

B.—Where both suits are for *rent* or other recurring liability.

C.—Where both suits relate to the *rate* of rent or the *area* for which rent is payable.

We shall deal with these three classes of cases in order.

A. *First suit for rent, subsequent suit for title*.—In this class of cases it is clear that the subsequent suit being one for *title*, the question of title is a matter "directly and substantially" in issue in that suit. Whichever party therefore raises the plea of *res judicata* must show that the question of *title* was also "directly and substantially" in issue in the former suit, that is, in the previously decided suit. If the question of title has been in issue *in its entirety* in the former suit, it will be said to have been "directly and substantially" in issue in that suit. But if the issue in the former suit does not cover the *entire* question of title, in other words, if it falls short of *going to the very root of the title*, and is confined only to some of the *incidents* of title, the question of title will be said to have been "collaterally or incidentally" in issue in the former suit (j).

Illustrations.

(a) A, claiming to be the *chela* and heir of a deceased *mohunt*, sues B (a tenant) for the rent of certain lands forming part of the estate of the *mohunt*. C claims that he, and not A, is the *chela* and heir of the deceased, and that he is therefore entitled to the rent. C is thereupon added as a defendant to the suit (see O. 1, r. 10, Code of 1882, s. 32). The issues raised are—

1. Whether A or C is the *chela* and heir of the *mohunt*?
2. Whether any and what rent is due by B?

The Court finds that A is the *chela* and heir of the *mohunt*. It also finds that there is a sum of Rs. 2,500 due by B for rent and it decrees A's claim.

Subsequently C sues A for a declaration that he is the *chela* and heir of the *mohunt* and claims that he is as such entitled to the *whole* of the property left by the *mohunt*. A contends that the question as to who is the *chela* and heir of the deceased is *res judicata*. The question is *res judicata*, and the suit ought to be dismissed, for though the former suit was for rent, the entire question of *title* to the property of the deceased was directly and substantially in issue in that suit and it was decided against C: *Toponidhee v. Sreeputty* (1880) 5 Cal. 832.

Note.—In this and the following illustration it is assumed that the other conditions of *res judicata* are present.

(i) (1916) 43 I. A. 91, 99, 43 Cal. 694, 706.
(j) *Gobind v. Taruck* (1878) 3 Cal. 145; *Radha v. Monohur* (1888) 15 Cal. 756, 15 I. A. 97;

Kasrawar v. Mohendra Nath (1898) 25 Cal. 136; *Dwarkanath v. Ramchand* (1899) 26 Cal. 428.

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(b) *A*, a Hindu dies leaving a widow and a brother, *C*. The widow sues *B* (a tenant) for the rent of certain property alleging that it was the *separate* property of her deceased husband. *C* claims to be entitled to the rent on the ground that it was the *joint* property of himself and his deceased brother and that he became entitled to it by survivorship. *C* is thereupon added as a defendant to the suit. The issues are—

1. Whether the deceased alone received the whole rent of the property in his lifetime, or whether the rent was received by him jointly with *C*?
2. Whether any and what rent is due by *B*?

The Court finds on the first issue that the deceased alone received the whole rent in his lifetime. (The finding on the second issue is unnecessary for our present purposes).

Subsequently *C* sues the widow for a declaration that he and his brother were joint, and claims the said property by right of survivorship. The question whether the deceased and *C* were joint or separate is not *res judicata*, for it was not “directly and substantially” in issue in the former suit. It was in issue in that suit only “collaterally or incidentally,” for it will be seen on referring to the first issue in that suit that it did not cover the *entire* question of *C*’s title, but related merely to the joint or separate receipt of rent: *Run Bahadur v. Lucho Koer* (1885) 11 Cal. 301, 12 I. A. 23; *Srihari v. Khatisk Chandara* (1897) 24 Cal. 569.

B. Both suits for rent or other recurring liability.—The same principles that apply to the preceding class of cases also apply here. Thus where *A* sues *B* for rent due for a particular period, and the defence is that *A* has no title to the land of which the rent is claimed, then, if a *direct* issue is raised and decided on the question of title the decision will operate as *res judicata* in a subsequent suit by *A* against *B* for the rent for a subsequent period either of the same (*k*) or other (*l*) property held under the same title. But if there is no *direct* issue raised on the question of title, and the finding falls short of going to the very root of the title upon which the claim for rent is based, it will not have the effect of *res judicata*. If the question of title is gone into in the previous suit, not as if the right of rent were sought to be established for one particular year but once for all, it will be said to have been *directly and substantially* in issue. But if the question of title is gone into in the previous suit not as if the right of rent were sought to be established once for all, but for one particular year, it will be said to have been in issue *collaterally or incidentally*. These principles also apply in the case of other recurring liability, such as malikana (*m*), maintenance (*n*), interest (*o*), annuity (*p*), &c.

Illustration.

A sues *B* for rent due for the year 1903. The defence is that the land is rent-free. An issue is raised, “whether the land is rent-free.” The Court finds that the land is rent-free, and *A*’s suit is dismissed. Subsequently *A* sues *B*, claiming rent for the year 1904. *B* again sets up the same defence, namely, that the land is rent-free. Here the question of *A*’s right to recover the rent having been “*directly and substantially*” in issue in the previous suit the suit for the rent for 1904 is barred as *res judicata*: *Rakhal Doss v. Heera* (1874) 22 W. R. 282; *Venkatachalapati v. Krishna* (1890) 13 Mad. 287; *Vishnu v. Ramling* (1902) 26 Bom. 25; *Natesa v. Venkatarama* (1907) 30 Mad. 510; *Dwarka Das v. Akhay Singh* (1908) 30 All. 470.

(k) *Nobo v. Foyzbux* (1876) 1 Cal. 202.

(l) *Chand Prasad v. Mahendra* (1902) 24 All. 112.

(m) *Balkishan v. Kishan Lal* (1880) 11 All. 148.

Gopi Nath v. Bhugwat (1884) 10 Cal. 697.

(n) *Bhikabhai v. Bai Bhuri* (1903) 27 Bom. 418.

(o) *Pahlwan v. Risal* (1882) 4 All. 55.

(p) *Dwarka Das v. Akhay Singh* (1908) 30 All. 470.

It may here be observed that each year's rent is in itself a separate and entire cause of action, and where a suit is brought for the rent due for a particular year, a judgment obtained in that suit, whatever the defence might be, would seem only to extend to the *subject-matter of the suit* and hence the landlord is at liberty to bring another suit for the *next year's rent* and the tenant is at liberty to set up to that suit any defence he thinks proper. The above proposition, however, is subject to this, and here comes in the doctrine of *res judicata*, that neither party is at liberty to re open in the suit for rent for the next year any question that was substantially and necessarily tried and determined between them in the suit for rent for the *previous year* (q). For the essence of the doctrine of *res judicata* is that where a *material issue* has been tried and determined between the same parties in a proper suit and in a competent Court as to the *status* of one of them in relation to the other or as to a *right or title* claimed by either of them against the other, it cannot again be tried in another suit between them (r).

As regards maintenance, it is to be noted that a decree for maintenance at a particular rate is no bar to a subsequent suit for maintenance at an *enhanced* rate on the ground of altered circumstances; for the rate of maintenance is a variable quantity changing from time to time according to the circumstances of the parties affected by the decree (s).

C.—*Rate of rent or area for which rent is payable*.—In this class of cases also both the suits are for rent, the first suit being for rent for a particular period, and the second for rent for a subsequent period. The matter which is pleaded as *res judicata* is not the plaintiff's *title* to the land of which the rent is claimed, but the *rate* of rent or the *area* for which rent is payable. If the Court in the first suit tries and determines the issue, "what is the proper rate of rent," or "what is the proper area for which rent is payable," it is clear that the issue relating from its very form not to the rent for a particular period but to the rent payable for the full term of the lease, the question of the rate or of the area as the case may be will be *res judicata* in all subsequent suits for rent for the remaining period of the lease (t).

Ex parte decree.—In the case of a suit in which a decree is passed *ex parte* [see O. 9, r. 6, Code of 1882 s. 100] the only matter that can be "directly and substantially" in issue is the matter in respect of which relief has been claimed by the plaintiff in the plaint. A matter in respect of which no relief is claimed can never be "directly and substantially" in issue in a suit in which a decree is passed *ex parte*, though the Court may have gone out of its way and declared the plaintiff to be entitled to relief in respect of such matter.

• *Illustration.*

A sues B to recover Rs. 500, being the rent due for the year 1906 at the rate of Rs. 2 per square yard. A does not pray for a declaration in the suit that the rate of rent is Rs. 2 per square yard. B does not appear, and a decree *ex parte* is passed against him for Rs. 500. Subsequently A sues B for rent due for the year 1907 also at the same rate. B appears at the hearing, and contends that the rate is Re. 1 per square yard. B is not precluded from raising that contention, for the question of rate cannot be said to have been "directly and substantially" in issue between A and B in the former suit. It cannot therefore be *res judicata*. Even if the Court in the former suit had declared that

(q) *Nobo v. Foyzbuz* (1876) 1 Cal. 202.
 (r) *Krishna v. Bunwari* (1876) 1 Cal. 144, 2 I. A. 253.
 (s) *Bangaru v. Vijayamachi* (1899) 22 Mad. 175.
 See also *Ricketts v. Romeswar* (1901) 28 Cal. 109.

(t) *Bakshi v. Nizamuddin* (1893) 20 Cal. 505;
Nil Madhub v. Brojo Nath (1894) 21 Cal. 236; *Bayyan Naidu v. Suranarayana* (1912) 37 Mad. 70 [F. B.]; *Mittar Poddar v. Jadab Chandra* (1917) 2 Pat. L. J. 159 [Incidentally in issue].

- S. 11. A was entitled to rent at the rate of Rs. 2 per square yard, the question of rate would not be *res judicata*, for A had not asked for a declaration in that suit in respect of the rate of rent. A's claim in the former suit was merely for the arrears of rent, Rs. 500, and the decree in that suit has no greater effect than evidence that Rs. 500 was due when the decree was passed. Had A in the former suit also prayed for a declaration in respect of the rate of rent as part of the substantive relief, and had the Court then declared that the rate of rent was Rs. 2, the question of rate would have been *res judicata* though the decree was passed *ex parte*, for it would then have been a matter "directly and substantially" in issue, every matter in respect of which relief is claimed in a suit being a matter "directly and substantially" in issue: *Modhusudan v. Brae* (1889) 16 Cal. 300. See ill. (2) cited under Rule II on p. 42 below.

Decree for injunction and *res judicata*.—A sues B for an injunction restraining B from doing certain acts. The injunction is granted. B repeats the acts complained of in the suit. A again sues B for an injunction. The suit is barred as *res judicata* for the relief claimed is covered by the injunction granted in the former suit, and A's remedy is to proceed against B for contempt of the Court's order in that suit: *Ram Saran v. Chatar Singh* (1901) 23 All. 465. See notes to s. 50 below.

Decree for restitution of conjugal rights and *res judicata*.—A sues B, his wife, for restitution of conjugal rights. Restitution is granted, and B goes and lives with A (that is to say, the decree is satisfied). B again leaves A, and A again sues B for the same relief. The suit is not barred as *res judicata*: *Keshavlal v. Parvati* (1894) 18 Bom. 327. [The distinction between this and the preceding case is this, that while in the suit for injunction the defendant is for ever restrained from doing the acts complained of, the wife cannot be directed in a suit for restitution of conjugal rights to live with her husband for the rest of her life; for many things may occur entitling her to leave him, for example, gross cruelty.]

Decree conditional on payment of money.—A decree in a former suit for possession of property conditional on the payment of a sum of money to the defendant is no bar to a subsequent suit for possession after the expiration of the period within which he might have obtained possession by execution of the decree (u).

It is the matter directly and substantially in issue in a suit, and not the subject-matter thereof, that forms the test of *res judicata*.—Hence it follows that though the subject-matter of the second suit may be entirely different from the subject-matter of the first, yet if a matter which is directly and substantially in issue in the subsequent suit was also directly and substantially in issue in the previous suit, the decision on the matter so in issue in the previous suit will operate as *res judicata* so as to bar the trial of that matter in the subsequent suit. Thus if A claims certain property as the adopted son of X, and the defendant denies the adoption, a finding in A's favour on the issue as to adoption will be binding on the defendant as *res judicata* in a subsequent suit by A against the same defendant to recover another property claimed under the same title (v). It is not open to the defendant to contend that the pro-

(u) *Ram v. Nodh* (1879) P. R. No. 93; *Gaman v. Imam Bakhsh* (1915) P. R. No. 77; *Mudon v. Baikar* (1906) 10 C. W. N. 839.

(v) *Pittapur Raja v. Buchi* (1885) 8 Mad. 219; 12 I. A. 16; *Krishna v. Bunwari Lal* (1976) 1 Cal. 44, A. 283; *Radha Pra-*

sad v. La Sahab (1881) 13 All. 53, 62, 17 I. A. 150; *Balkishan v. Kishan Lal* (1889) 11 All. 148, 157; *Ananta v. Damodhar* (1880) 13 Bom. 25; *Chandi Prasad v. Maharaja Mahendra* (1902) 24 All. 112; *Dwarka Das v. Akhay Singh* (1908) 30 All. 470.

erties claimed in the two suits being different, the decision on the question of A's adoption in the first suit cannot operate as *res judicata* in the second. Similarly, in the illustration cited under class B of rent-suits (p. 34 *ante*) it is no answer to the plea of *res judicata* that the subject matters of the two suits are different. The reason is that the matter directly and substantially in issue in both the suits is the same, namely, whether the particular land of which the rent is claimed is rent-free, and the decision therefore on that issue in the first suit operates as *res judicata* in the subsequent suit. But the decision cannot apply to other lands held by B under A, unless they form part of the same tenure (w).

From the same fundamental principle that the matter directly and substantially in issue, and not the subject-matter, constitutes the test of *res judicata*, it also follows that where a matter directly and substantially in issue in a suit is not the same as that in a previously decided suit, the trial of that matter will not be barred as *res judicata*, though the subject-matter of the two suits may be the same (x).

Where both the matter directly and substantially in issue and the subject-matter are the same in both the suits, the matter in issue will be *res judicata*, not because of the identity of the subject-matter, but because of the identity of the matter directly and substantially in issue (y). And where the matter directly and substantially in issue and the subject-matter are both different in the two suits, the matter in issue will not be *res judicata*, not because the subject-matters are different, but because the matters directly and substantially in issue in the two suits are different (z). A Mahomedan dies leaving a widow and other heirs. After his death some of his heirs sue the widow for the recovery of their share. The widow's defence is that her dower debt is not paid and she is entitled to remain in possession until the debt is paid. The widow's claim is decreed on payment by the plaintiffs to her of Rs. 3,900, the proportionate amount of dower payable by them. The sum adjudged to be due is not paid, and the suit is in consequence dismissed. This does not bar a subsequent suit by the same heirs for the recovery of their share on payment to the widow of the amount that might then be found payable to her for her dower. The decree in the first suit operates as *res judicata* only as regards the amount of dower, the rate of interest, and the sum payable by the plaintiffs before obtaining possession up to the date of the decree. But it does not operate as *res judicata* on the question of the plaintiffs' right to inherit the property of the deceased. The decree in the first suit did not by the dismissal of the suit extinguish the plaintiffs' right to inherit the estate of the deceased (a).

Former suit : Explanation I.—We have said above that a decision in a former suit may operate as *res judicata* in a subsequent suit. What is the meaning of "former suit"? Does it refer to the suit that has been first instituted or to the suit that has been first decided? The answer is that it refers to the suit that has been first decided; in other words, "former suit" means a previously decided suit. The result therefore is that if suit No. 2 is instituted after the date of the institution of suit No. 1, and suit No. 2 is decided first, the decision in suit No. 2 may operate as *res judicata* in suit No. 1 (b). The same rule applies to appeals (c). Explanation I, which is new, does no more than give effect to these decisions.

(w) *Ram Chunder v. Madho* (1886) 12 Cal. 484, 12 I. A. 188.

(x) *Jagatjit v. Sarab* (1892) 19 Cal. 159, 172, 18 I. A. 160, 176.

(y) *Triloki v. Pertab* (1889) 15 Cal. 808, 15 I. A. 113.

(z) *Zamindar of Pittapuram v. Proprietors of Kolanki* (1878) 2 Mad. 23, 5 I. A. 200.

(a) *Maina Bibi v. Wasi* (1919) 41 All. 588.

(b) *Gururajammah v. Venkata Krishnama* (1901) 24 Mad. 350; *Balkishan v. Kishan Lal* (1889) 11 All. 148.

(c) *Ram Lal v. Chhab Nath* (1890) 12 All. 578; *Beni Madho v. Indar Sahai* (1909) 32 A. 67.

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A sues *B* for possession of certain premises alleged to have been let to *B* as a monthly tenant. *B* sues *A* for a declaration that he holds the premises under a lease from *A* of which two years are yet to expire. Both the suits are heard together, and only one judgment is delivered in both, the finding of the Court being that *B* held the premises not under a lease as alleged by him, but as a monthly tenant. A decree is passed in *A*'s suit directing *B* to deliver up possession, and a separate decree is passed in *B*'s suit dismissing the suit with costs. *B* does not appeal from the decree passed against him in *A*'s suit, but prefers an appeal from the decree passed against him in his own suit. *A* contends that the appeal is barred as *res judicata*, stating as a reason that no appeal having been preferred by *B* within the period allowed by law from the decision in his (*A*'s) suit that *B* held the premises as a monthly tenant, the decision became final, and that decision having been given in a "former suit," the matter could not be re-tried in the appeal from the decision in *B*'s suit. Does the decree passed in *A*'s suit operate as *res judicata* so as to preclude the appellate Court from hearing the appeal preferred by *B* from the decree passed in his (*B*'s) suit? No, according to the Calcutta and Madras High Courts, the reason given being that there being but one judgment in both the suits, neither suit can be said to be a "former suit" in relation to the other (*d*). Yes, according to recent rulings of the Allahabad High Court, the reason given being that if the appeal were heard and the appellate Court reversed the decree of the lower Court, there would be two inconsistent decrees on the files of the Court, the one in *A*'s suit in *A*'s favour, and the other in *B*'s suit in *B*'s favour, in respect of the same matter in issue, and this would cause a complete *impasse* in execution proceedings. The result is that according to the Allahabad High Court *B* must prefer an appeal from each decree if he wishes to avoid the bar of *res judicata* (*e*).

Suit.—"There is no definition of the word 'suit,' probably because it is not possible to frame one which will satisfactorily survive every test. But on the other hand it is not difficult to decide in the vast majority of cases whether a proceeding is in fact a suit or whether it is merely a summary or subsidiary application" (*f*). In the case of *Venkatachandrappa v. Venkatarama* (*g*), where the proceeding was held not to have been a suit, it was said, "suit is a very comprehensive term. It includes any proceeding in a court of justice by which a party pursues the remedy which the law gives him. If a right is litigated between parties in a court of justice, the proceeding by which the decision of the Court is sought is a suit."

The matter of which the trial is barred under this section must have been heard and decided in a former suit. Proceedings under the Land Acquisition Act, 1894, differ considerably from a regular suit; therefore, a decision of the Court under that Act with respect to the apportionment of compensation awarded in respect of property acquired under the Act does not operate as *res judicata* in a subsequent suit relating to the question of title to other properties, though held under the same title (*h*). But a proceeding under s. 22 of the Provincial Insolvency Act, 1907, for a declaration of title and for possession of property attached by the Insolvency Court as being property of the insolvent is a 'suit', and the decision in such proceeding is a bar to a subsequent suit by the applicant in a civil Court for the same relief (*i*).

(*d*) *Abdul Majid v. Jew Narain* (1889) 16 Cal. 233; *Mariamnissa v. Joyab Bibi* (1906) 33 Cal. 1101; *Punchanada v. Vaitthinatha* (1906) 29 Mad. 333. See *Dakipa v. Rani Suraj* (1916) P. R. no. 48, p. 135.
(*e*) *Zaharia v. Debja* (1910) 33 All. 51 (F. B.); *Dakhni Din v. Syed Ali* (1910) 33 All. 151; *Anant Das v. Uday Bhan* (1913) 35 All. 187.

(*f*) *Pita Ram v. Jujhar Singh* (1917) 39 All. 626, 634.

(*g*) (1898) 22 Mad. 256.

(*h*) *Dirgaj Deo v. Kail Charan Singh* (1907) 34 Cal. 466; *Mahadevi v. Neelamani* (1897) 20 Mad. 269; *Nobodeep Chunder v. Brojendra Lal* (1881) 7 Cal. 406.

(*i*) *Pita Ram v. Jujhar Singh* (1917) 39 All. 626.

B.—Explanation IV : Matter directly and substantially in issue “constructively.”

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Matter which might and ought to have been made ground of attack or defence.—A matter directly and substantially in issue may be either “actually” in issue or it may be in issue “constructively.” In all the cases cited above, where a matter was held to have been in issue directly and substantially, it was “actually” in issue directly and substantially, for it was *actually* alleged by one party and denied by the other. It often happens that a matter which *might and ought* to have been made *ground of attack* by the plaintiff to substantiate the relief claimed by him in the suit is not alleged by him as a ground of attack; and also that a matter which *might and ought* to have been made *ground of defence* by the defendant is not set up as a ground of defence. A matter which *might and ought* to have been made ground of attack or defence in the former suit, but which has not been alleged as a ground of attack or defence, will be deemed to have been a matter directly and substantially in issue in such suit (*Explanation IV*). That is to say, though it has not been *actually* in issue directly and substantially, it will be regarded as having been *constructively* in issue directly and substantially. This section draws no distinction between the claim that *was actually* made in a suit, and the claim that *might and ought* to have been made. Where a matter has been *actually* in issue, it is necessary, to constitute *res judicata*, that it should have been *heard and finally decided*. But where a matter has been *constructively* in issue, it could not, from the very nature of the case, be heard and decided; and it will be deemed to have been heard and decided against the party omitting to allege it. This is in accordance with the view of the section taken by the High Courts of Allahabad and Bombay (*j*). On the other hand it has been held by the Calcutta High Court that though a matter, which might and ought to have been made ground of attack or defence should be deemed as provided by Explanation IV, to have been *directly and substantially* in issue, yet it could not be deemed to have been “heard and finally decided,” as there was nothing in Explanation IV to suggest that such matter should *also* be deemed to have been *heard and finally decided* (*k*). The view thus expressed does not seem to be sound law. It attaches greater importance to *form* than to *substance*. Its correctness was doubted in a later decision of the same Court (*l*), and the Chief Court of the Punjab has expressly dissented from it (*m*).

Illustrations.

1. X, a Hindu, dies leaving a widow. The widow makes a gift of certain property belonging to her husband to her brother, B. After the death of the widow, A, alleging that he and X were members of a joint family sues B for a declaration that he is entitled to the property by right of *survivorship*. The Court finds that A and X were separate, and A's suit is dismissed. Subsequently A sues B for the recovery of the same property, alleging that as the nearest reversionary heir of X, he became entitled to the property on the death of the widow, and that the alienation made by her in favour of B was not binding upon him. The suit is barred as *res judicata*. A *might and ought* to have set up the title by *heirship* as a *ground of attack* in the former suit. It will therefore be deemed to have been “directly and substantially in issue” in that suit, and it will also be deemed to have been “heard and finally decided” against A : *Guddapa v.*

(j) *Sri Gopal v. Pirthi Singh* (1898) 20 All. 110, 113, confirmed on appeal in (1902) 24 All. 429 [P. C.]. *Guddappa v. Tirkappa* (1901) 25 Bom. 189, at pp. 192 and 197.

(k) *Kailash v. Baroda* (1897) 24 Cal. 711; followed in *Woomesh v. Baroda* (1901)

28 Cal. 17.

(l) *Jamadar Singh v. Serazuddin* (1908) 35 Cal. 979. See also *Bayyan Naidu v. Suryanarayana* (1912) 37 Mad. 70, 74.

(m) *Gobind Lal v. Baldeo Singh* (1915) P. R. No. 12, p. 69.

- S. 11. *Tirkappa* (1901) 25 Bom. 189, dissented from in *Ramaswami v. Vythinatha* (1903) 26 Mad. 760, a case on different facts altogether. The grounds of dissent, it is submitted, are not satisfactory. See also *Masilamani v. Thiruvengadam* (1908) 31 Mad. 385, being ill. (3) below.

2. *A*, a Hindu, dies leaving a widow and a brother, *B*. The widow sues *B* for recovery of certain property, alleging that it was the self-acquired property of her husband, and that a will alleged to have been executed by her husband and relied on by *B* is a forgery. *B* alleges that the property was joint family property, and that on the death of *A* he became entitled thereto by right of survivorship, but he does not claim any title to the property under the will. The Court finds that the property was the self-acquired property of *A*, and decrees the widow's claim. Subsequently *B* sues the widow to recover the same property from her, now claiming the same as a devisee under *A*'s will. The suit is barred as res judicata. *B* might and ought to have set up the claim under the will as a ground of defence in the former suit. "When a plaintiff claims an estate, and defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward": *Srimut Rajah v. Katama Natchiar* (1866) 11 M. I. A. 50; *Doorga Persad v. Doorga Konwari* (1879) 4 Cal. 190, 5 I. A. 149.

3. *A* sues *B* to recover certain property belonging to the estate of *C*, alleging that his father had been adopted by *C*'s brother, *D*, to whom the property descended on *C*'s death. The suit is dismissed on the ground that the adoption is not proved. *A* then sues *B* to recover the same property claiming it as *C*'s bandhu. The suit is barred as res judicata. *A* ought to have in the first suit claimed the property in the alternative as *C*'s bandhu: *Masilamani v. Thiruvengadam* (1908) 31 Mad. 385.

Test.—The question whether a matter might have been made a ground of attack or defence in the former suit rarely presents any difficulty. Whether it ought to have been made a ground of attack or defence depends on the particular facts of each case. As a general rule we may say that if a matter could have been set up as a ground of attack or defence in the former suit, and if its introduction into that suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which ought to have been made a ground of attack or defence in that suit, unless the matters in that and the subsequent suit are so dissimilar that their union might lead to confusion (*n*). Thus in ill. (1) above the title by heirship could have been made a ground of attack in the alternative in the first suit; it was not forbidden by any rule of pleading; moreover, it was necessary for the complete and final disposal of all questions as to *A*'s right to the property. Further, the question in both suits being the same, namely, whether *A* was entitled to the property or *B*, the title by survivorship and the title by heirship could not be said to be so dissimilar that their union might lead to confusion. It may appear at first sight that the two matters are dissimilar, for the title by survivorship and the title by heirship have to be supported by different evidence. But the test of evidence which was brought to the front in some old decisions (*o*) is not a satisfactory one, and though it was advanced in argument in two cases before the Judicial Committee of the Privy Council, it was not even so much as noticed in the judgments in those cases (*p*). The reason is obvious, for when a plaintiff sets up alternative grounds of attack, or when a defendant sets up alternative grounds of defence, the

(*n*) *Kameswar v. Rajkumari* (1893) 20 Cal. 79, 85, 10 I. A. 234; *Moosa v. Ebrahim* (1912) 40 Cal. 1, 39 I. A. 237; *Guddappa v. Tirkappa* (1901) 25 Bom. 189, 192; *Srimut Rajah v. Katama Natchiar* (1866) 11 M. I. A. 50, 73; *Woomatara v.*

Unnopurna (1873) 11 B. L. R. 158, 167.
(*o*) *Muttu Chetti v. Muttan Chetti* (1882) 4 Mad. 296, 299; *Naro v. Ramchandra* (1889) 13 Bom. 326, 329.
(*p*) 11 M. I. A. 50 and 11 B. L. R. 158, *supra*.

evidence in support of such alternative grounds must in the majority of cases, be different. But where the evidence in support of one ground is such as might be destructive of the other ground, the two grounds, it has been said, need not be set up in the same suit. The reason given is that the test of determining whether both the grounds ought to have been set up in the same suit is afforded by the provisions of O. 2, r. 1, and the provisions of that rule as to the framing of suits are only to be applied "as far as practicable" (q).

S. 11.

It is clear that it cannot be said of any matter that it *ought* to have been set up as a ground of attack in a former suit, if its introduction would have been *incongruous* to the matter of that suit (r). See Rule IV below.

The decisions bearing on this branch of the subject are numerous and at first sight conflicting. A careful examination of these decisions leads to the following four Rules.

Rule I.—Where the *right claimed* in both suits is the *same*, the subsequent suit will be barred as *res judicata*, though the right in the subsequent suit may be sought to be established by a *title different* from that in the first suit.

Exception.—The dismissal of a plaintiff's suit for the recovery of land based on an alleged lease is no bar to a subsequent suit for the recovery of the same land on the strength of his general title.

[In this and the following rules when it is said that the subsequent suit is barred as *res judicata*, it is understood that it is barred by virtue of Explanation IV, and that the other conditions of *res judicata* are present.]

Illustrations of Rule I.

1. See *Gudappa v. Tirkappa* (1901) 25 Bom. 189, being ill. (1) on p. 39 above, and *Masilamania v. Thiruvengadam* (1908,) 31 Mad. 385, being ill. (3) on p. 40.

2. A Hindu, *H*, dies leaving a widow *W*, and a son-in-law, *S*, being the husband of a predeceased daughter, *D*. *W* sues *S*, as the *heir of her husband H*, to recover certain property, alleging that it forms part of the estate of *H*. The defence is that *H* had made a gift of the property to his daughter, *D*, and that on *D*'s death, *S* as *D*'s husband, became entitled to the property as *D*'s heir. *W* alleges that the deed of gift relied upon by *S* is a forgery. The Court finds that the deed of gift is genuine, and the suit is dismissed. *W* then sues *S* to recover the same property, alleging that it being found that the property belonged to *D*, she is entitled to the property as the *heir of her daughter, D*. The suit is barred as *res judicata*. Here the right claimed in both the suits is the same, namely the right to the property in question. In the first suit, it was claimed by *W* as her *husband's heir*. In the second suit it is sought to be established by her by a different title, namely, as her *daughter's heir*. *W* "might and ought" to have claimed in the *alternative* as her *daughter's heir* in the former suit. Having failed to do so, her title, as her daughter's heir, will be deemed to have been "directly and substantially" in issue in the former suit, and it will also be deemed to have been heard and finally decided against her in that suit: *Denobundhoo v. Kristomonee Dossee* (1877) 2 Cal 152, dissented from in *Ummatha v. Cheria* (1882) 4 Mad. 308. The Madras case falls within the *Exception* rather than the *Rule*.

(q) *Masilamania v. Thiruvengadam* (1908) 31 Mad. 385, 396; *Ramaswami v. Vythinatha* (1903) 26 Mad. 760.
(r) *Deputy Commissioner of Kheri v. Khanjan Singh* (1907) 29 All. 331, 34 I. A. 72;

Lala Soni Ram v. Kanhaiya (1913) 17 C. W. N. 605 [P. C.]; *Divan Chand v. Hari Chand* (1914) P. R. no. 102, p. 383; *Aishan v. Muhammad* (1916) P. R. no. 94, p. 282.

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3. *A* lends Rs. 50,000 to a Hindu widow on a mortgage of her husband's property. The widow then surrenders the property to *B*, the reversionary heir of her husband, on *B* agreeing to pay all her debts. *A* sues *B* and the widow to recover Rs. 50,000 by sale of the mortgaged property. *A* also asks for a personal decree against the widow, but he does not ask for a personal decree against *B*. *B* is joined as a defendant on the ground that the mortgaged property formed part of the property transferred by the widow to him. The Court finds that the mortgage is not binding upon the husband's estate, and the suit against *B* is accordingly dismissed. As against the widow, a personal decree is passed for the amount of the loan. *A* realises Rs. 5,000 only from the widow, and after her death, he sues *B* for the balance of the money due under the decree (that is to say, *A* asks for a personal decree against *B* for the balance), alleging that *B* was personally liable under the agreement with the widow to pay her debts. The suit is barred as *res judicata*, for *A* "might and ought" to have alleged in the former suit that if the mortgage was not binding on the estate, *B* was at all events personally liable to pay the debt in consequence of the agreement which he (*B*) had entered into with the widow: *Kameswar Pershad v. Rajkumari* (1893) 20 Cal. 79, 19 I. A. 234.

Note.—Suppose that in the above illustration, *A* had applied in the first suit for amendment of the plaint by adding a claim for relief against *B* personally, but the application was refused. In such a case it has been held that the subsequent suit would not be barred: *Alagirisami v. Sundareswara* (1898) 21 Mad. 278; *Thakore v. Thakore* (1890) 14 Bom. 31.

For other cases under this Rule, see foot-note (s).

Illustration of the Exception to the Rule.

A sues *B* to recover certain land from him, alleging that *B* held the land under a lease, and that the lease had expired. The lease is not proved, and the suit is dismissed. Subsequently *A* sues *B* to recover the same land on the strength of his title. The is not barred as *res judicata*: *Zamorin of Calicut v. Narayanan* (1899) 22 Mad. 323; *Kutti Ali v. Chindan* (1900) 23 Mad. 629; *Kandunni v. Katiamma* (1886) 9 Mad. 251; *Ummatha v. Cheiria* (1882) 4 Mad. 308; *Girdhar v. Dayabhai* (1884) 8 Bom. 174.

Rule II.—If a matter which forms a ground of attack in the subsequent suit could have been alleged as a ground of defence in the former suit, but was omitted to be so alleged in that suit, it will be deemed to have been directly and substantially in issue in that suit within the meaning of *Explanation IV*.

This rule contemplates cases in which the plaintiff in the subsequent suit was defendant in the former suit.

Illustrations.

1. The Privy Council case of *Srimut Rajah v. Katama Natchiar* (1866) 11 M. I. A. 50, which stands as ill. (2) on p. 40 above, and the Privy Council case of *Doorga Persad v. Kenwari* (1879) 4 Cal. 190, 5 I. A. 149, which is there cited, belong to this class.

2. *A* and *B*, two Hindu brothers who have become separate in estate, own a garden which has not yet been divided between them. *A* dies leaving a widow who sells *A*'s half share in the garden to *C*. After the death of the widow, *C* sues *B* for partition of the garden, and a decree *ex parte* is passed under which he (*C*) enters into possession of a

(s) *Akayi v. Ayissa* (1903) 26 Mad. 645; *Imam Khan v. Ayub Khan* (1897) 19 All. 517; *Haji Hasam v. Mancharam* (1879) 3 Bom.

137; *Woomatara v. Unnopoorana* (1873) 11 B. L. R. 158 (P. C.); *Kesar Singh v. Asa Singh* (1913) P. R. no. 86, p. 305.

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moiety of the garden. *B* then sues *C* to recover possession of the moiety sold by *A*'s widow to *C*, alleging that the sale was made by the widow without legal necessity, and that on the death of the widow, he became entitled to the moiety as the reversionary heir of *A*. The suit is barred as *res judicata*. *B* "might and ought" to have raised the question of the validity of the sale as a ground of defence in the former suit: *Shyama Charan v. Mrinmayi Debi* (1904) 31 Cal. 79.

3. A mortgagee, who holds the mortgaged property also as lessee from the mortgagor, sues the mortgagor to recover Rs. 3,000, being the amount of the mortgage-debt. At the date of the suit the mortgagee owes Rs. 4,000 to the mortgagor for rent under the lease, and this sum the mortgagor claims to set off against the mortgage-debt under an *express agreement* in that behalf. The agreement is not proved, and a decree is passed against the mortgagor for Rs. 3,000. The property is sold in execution of the decree, and it is purchased by the mortgagee with the leave of the Court. The mortgagor then sues the mortgagee to have the sale set aside, and for a declaration that the mortgage-debt is extinguished, now claiming that a *general account* may be taken as between him and the mortgagee, and that in taking such account the rent due to him may be set off against the mortgage-debt. The suit is barred, for the mortgagor "might and ought" to have set up that claim in the alternative in the former suit: *Mahabir Pershad v. Macnaghten* (1889) 16 Cal. 682, 16 I. A. 107.

4. *A*, who owns a share in a village, mortgages it to *B*, and sells it subsequently to *C*. *C* sues *B* for redemption of the mortgage, and obtains a decree. Subsequently *B* sues *C* for pre-emption of the share sold by *A* to *C*, alleging that he is a co-sharer in the village and entitled as such to a right of pre-emption. The suit is not barred. The right of pre-emption not being a "vested and ascertained" right when *B* filed his written statement in the former suit, it could not have been properly pleaded by *B* as an answer to the claim for redemption in that suit: *Ram Chand v. Durga Prasad* (1904) 26 All. 61.

For other cases under this rule, see foot-note (t).

Rule III.—Where the right claimed in the subsequent suit is *different* from that in the former suit, and it is claimed under a *different title*, the subsequent suit is not barred as *res judicata*.

Illustrations.

1. *A* sues *B* for possession of certain lands alleged to have come to his share on a partition of joint family property with *B*. The defence is that the family property has not yet been divided, and the suit is dismissed on a finding to that effect. A subsequent suit by *A* against *B* for partition of the family property is not barred: *Shivram v. Narayan* (1881) 5 Bom. 27; *Konerrav v. Gurrav* (1881) 5 Bom. 589; *Nilo v. Govind* (1886) 10 Bom. 24; contra, *Bheeka v. Bhuggoo* (1878) 3 Cal. 23.

2. *A*, alleging that *B* held certain lands from him under a lease and that the lease had expired, sues *B* to recover Rs. 500 for *use and occupation* of the land. The defence is that the lease is a subsisting lease, and the suit is dismissed on a finding to that effect. A subsequent suit by *A* to recover Rs. 500 as *rent* payable under the lease is not barred: *Watson v. Dhonendra* (1878) 3 Cal. 6.

(t) *Maktum v. Imam* (1873) 10 B. H. C. 293;
Dost Muhammad v. Said Begam (1898)
 20 All. 81; *Hari v. Ganpatrao* (1883)

7 Bom. 272; *Jagan Nath v. Balkisan*
 (1907) All. W. N. 275.

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[*Note the peculiar character of the cases cited above.*—in ill. (1), *A* first suing on the basis of a partition, the Court finding that there was no partition, and *A* subsequently suing for partition; in ill. (2), *A* first suing on the basis that the lease has expired, the Court finding that the lease has not expired, and *A* subsequently suing on the basis that the lease is a subsisting lease. For other cases of a similar nature, see foot-note (*w*).]

3. A suit by *A* against *B* in 1869 to recover a talukdari estate is dismissed on a finding that the estate had become the absolute property of *B* under a conditional sale made by *A* to *B* in 1853. *A* then sues *B* in 1875 for redemption of the same property, alleging that he had mortgaged the property as absolute owner thereof to *B* in 1854. The suit is not barred: "It may be difficult to reconcile the position of *B* as mortgagee in 1854 with his position as absolute owner in 1853. But if it be established that *A* was mortgagor in 1854, why should he be debarred of his right [of redemption] merely because at a certain date [*i.e.*, in 1853] he may have had no right to the property at all?" : *Amanat Bibi v. Imdad Husain* (1888) 15 Cal. 800, 15 I. A. 106; *Balbhaddar v. Ram Lal* (1904) 26 All. 501.

4. *A* sues *B* for redemption of a mortgage alleged to have been executed in 1856 of 50 cawnies of land. *B* denies the genuineness of the mortgage, and alleges that 14 out of the 50 cawnies were mortgaged to him in 1853, and that the 14 and the remaining 36 were sold to him by *A* in 1855. The mortgage is not proved, and the suit is dismissed. *A* then sues *B* to redeem the 14 cawnies on the footing of the mortgage of 1853. The suit is not barred: *Ramaswami v. Vythinatha* (1903) 26 Mad. 760; *Veerana v. Mathukumara* (1904) 27 Mad. 102; *Parambath v. Puthengattil* (1905) 28 Mad. 406; *Thirikaikat v. Thiruthayil* (1906) 29 Mad. 153; *Mahabir v. Purbhoo Nath* (1907) 12 C. W. N. 292; *Ram Sahai v. Ahmadi Begam* (1910) 33 All. 302.

5. *A*, alleging that he mortgaged certain lands to *B* with possession, sues *B* for redemption, the suit being brought by him as mortgagor. *A* fails to prove the alleged mortgage, and the suit is dismissed. *A* then sues *B* for possession of the same lands, now claiming as owner thereof. The suit is not barred: *Mahomed Ibrahim v. Sheik Hamja* (1911) 35 Bom. 507.

For other cases under this rule, see foot-note (*v*).

Rule IV.—*It cannot be said of a relief which if claimed in the first suit would have made that suit bad for multifariousness that it ought to have been made a ground of attack in that suit (w).*

Application of the above rules to suits on mortgage.—If a mortgagee, in a suit for redemption against him by the mortgagor, omits to obtain an order for sale of the mortgaged property on failure of payment by the mortgagor of the mortgage-debt within the time allowed for redemption, he will be precluded from bringing a separate suit for sale on default of payment by the mortgagor within the time aforesaid. The mortgagee "might and ought" to have claimed the right of sale in the suit for redemption brought against him (*x*). Similarly, if a prior mortgagee is made a party to a suit brought by a subsequent mortgagee on his mortgage, but omits to set up his claim under his prior mortgage, he will be precluded from bringing a separate suit to enforce his mortgage. This rule does not apply where the subsequent mort-

(u) *Shridhar v. Narayan* (1874) 11 B. H. C. 224; *Varathayangar v. Krishnashami* (1887) 10 Mad. 102; *Amer v. Nathu* (1886) 8 All. 396; *Zinat-un-Nissa v. Rajan* (1905) 27 All. 142.
(v) *Thandavan v. Valliamma* (1892) 15 Mad. 336; *Sarkun v. Rahuman* (1897) 24 Cal. 83; *Nathu v. Budhu* (1894) 18 Bom. 537;

Naro v. Ram Chandra (1888) 13 Bom. 326; *Sheo Kutan v. Sheo Sahai* (1884) 6 All. 358; *Bai Diwali v. Umedbhai* (1916) 40 Bom. 614; *Nihal Singh v. Hira* (1913) P. R. no. 87, p. 308.
(w) *Kura v. Madho* (1915) P. R. no. 68, p. 292.
(x) *Muloji v. Sagaji* (1889) 13 Bom. 567.

gagee admits in his plaint the debt due to the prior mortgagee and has actually offered to redeem that debt. In the same way, if a subsequent mortgagee is made a party to a suit on a mortgage prior to his own, but omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead (y).

In this connection we may mention a point which was left open by their Lordships of the Privy Council in *Sri Gopal v. Pirthi Singh* (z) cited above, namely, whether a mortgagee who has several mortgages on the same property can treat them as separate causes of action, or whether he must bring one suit on all of them. This point arose in a recent case before the High Court of Bombay, where it was held that if a mortgagee who has two mortgages upon the same property sues upon the mortgage of the later date, and the property is sold without reference to the prior mortgage, he cannot afterwards sue on the prior mortgage, not because the several mortgages constitute but one cause of action within the meaning O. 2, r. 2, but because of the general principles of the law of mortgage and of *res judicata* (a). Similarly it has been held by the High Court of Madras that if the mortgagee brings a suit on the prior mortgage without mentioning his subsequent mortgage, and the property is sold, he cannot afterwards sue to enforce the subsequent mortgage against the property (b). The ground of these decisions seems to be that the mortgagee in such a case must be deemed to be a party to the first suit as a prior or subsequent mortgagee according as the first suit is on the subsequent or prior mortgage, and that the case therefore is similar to the one where the prior or subsequent mortgagee being joined as a party does not set up his claim under the mortgage. But where a mortgagee who has two mortgages upon the same property sues on the mortgage of the later date reserving his rights under the prior mortgage, and the property is put to sale subject to the prior mortgage, there is nothing to preclude him from subsequently suing upon the prior mortgage (c).

In suits for redemption, foreclosure or sale, there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee right up to the time of actual redemption, foreclosure or sale, as the case may be (d). A mortgagor, therefore, who has obtained a decree for redemption against a mortgagee in possession, and paid what was due according to the decree, and obtained possession, cannot subsequently sue for profits realized by the mortgagee for a period prior to the delivery of possession. Such profits "might and ought" to have been taken into account at the time of passing the decree (e). Similarly, where a suit is brought by a mortgagor under s. 62 of the Transfer of Property Act to recover possession of the mortgaged property, the mortgage being a usufructuary one, and a deposit is made by him in Court under s. 83 of the Act of the amount due to the mortgagee, and a decree is passed for possession, the mortgagor cannot subsequently sue for profits realized by the mortgagee from the date of the deposit to the date of the delivery of possession (f). In both these cases it might be said that there was but one cause of action, and the subsequent suit was therefore barred by the provisions of O. 2, r. 2 [Code of 1882, s. 43].

See notes below, "Finality of decree in redemption suits."

(y) *Sri Gopal v. Pirthi Singh* (1902) 24 All. 429, 29 I. A. 118; *Gopal v. Benarasi* (1904) 31 Cal. 428; *Ajudhia v. Inayat-Ullah* (1912) 35 All. 111 (prior debt admitted); *Mahomed Ibrahim v. Ambika Pershad* (1911) 39 Cal. 527, 39 I. A. 68; *Gajadhar v. Bhagwanrao* (1912) 34 All. 599; *Krishna v. Amiral* (1914) 19 C. W. N. 942, 945 [prior mortgage admitted].
 (z) (1902) 24 All. 429, 29 I. A. 118.
 (a) *Dhondo v. Bhikaji* (1914) 39 Bom. 138.
 (b) *Nathu v. Annangara* (1906) 30 Mad. 353,

dissenting from *Sundar Singh v. Bholu* (1898) 20 All. 322. See also *Hari Narain v. Kusum* (1910) 37 Cal. 589.
 (c) *Subramania v. Balasubramania* (1915) 88 Mad. 927; *Dhondo v. Bhujaki* (1914) 39 Bom. 138, 145.
 (d) *Mahabir Pershad v. Macnaghten* (1889) 16 Cal. 682, 16 I. A. 107; *Vinayak v. Duttatraya* (1902) 26 Bom. 601.
 (e) *Kashi v. Bagraj Prasad* (1907) 30 All. 36.
 (f) *Rukhminibai v. Venkatesh* (1907) 31 Bom. 527; *Satyabadi v. Harabati* (1907) 34 Cal. 223.

S. II. Subject-matter of the suit.—It is not necessary for Explanation IV to be applicable that both the issue and the subject-matters of the two suits must be the same. It is quite enough if the matters in issue are the same, otherwise in suits for arrears of rent there could be no *res judicata* at all, for the subject-matters of successive suits for arrears of rent are necessarily different (g). See notes on p. 38 above.

Issue of law.—Issues are of three kinds: (1) issues of fact, (2) issues of law, and (3) mixed issues of law and fact.

An issue of fact may be *res judicata*. Almost all the cases we have hitherto dealt with relate to issues of fact. Note the words with which the section begins “no Court shall try any suit or issue.”

An issue of mixed law and fact stands on the same footing as an issue of fact, and it may also be *res judicata* (h).

An issue of law may or may not be *res judicata*. It may be *res judicata*, if the cause of action in the subsequent suit is the same as that in the former suit, as was the case in the undermentioned cases (i). But it cannot be *res judicata* if the cause of action in the subsequent suit is different from that in the former suit, as was the case in the undermentioned cases (j). The latter cases are all cases of recurring liability, such as rent, maintenance, etc.

Illustrations.

1. X sells certain property to A. At the time of sale the property was in the possession of B who claimed it adversely to X. A then sues B in the High Court of Calcutta to recover possession of the property under the deed of sale from X. An issue is raised in the suit, and it is an *issue of law*, namely, whether a person who is not in possession of property at the time of sale is competent to convey it. The issue is found in the negative, and A's suit is accordingly dismissed. It is subsequently decided by a Full Bench of the same High Court in another case between different parties altogether that although a person may not have property in his possession, he is nevertheless competent to convey it. After the decision of the Full Bench, A again sues B to recover possession of the same property under the same deed of sale, and asks for a decision in his favour on the strength of the Full Bench ruling on the point of law that was decided against him in the former suit. Here the cause of action in the subsequent suit is the same as that in the former suit. The Court is therefore precluded from re-trying the same question of law in the subsequent suit, in other words, the issue of law is *res judicata*. It is immaterial that the decision on the question of law in first suit was erroneous: *Gowri Koer v. Audh Koer* (1884) 10 Cal. 1087. See as to this case the observations of Maclean, C.J., in *Alimunnissa v. Shama Charan* (1905) 32 Cal. 749.

2. A sues B in the year 1894 to recover 12 years' arrears of his share of a certain Government allowance received by B. B contends that A is not entitled to recover more than 3 years' allowance, having regard to the provisions of the Indian Limitation Act. The Court decrees the whole of A's claim. In the year 1907 A sues B for further

(g) *Jamadar Singh v. Serazuddin* (1908) 35 Cal. 979.

(h) *Bishnu Priya v. Bhaba Sundari* (1901) 28 Cal. 318; *Koyana v. Doosy* (1906) 29 Mad. 225.

(i) *Gowri Koer v. Audh Koer* (1884) 10 Cal. 1087; *Phundee v. Jangi Nath* (1893) 15 All. 327; *Kavari Ammal v. Sastri Ramier* (1903) 26 Mad. 104; *Waman v. Hari* (1907) 31 Bom. 128.

(j) *Alimunnissa v. Shama Charan* (1905) 32

Cal. 749; *Baij Nath v. Padmanand* (1912) 39 Cal. 848; *Chamanlal v. Bapubhai* (1898) 22 Bom. 669; *Vishnu v. Ramling* (1902) 26 Bom. 25; *Parthasaradi v. Chinna* (1882) 5 Mad. 304; *Venku v. Mahalinga* (1888) 11 Mad. 393, 395-396; *Gopu v. Sami* (1905) 28 Mad. 517; *Mangalathammal v. Narayanswami* (1907) 30 Mad. 461; *Aitamma v. Naraina* (1907) 30 Mad. 504; *Kuppana v. Kumara* (1909) 34 Mad. 450.

arrears for 12 years from the year 1895 to the year 1906. *B* raises the same point of law that was raised by him in the former suit. Here the cause of action in the subsequent suit is *different* from that in the former suit, for the claim in the subsequent suit is for further arrears that had accrued due after the institution of the former suit. The Court, therefore, is not precluded from re-trying the same question of law, and if it finds that the question of law was wrongly decided in the former suit, it may decide the suit on what it considers is the correct interpretation of the law: *Chamanlal v. Babubhai* (1898) 22 Bom. 669.

It will be observed that in the case cited in ill. (2) the matter directly and substantially in issue in the subsequent suit was also directly and substantially in issue in the former suit, and the other conditions of *res judicata* were also present, and yet it was held that the subsequent suit was not barred as *res judicata*. The effect of this and other cases cited in foot-note (j) on p. 46 appears to be that where the matter directly and substantially in issue is a matter of law, it may not be *res judicata*, if the cause of action in the subsequent suit is different from that in the former suit (k). The reason given for the decisions now under review is that the Courts would be perpetuating an injustice for all time if they were to hold that an erroneous decision on a point of law in a former suit was binding upon the parties in a subsequent suit instituted upon a fresh cause of action.

CONDITION II : HEREIN OF EXPLANATION VI.

The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

Same parties.—*A* sues *B* for rent. The defence is that *C*, and not *A*, is the landlord. *A* fails to prove his title, and the suit is dismissed. *A* then sues *B* and *C* for a declaration of his title to the property. The suit is not barred, for the parties to the two suits are not the same, *C* not having been a party to the former suit (l).

Res judicata as between co-defendants.—As a matter may be *res judicata* between a plaintiff and a defendant, so it may be *res judicata* as between plaintiffs or as between co-defendants. First, as to *res judicata* between co-defendants: if in a suit by *A* against *B* and *C*, there is a matter directly and substantially in issue between *B* and *C*, and an adjudication upon that matter is necessary to the determination of the suit, the adjudication may operate as *res judicata* in a subsequent suit between *B* and *C* in which either of them is plaintiff and the other defendant (m). In other words, "if a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide the case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree which the plaintiff obtains" (n). The above observations indicate the reluctance which the Courts

(k) See *Alimunnissa v. Shama Charan* (1905) 32 Cal. 749, 754.

(l) *Dwarkanath v. Ram Chand* (1899) 26 Cal. 428, 432.

(m) *Ramchandra v. Narayan* (1887) 11 Bom. 216; *Magniram v. Mehdi Hossein* (1904) 31 Cal. 95; *Chajju v. Umrao* (1900) 22 All. 386; *Balamhat v. Narayanhath* (1901) 25 Bom. 75; *Bapu v. Bhavani* (1898) 22 Bom.

245; *Muhammad v. Visvanath* (1903) 26 Mad. 337; *Kandiyi v. Zamorin of Calicut* (1906) 29 Mad. 615; *Yunus v. Durji* (1907) 30 Mad. 447; *Gurdeo Singh v. Chandrikah Singh* (1909) 36 Cal. 193; *Hari Annaji v. Vasudev* (1914) 38 Bom. 438;

(n) *Collingham v. Earl of Shrewsbury* (1843) 3 Hare 627, 638.

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Res judicata as between co-plaintiffs—Next, as to *res judicata* between co-plaintiffs. As a matter may be *res judicata* between co-defendants, so it may be *res judicata* between co-plaintiffs, subject to the same conditions that obtain in the case of co-defendants (q).

Parties in subsequent suit claiming under parties in former suit.—If the first suit is between *A* and *B*, and the second between *A* and *C*, the decision in the first suit cannot operate as *res judicata* in the second unless *C* claims under *B*. If *C* does not claim under *B*, he cannot be bound by any decision in a suit between *A* and *B*. The dismissal, therefore, of an ejectment suit brought by a *lessee* against a trespasser is no bar to a subsequent suit for ejectment by the *lessor* against the same person; for a lessor cannot be said to claim under his lessee (r). Where there are several reversioners entitled successively to a property held by a Hindu widow and forming part of the estate of her husband, no one of such reversioners can be said to claim through or derive his title from another; a decree, therefore, in a suit by one of the reversioners seeking to set aside an alienation made by the widow of her husband's property is no bar to a subsequent suit brought by another reversioner for setting aside the same alienation (s).

If the first suit is between *A* and *B*, and the second between *C* and *D*, the decision in the first suit cannot operate as *res judicata* in the second unless *C* claims either under *A* or *B*, and *D* claims under the other of them; that is to say, if *C* claims under *A*, *D* must be claiming under *B*, and if *C* claims under *B*, *D* must be claiming under *A*. It is clear that if both *C* and *D* claim under *A* alone, nothing that is decided in the suit between *A* and *B* will operate as *res judicata* in the subsequent suit between *C* and *D*, for neither of them claims under *B*. The result is the same if both *C* and *D* claim under *B* alone. In other words, the plea of *res judicata* cannot prevail if all the parties in the subsequent suit claim under one party only in the former suit (t).

A Hindu son in a joint family does not "claim under" his father within the meaning of this section; he becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father. Therefore the dismissal of a suit for redemption of a mortgage of joint family property brought by the father alone is no bar to a subsequent suit for redemption by the son (u). But the son, it seems, would be bound by the decree, if he had knowledge of the suit and had assisted the father in the suit (v). Mere knowledge of the suit, however, is not enough to bind the son (w). The cases in which it has been held that a decree obtained against a Hindu father for a debt is binding upon the son stand on a different footing. They depend on the obliga-

(o) *Fakirchand v. Naginchand* (1916) 40 Bom. 210, 216.

(p) *Venkayya v. Narasammur* (1888) 11 Mad. 204.

(q) *Krishnan v. Kannan* (1898) 21 Mad. 8; *Rukhmini v. Dhondo* (1911) 36 Bom. 207.

(r) *Rambrohm v. Bunsu* (1882) 11 C. L. R. 122.

(s) *Chhiddu v. Durga* (1900) 22 All. 382.

(t) *Asghar v. Mahomed* (1903) 30 Cal. 556.

(u) *Sundar Lal v. Chhitar Mal* (1907) 29 All. 1; *Ram Narain v. Bisheshar* (1888) 10 All. 411. See notes to O. 34, r. 1.

(v) *Narayan v. Pandurang* (1881) 5 Bom. 685.

(w) *Ram Narain v. Bisheshar* (1888) 10 All. 411, 413.

tion of a Hindu son to pay his father's debts not improperly incurred, and upon the presumption in some of them that the suit was brought against the father as the *representative* of the family and of the family property (x).

A purchaser at a revenue sale does not "claim under" the defaulting proprietor: therefore a decree against the defaulting proprietor cannot constitute *res judicata* as against the purchaser (y).

The title by which the parties in the subsequent suit claim must have arisen "subsequently" to the commencement of the former suit.—In order that a decision in a suit between A and B may operate as *res judicata* in a subsequent suit between A and C, it is necessary to show that C claims under B by a title arising *subsequently* to the commencement of the first suit. Thus a purchaser, mortgagee, or donee of a property is not estopped by a decree obtained in a suit against the vendor, mortgagor or donor commenced *after* the date of the purchase, mortgage or gift (z).

See notes below under the head "Condition III: Litigating under the same title."

Explanation VI.—This explanation provides that where persons litigate *bonâ fide* in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to "claim under" the person so litigating. It refers to cases in which a decision in a suit may operate as *res judicata* against persons *not expressly named* as parties to the suit, as where a suit is instituted by A and B on behalf of themselves "and others," or where it is instituted against A and B on behalf of themselves "and others." The conditions under which the decision in such a suit may constitute *res judicata* against the parties not expressly named in the suit are—

- (1) that there must be a *right claimed* by A and B *in common* for themselves and the parties not expressly named in the suit (a), and
- (2) that the parties not expressly named in the suit must be *interested in such right*.

Illustrations.

(1) A decree in a suit against certain members of a sect alleged to be wrongdoers in their *individual* capacity cannot operate as *res judicata* in a subsequent suit against the other members of the sect: *Sadagopa Chariar v. Krishnamoorthy Rao* (1907) 30 Mad. 185, 34 I. A. 93. [The wrong complained of in the former suit in this case was that the defendants carried an idol in procession through certain streets and that such processions were in violation of the plaintiff's rights. The suit was against the defendants in their *individual* capacity, and not as representing the sect to which they belonged].

(2) A, alleging that he is the proprietor of a village, sues B, C, and D for ejectment. The defence is that A is not the proprietor at all, that a *part* of the village belongs to B, C and D, and *the rest* to X, Y and Z. The Court finds that A is not the proprietor, and A's suit is dismissed. A then sues X, Y and Z, and also B, C and D, for a declaration, that he is the proprietor of the village and for possession. The question of A's title to the village is *res judicata* so as to bar the suit against B, C and D, who were parties to the former suit, but it is not *res judicata* so as to bar the suit against X, Y and Z *who were not parties to the former suit*. It cannot be said that B, C and D litigated in the

(x) *Ram Narain v. Bisheshar* (1888) 10 All. 411, 418.

(y) *Gadadhar v. Radhacharan* (1907) 34 Cal. 868.

(z) *Sita Ram v. Amir* (1888) 8 All. 324; *Joy Chandra v. Sreenath* (1905) 32 Cal. 357 (vendor and purchaser); *Niazullah v. Nazir* (1893) 15 All. 108; *Abdul Ali v.*

Miakhani (1911) 35 Bom. 296 (donor and donee); *Ramchandra v. Malkapa* (1916) 40 Bom. 679.

(a) *Somasundara v. Kulandaivelu* (1905) 23 Mad. 457 [F. B.]; *Surender Nath v. Brojo Nath* (1886) 13 Cal. 352; *Jamangal Deo v. Bed Saran* (1911) 33 All. 493.

S. 11. former suit in respect of a private right claimed in common for themselves and X, Y and Z, for what B, C and D did in the former suit was that they set up their own right to a part of the property and alleged that another part belonged to X, Y and Z: *Jaimangal Deo v. Bel Saran* (1911) 33 All. 493.

(3) A and B as members of the Mahomedan community bring a suit against C for a declaration that a certain mosque and a garden appertaining to the mosque are wakf property. The plaintiffs fail to prove that the property is wakf property, and the suit is dismissed. After some years a suit is brought by nine other members of the same community against the same defendant C for the same relief. The suit is barred as *res judicata*: *Muhammad v. Sumitra* (1914) 36 All. 424.

The right referred to in this Explanation may either be a public right or a private right. The words "public right" have been added into this Explanation in view of the provisions of s. 91 below. The right to have a public nuisance abated is a public right. But the right of pasturage claimed by custom by the inhabitants of a village over a tract of land, or to take water from a spring or well, is a private right (b).

It may here be noted that in some of the cases that arose under the Code of 1882 the opinion was expressed that the present Explanation, so far as it relates to private rights, must be confined to cases where leave to sue had been obtained under s. 30 of that Code [now O. 1, r. 8 (1)] (c).

Representative suit.—If the parties in the subsequent suit can be said to have been represented by the parties in the former suit, the decision in the former suit will bind the parties in the subsequent suit. Thus a trustee of a *devasam*, a *karnum*, a holder of *vatun* lands, an administrator of the estate of a deceased person, a *shebait*, a holder of *saranjam* lands, represents each his successor: therefore, a decree against him will bind his successor (d). Similarly a decree against a *benamidar* binds the real owner (e). On the same principle a decree against the *karnavan* of a *tarwad* in his representative capacity binds the members of the *tarwad* (f).

A decree passed against a Hindu widow as representing the estate of her deceased husband in respect of a debt or other transaction binding on the estate is binding upon the reversioners (g), "unless," as was observed by their Lordships of the Privy Council in the *Shivayanga* case, "it could be shown that there had not been a fair trial of the right on that suit—or in other words, unless that decree could have been successfully impeached on some special ground" (h). The reason of this qualification is that, though a Hindu widow represents the estate of the reversioners for some purposes, it is her duty not only to represent the estate, but also to protect it (i). Thus it has been held that a compromise made by a Hindu widow is not binding on the reversioners, whether litigation has commenced or not, not even if it has been followed by a decree of Court (j)

(b) *Kalishunkur v. Gopal Chunder* (1881) 6 Cal. 1.
(c) *Thanakoti v. Muniappa* (1885) 8 Mad. 496, 499; *Somasundari v. Kulandaiavelu* (1905) 28 Mad. 457, 463.

(d) *Mudharan v. Keshavan* (1888) 11 Mad. 191; *Venkayya v. Suramma* (1889) 12 Mad. 235; *Radhabai v. Anant Rao* (1885) 9 Bom. 198; [*vatun* lands]; *Bai Meherbai v. Magan-chand* (1905) 29 Bom. 96; *Raja Ranjit v. Basanta* (1908) 12 C. W. N. 739; *Jharida Das v. Jalandhar* (1912) 39 Cal. 887; *Prosunno Kumari v. Golab Chand* (1875) 14 Beng. L. R. 450, 459, 2 I. A. 145; *Madharao v. Anusuyabai* (1916) 40 Bom. 606 [*saranjam* lands].

(e) *Gurnarayan v. Sheo Lal Singh* (1919) 46 I. A. 1. 9-10, 46 Cal. 566, 575. *Nand Kishore v. Ahmad* (1890) 18 All. 69; *Ravji v. Mahadeo* (1898) 22 Bom. 679.

(f) *Komappan v. Ukkaran* (1894) 17 Mad. 214; *Marinittil v. Pathram* (1907) 30 Mad. 215.

(g) *Katama Natchiar v. Rajah of Sivagunga* (1883) 9 M. I. A. 543; *Pertab Narain v. Triloki* (1885) 11 Cal. 186, 11 I. A. 197; *Hari Nath v. Mothur Mohun* (1894) 21 Cal. 8, 20 I. A. 183.

(h) *Katama Natchiar v. Srimut Rajah* (1863) 9 M. I. A. 543, 608; *Chaudhri Risal Singh v. Balwant Singh* (1918) 45 I. A. 168, 40 All. 593.

(i) *Nugenderchunder v. Sreemutty Kaminee Dossee* (1897) 11 M. I. A. 241, 267.

(j) *Sant Kumar v. Deo Saran* (1886) 8 All. 385; *Gobind v. Khunni Lal* (1907) 29 All. 487; *Mahadevi v. Baldeo* (1908) 30 All. 75. *Sheo Narain v. Khurgo Koerry* (1882) 10 C. 1. R. 337; *Rajalakshmi v. Katayani* (1910) 38. Cal. 639.

And the opinion has also been expressed that a decree against a Hindu widow passed on an *award* does not bind the reversioners (*k*). In fact, the Courts have held that a decree against a Hindu widow does not bind the reversioners unless it was passed "in a suit contested to the end" (*l*), or, as put by the High Court of Allahabad, "the reversioners can be bound *only* by decree made *after full contest* in a *bona fide* litigation" (*m*). But if a decree is passed *after full contest*, it is binding on the reversioners, though the widow may have filed an appeal from the decree, and subsequently withdrawn the appeal (*n*). The effect of these decisions is that when a suit is brought against a Hindu widow by a creditor of her husband, and the widow *consents* to a decree being passed against her, the decree cannot bind the reversioners *at all*, though the widow may be quite satisfied that the debt was really due. But the High Court of Madras has held differently in a recent case (*o*). In that case it was observed that a Hindu widow "as representing the estate was certainly not bound to raise any defence in the case when satisfied that the debt was really due," and it was held that the decree, though it was a *consent decree*, was binding on the reversioners, the Court having been satisfied on the evidence adduced in the suit before it that the debt was in fact due and that there was no collusion or fraud in obtaining the decree. The effect of that decision is that a decree against a Hindu widow, though it is a consent decree, *may* bind the reversioners in a proper case, not that it cannot bind the reversioners *in any case* as held by the other High Courts. The same view has been recently taken by the High Court of Allahabad (*p*). The extreme view taken by the Bombay and Calcutta High Courts is difficult to support since the decision of the Privy Council in *Khunni Lal v. Gobind Krishna* (*q*), in which their Lordships expressly recognized the power of a daughter (who takes a widow's estate in provinces other than the Bombay Presidency) to enter into a compromise *even without litigation*. However that may be, it is quite clear that a decree passed against a widow not in her representative but personal character, cannot bind the reversioners (*r*). Similarly a decree passed against the legal personal representative of a Hindu widow in respect of her husband's estate cannot bind a reversioner, for the representative of a widow does not represent the estate of the husband (*s*). But there is no authority for the proposition that a Hindu widow, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits of a suit by or against her are tried and the trial is fair and honest. The mere fact, therefore, that she is personally estopped from denying the material facts of the case is no ground for withholding the application of the rule enunciated at the commencement of this paragraph, namely, that where the estate of a deceased Hindu has vested in his widow or other limited heir, a decree fairly and properly obtained against her, after a trial upon the merits, is binding on the reversionary heirs. Thus where a Hindu widow instituted a suit for a declaration that an adoption made by her to her deceased husband was invalid, and the suit was dismissed on the ground that the widow was estopped by her conduct from denying the validity of the adoption, and it was further found upon the facts that the adoption was valid, it was held in a suit brought by the reversionary heir after the widow's death for a declaration that the adoption was invalid, that the reversionary heir was bound by the decision in the first suit as *res judicata* (*t*). But a decree passed against a widow by reason of an *admission* made by her does not bind the reversioner (*tl*).

Decree in a representative suit.—See O. 1, r. 8, "Decree in a representative suit."

(*k*) *Jeram v. Veerbai* (1903) 5 Bom. L. R. 885, 887; *Ram Sarup v. Ram Dei* (1907) 29 All. 239, 241.

(*l*) *Jeram v. Veerbai* (1903) 5 Bom. L. R. 885, 887, and cases cited in previous notes.

(*m*) *Gobind v. Khunni Lal* (1907) 29 All. 487, 494; *Mahadei v. Baldeo* (1908) 30 All. 75.

(*n*) *Ghelnabai v. Bai Javer* (1912) Bom. 172.

(*o*) *Subbammal v. Avudaiyammal* (1907) 30 Mad. 3.

(*p*) *Gur Nanak v. Jainarain* (1912) 34 All. 385.

(*q*) (1911) 33 All. 356, 381 A. 87.

(*r*) *Subbi v. Ramkrishna* (1918) 42 Bom. 69.

(*s*) *Kailash v. Girja* (1912) 39 Cal. 952.

(*t*) *Chaudhri Risal Singh v. Balwant Singh* (1918) 45 I. A. 168, 40 All. 593.

(*tl*) *Kanku v. Jadav* (1919) 43 Bom 809.

S. 11. Res judicata in suits under O. 21, r. 63.—See notes to O. 21, r. 63, “*Res judicata*.”

Judgment in rem.—It will have been seen from what has preceded that a judgment in a suit is binding only upon the parties to the suit and their privies. “As a general principle, a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous” (u). There are, however, certain judgments which bind all the world and not only the parties to the proceeding in which they were passed and their privies. A judgment that is binding upon the parties and their privies only is called a judgment *in personam*. A judgment which binds all the world is called a judgment *in rem*. Judgments *in rem* are outside the scope of the present section. They are dealt with in the Indian Evidence Act, s. 41.

Decree against minor.—A decree passed against a minor properly represented is binding upon him like a decree passed against an adult, but it is open to the minor to impeach such decree by a suit in cases where the next friend or guardian for the suit has been guilty of fraud or negligence in allowing the decree to be passed against him (v).

CONDITION III.

“Litigating under the same title.”

The third condition of *res judicata* is that the parties in the subsequent suit must have litigated under the “same title” in the previously decided suit. The expression “same title” means the same capacity. “A verdict against a man suing in one capacity will not stop him when he sues in another distinct capacity, and, in fact, is a different person” (w). Thus where a suit is brought by a person to recover possession from a stranger of *math* property claiming it as the *heir* of a deceased *mohunt*, but he does not produce any certificate of succession to establish his *heirship* and the suit is thereupon dismissed, the dismissal is no bar to a suit by him *as manager of the math on behalf of the math* (x). Similarly the dismissal of a suit brought by a son against his father for maintenance claimed *under an agreement* is no bar to a suit by him against the father for a declaration that he is entitled to maintenance out of certain lands in the hands of the father *held under a sanad* from Government whereby, it was alleged, the lands were charged at the time of grant with the maintenance of the junior members of the family (y).

* A mortgagee in possession, does not lose the character of *mortgagee* and become a *trespasser* because he refuses to deliver up possession of the mortgaged property to the mortgagor on deposit being made by the latter in Court of the amount payable on the mortgage. A executes a usufructuary mortgage of his property to B, and places B in possession thereof. At the proper time A tenders the mortgage-debt, Rs. 500, to B and asks to be restored to possession. B refuses to accept the tender on the ground that more is due to him and to deliver up possession of the property to A. A sues B for redemption, and deposits Rs. 500 in Court. The Court finds that the tender was proper, and directs B to deliver up possession to A. After entering into possession, A sues B to recover mesne profits from B from the date of the deposit in Court to

(u) *Duchess of Kingston's case* 2 Smith's L. C. 731.

(v) *Oursandas v. Lakka Vahu* (1895) 19 Bom. 571; *Lalla v. Ramandan* (1895) 22 Cal. 8; *Ismail v. Sultan Bibi* (1917) P. R. no. 103, p. 300. See notes to O. 9, r. 9.

(w) *Duchess of Kingston's case*, 2 Smith's L. C. 731, 750. See also *Ali Moidin v. Kombi*

(1882) 5 Mad. 239, 241.

(x) *Babajirao v. Laxmandas* (1904) 28 Bom. 215; Distinguish *Hargovan v. Mulji* (1909) 34 Bom. 416.

(y) *Ahmad v. Nihal-ud-Din* (1883) 9 Cal. 945, 10 I. A. 45.

the date of the recovery of possession. The suit is barred, for *A* "might and ought" to have claimed the mesne profits in the first suit. The suit is between the same parties litigating "under the same title," that is, as mortgagor and mortgagee. The mortgage is not extinguished after the tender and deposit, and *B* does not become a trespasser after that date. It cannot therefore be said that the suit against *B* for mesne profits is against him as a trespasser, and not as a mortgagee (z).

The words "between parties under whom they or any of them claim litigating under the same title" cover a case where the later litigant occupies by succession the same position as the former litigant. There may be a succession by the ordinary rules of inheritance or succession by some very special rules as in the case of Saranjam estates or Vatan estates. The words of the section do not make any distinction between different forms of succession. A decree, therefore, against a Saranjamdar may operate as *res judicata* against his heir and successor (a); so also a decree against a Vataradar (b).

See notes above, p. 50, "Representative suit," first para.

CONDITION IV; HEREIN OF EXPLANATION II.

**The Court which decided the former suit must have been
a Court competent to try the subsequent suit or the
suit in which the issue alleged to be barred
as *res judicata* is subsequently raised.**

In order that a decision in a former suit may operate as *res judicata* in a subsequent suit, it is necessary that the Court which tried the former suit must have been a Court competent to try the subsequent suit.

The Court which decided the former suit may have been a Court of "exclusive" jurisdiction, or a Court of "concurrent" jurisdiction, or it may have been a Court of which the jurisdiction was "not concurrent" with that of the Court in which the subsequent suit is brought.

Where the Court which decided the former suit was a Court of "exclusive" jurisdiction.—If a matter directly and substantially in issue in a former suit has been adjudicated upon by a Court of *exclusive* jurisdiction, the adjudication will bar the trial of the same matter in a subsequent suit, though the Court which decided the former suit may not be competent to try the subsequent suit. Thus Courts of Revenue have jurisdiction in respect of certain matters to the entire *exclusion* of Civil Courts, and a judgment of a Revenue Court on such a matter will operate as *res judicata* in a subsequent suit in a Civil Court, though the Revenue Court may not be competent to try the subsequent suit (c).

Where the Court which decided the former suit was a Court of which the jurisdiction was "not concurrent" with that of the Court in which the subsequent suit is brought.—In such a case the Court which decided the former suit could not possibly be a Court "competent to try the subsequent suit" within the meaning of this section (d).

Where the Court which decided the former suit was a Court of "concurrent" jurisdiction.—In such a case the Court which decided the former suit may or may not have been "competent to try the subsequent suit." If it was, the decision would operate as *res judicata*, but not otherwise.

(z) *Rukhmīnibai v. Venkatesh* (1907) 31 Bom. 527; *Satyabadi v. Harabadi* (1907) 34 Cal. 223; *Ram Din v. Bhoop Singh* (1908) 30 All. 225.
(a) *Madhavrao v. Anusayabai* (1916) 40 Bom. 606

(b) *Radhabai v. Anantrav* (1885) 9 Bom. 193.
(c) *Subarni v. Bhagwan* (1897) 19 All. 101.
(d) *Edun v. Bechun* 8 W. R. 175, 179; *Misir v. Sheo Baksh* (1883) 9 Cal. 439, 445, 9 I. A. 197.

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Summarising the above, we may say that in order that a decision in a former suit may operate as *res judicata*, the Court which decided that suit must have been either—

1. a Court of exclusive jurisdiction, or
2. a Court of concurrent jurisdiction "competent to try the subsequent suit." (e).

"Competent to try such subsequent suit."—In determining whether a Court of concurrent jurisdiction, which decided the former suit, was *competent to try the subsequent suit*, the following points should be noted :—

(1) *The Court which decided the former suit must have been a Court competent to try the subsequent suit as regards the "amount" of the subsequent suit.*—In other words, the jurisdiction of the Court which decided the former suit, and that of the Court in which the subsequent suit is brought, must be concurrent as regards their *pecuniary limit*. *A* sues *B* in Court *X* to recover interest due on a bond for Rs. 12,000. For the defence it is alleged that the amount actually lent by *A* was Rs. 4,000, that *B* being in want of money passed the bond for Rs. 12,000 and that *A* therefore was not entitled to interest on more than Rs. 4,000. The Court finds that the amount actually lent was Rs. 4,000, and awards *A* interest on that amount. Court *X* is a Court of which the jurisdiction is limited to suits of which the value does not exceed Rs. 5,000. *A* then sues *B* in a High Court to recover the principal sum of Rs. 12,000, alleging that that was the actual amount lent by him to *B*. *B* contends that the actual amount advanced was Rs. 4,000, and that the question as to whether Rs. 12,000 was lent or Rs. 4,000 is *res judicata*. The question is not *res judicata* for the jurisdiction of Court *X* being limited to Rs. 5,000, it was not a Court competent to try the subsequent suit in which the amount claimed is Rs. 12,000 (f). Contrast No. 7 below.

(2) *The jurisdiction of the two Courts must be concurrent not only as regards the "pecuniary" limit, but also as regards the "subject-matter" of the subsequent suit.*—Thus certain Courts have no jurisdiction to adjudicate upon questions of *title*, though that question may be gone into incidentally to decide the principal question. A finding on a question of *title* by such Court cannot operate as *res judicata*. This generally happens in the following cases :—

(a) *Where the first Court is a "Probate Court" and the second Court a "Civil Court."*—*A* and *B*, each claiming to be the heir of *X*, apply to a High Court, in the exercise of its *testamentary jurisdiction*, for letters of administration of the estate of *X*. The Court finds that *A* is the heir of *X*, and grants letters to him. *B* then sues *A* in the same Court in the exercise of its *original jurisdiction* for a declaration that he, and not *A*, is the heir of *X*. The suit is not barred, for a Probate Court has no jurisdiction to finally adjudicate upon questions of *title* (g). It must not, however, be supposed that a decision of a Probate Court cannot operate as *res judicata* in any subsequent proceeding in a Civil Court. Thus if *A*, alleging to be the executor of *B*'s will, applies for probate of the will, and *C*, *B*'s widow, opposes the application, and probate is refused on the ground that the will is not proved, *A* will be precluded, in a subsequent suit by *C* against him to recover her husband's property from him, from contending that he is the husband's executor and is entitled as such to retain possession of the property. Though the judgment of the Probate Court refusing probate to *A* does not operate in such a case as a judgment *in rem*, it operates as *res judicata* between *A* and *C* under s. 83 of the Probate

(e) *Ib.*
 (f) *Misir v. Sheo Baksh* (1883) 9 Cal. 439, 9 I. A. 197; *Ramdayal v. Jankidas* (1900) 24 Bom. 456; *Giriya v. Sabapathy* (1906) 29 Mad. 65; *Sheikh Hassu v. Ram Kumar Singh* (1894) 16 All. 183.
 (g) *Arunmoyt v. Mohendra Nath* (1893) 20 Cal.

888; *Chintaman v. Ramchandra* (1910) 34 Bom. 589; *Lalit Mohan v. Radharaman* (1911) 15 C. W. N. 1021; *Magbul Shah v. Muhammad* (1918) P. R. no. 49, p. 167; See, however, *Sheoparsan v. Ramnandan* (1916) 43 I. A. 91, 98-99, 48 Cal. 694, 705-706.

and Administration Act (V of 1881) and s. 11 of the Code (*h*). Similarly a decision of the Probate Court that the testator executed the will sought to be proved as a free agent and not under undue influence precludes the party against whom the decision was given from reopening it in a suit in a Civil Court (*i*). See Evidence Act, 1872, s. 41.

(*b*) *Where the first Court is a "Munsif's Court" and the second Court a "District Court."*—*A* sues *B* for rent in a Munsif's Court. The defence is that *C* and not *A* is the landlord. The Court finds that *A* is not the landlord, and the suit is dismissed. *A* then sues *B* in a District Court for a declaration of title to the land. The suit is not barred, for a Munsif's Court has no jurisdiction to adjudicate upon questions of title (*j*).

Similarly, a decision in a suit for damages instituted in a Provincial Court of Small Causes [a Court not competent to try a suit for title] does not operate as *res judicata* in a subsequent suit for establishment of title (*k*).

(*c*) *Where the first Court is a "Revenue Court" and the second Court is a "Civil Court."*—A decision of a Revenue Court on a question of title is no bar to the trial of the same question by the ordinary Civil Courts, unless the Revenue Court is empowered by the Legislature to determine questions of title so as to constitute it *pro tanto* a Civil Court (*l*). The reason is that Courts of Revenue are generally Courts of jurisdiction limited to adjudicate upon questions of rent, tenure, etc. (*m*). There are, however, some matters of which the decision by a Revenue Court is expressly declared by the Act constituting the Court to have the force of a decree in a civil suit (*n*), and some as to which it is declared that the decision shall be final (*o*). In such cases, the decision of a Revenue Court will operate as *res judicata* so as to bar the trial of the same matter in a Civil Court.

(*d*) *Where the first Court is a "Criminal Court" and the second Court is a "Civil Court."*—An order by a Magistrate under s. 146 of the Criminal Procedure Code, 1898, declaring a party to be entitled to possession of certain lands, is conclusive on the point of actual possession in a subsequent proceeding in a Civil Court (*p*). But a conviction or an acquittal in a criminal case is not conclusive in a civil suit for damages in respect of the act charged against the accused (*q*). The finding, therefore, of a Criminal Court that *A* assaulted or abducted *B*, is not *res judicata* in a suit for damages against *A* for assault or abduction (*r*).

The judgment of a Civil Court may in a proper case be admissible in evidence in a criminal proceeding between the same parties. Thus where *A* charged *B* with criminal breach of trust in respect of certain items, and it appeared that all those items had been dealt with by the Civil Court and the contentions of the accused with reference to all of them had been found to be correct by that Court, it was held that the judgment of the Civil Court was admissible in evidence in the criminal proceeding against the accused (*s*).

(*h*) *Kalyanchand v. Sitabai* (1913) 38 Bom. 309. See also *Brendon v. Sundarabai* (1913) 38 Bom. 272.

(*i*) *Babu Lal v. Hari Baksh* (1918) P. R. no. 13, p. 60.

(*j*) *Ran Bahadur v. Lucho Koer* (1885) 11 Cal. 301, 12 I. A. 23.

(*k*) *Dulare Lal v. Hazari Lal* (1914) 12 All. L. J. 853. It is otherwise where the first suit is tried as a regular suit: *Ram Faqir v. Bindeshri Singh* (1919) 41 All. 54.

(*l*) *Bed Saran v. Bhagat Deo* (1911) 33 All. 453; *Bihari v. Sheobalak* (1907) 29 All. 601.

(*m*) *Hurri Sunker v. Muktarani* (1875) 15 B. L. R. 238; *Rani Kishori v. Raja Ram* (1904) 26 All. 468; *Ashraf v. Ali Ahmad* (1904) 26 All. 601; *Mahesh v. Ranjor* (1905) 27 All. 163; *Inayat Ali v. Murad Ali* (1905)

27 All. 569; *Dharani v. Gaber* (1903) 30 Cal. 339 [Bengal Tenancy Act, 1885, old s. 107]; *Rangayya v. Ratnam* (1897) 20 Mad. 392.

(*n*) *Durga Churn v. Hateen* (1902) 29 Cal. 252; *Sheo Narain v. Parmeshar* (1896) 18 All. 270; *Kalka Prasad v. Manohar Lal* (1916) 38 All. 302, 310.

(*o*) *Mahendra v. Girish Chandra* (1918) 3 Pat. L. J. 379 [Bengal Tenancy Act, 1885, s. 107].

(*p*) *Lillu v. Annaji* (1881) 5 Bom. 387.

(*q*) *Bishonath v. Huro* (1866) 5 W. R. 27; *Doorga v. Doorga* (1866) 6 W. R. Civ. Ref. 26.

(*r*) *Ali Buksh v. Shaikh* (1869) 12 W. R. 477; *Ram Lal v. Tula Ram* (1882) 4 All. 97. See Evidence Act, s. 43.

(*s*) *In re Markur* (1914) 41 Bom. 1.

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(3) *To determine whether the Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that Court at the date of the "former" suit, and not to its jurisdiction at the date of the "subsequent" suit (t).*

The leading case on the subject is *Gopi Nath v. Bhugwat (u)*. In that case a suit was brought in the year 1860 to recover certain property of which the value at that time was less than Rs. 1,000, and therefore the proper Court to try it was that of the Munsif. A second suit was afterwards brought in the year 1880 between the same parties in the Court of the Subordinate Judge to recover the same property, which had then risen in value and become worth more than Rs. 1,000. The matter directly and substantially in issue in both the suits was the same, and the question arose whether the decision of the Munsif in the first suit operated as *res judicata* in the second suit. It was contended that as the Munsif could not have tried the second suit in consequence of the value of the property being more than Rs. 1,000, his decision could not have the effect of *res judicata*. But it was held that the decision operated as *res judicata*, for if the second suit were instituted in the year 1860, that is, at the time when the first suit was brought, the Munsif's Court would have been quite competent to try it. Mitter J. said: "The reasonable construction of the words 'in a Court of jurisdiction competent to try such subsequent suit' seems to us to be that it must refer to the jurisdiction of the Court at the time when the first suit was brought: that is to say, if the Court which tried the first suit was competent to try the subsequent suit, if then brought, the decision of such Court would be conclusive under s. 13 [of the Code of 1882], although on a subsequent date by a rise in the value of such property or from any other cause the said Court ceased to be a proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property." The High Court of Madras has also held the same way (v). But it has been held by the latter Court that the augmentation of a pecuniary claim by accrual of interest is not similar to a rise in the market value of a property, and that though in the latter case the decision in the prior suit may operate as *res judicata* in the subsequent suit, it cannot in the former case (w).

(4) *The Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular "matter in issue" in the subsequent suit, but also the subsequent "suit itself" in which the issue is subsequently raised (x).*

(5) *It is the competency of the "original" Court which decided the former "suit" that must be looked to, and not that of the "appellate" Court in which that suit was ultimately decided on "appeal" (y).*—A suit is instituted in a Munsif's Court. An appeal from the decree in that suit is preferred to a District Court. A subsequent suit relating to the same matter in issue is brought also in a District Court. The decision in the first suit cannot operate as *res judicata* in the subsequent suit, for though the District Court that heard the appeal may have jurisdiction to try the subsequent suit, the Munsif's Court, that is, the Court which decided the former suit, is not a Court of jurisdiction competent to try the subsequent suit.

(6) *A Court does not cease to be a "Court of jurisdiction competent to try the subsequent suit," if its inability to entertain it arises not from incompetence, but from the*

(t) *Gopi Nath v. Bhugwat* (1884) 10 Cal. 697;
Raghunath v. Issur Chunder (1885) 11 Cal.
 153; *Kunji v. Raman* (1892) 15 Mad. 494.
 (u) (1884) 10 Cal. 697.
 (v) *Venkatachalam v. Aiyamperumal* (1919) 42
 Mad. 702.
 (w) *Griya v. Sabapathy* (1906) 29 Mad. 65.
 (x) *Gokul Mandar v. Padmanund* (1902) 29 Cal. 707.

(P. C.); *Rat Charan v. Kumud Mohun*
 (1898) 25 Cal. 571, 576; *Ram Gopal v.*
Prasanna Kumar (1905) 10 C. W. N. 529;
Shibo Rout v. Baban Rout (1908) 35 Cal.
 356.
 (y) *Bharasi v. Sarat Chunder* (1896) 23 Cal. 415.
Shibo Rout v. Baban Rout (1908) 35 Cal.
 356.

existence of another Court with a preferential jurisdiction (2). Thus a finding by a Munsif in a suit for possession under s. 9 of the Specific Relief Act, 1877, instituted in his Court that the plaintiff was wrongfully dispossessed by the defendant, is *res judicata* on the issue as to wrongful dispossession in a subsequent suit brought by the same plaintiff against the same defendant for damages for wrongful dispossession in a Court of Small Causes. It cannot be said that the Munsif who tried the first suit was not competent to try the subsequent suit for damages.

(7) *A decision on a matter directly and substantially in issue in a former suit may operate as res judicata, though the plaintiff may in the subsequent suit join new causes of action with such matter and institute the subsequent suit in a Court of superior jurisdiction (a).* Thus a decision in a suit brought in a Munsif's Court that the plaintiff is not entitled to road and public works cesses at the rate claimed by him will operate as *res judicata* (other conditions of *res judicata* being present) in a subsequent suit by the same plaintiff against the same defendant instituted in the Court of a Subordinate Judge to recover road and public works cesses at the rate claimed by him in the former suit and also embankment and dak cesses. It cannot be said that the claim for road and public works cesses is not barred as *res judicata*, because the Munsif was not competent to try the subsequent suit. "It would have been perfectly competent for a Munsif to try the plaintiff's present suit for road cess and public work cess."

(8) *A decision on a matter directly and substantially in issue in a suit tried by a Revenue Court may operate as res judicata in a subsequent suit brought in the same Court, though the character of the suits may be such that in the one case an appeal lies to the Commissioner, and in the other to a District Court. The fact that in the two suits appeals may lie to different Courts does not affect the application of the rule of res judicata (b).*

Explanation II.—This explanation is new. Under the Code of 1882 it was held by the High Courts of Bombay (c) and Madras (d) that a decision in a suit in which no second appeal was allowed by law could not operate as *res judicata* in a subsequent suit in which such appeal was allowed. Hence it was held that a decision in a suit of the nature cognizable in Provincial Courts of Small Causes could not operate as *res judicata* where the amount or value of the subject-matter of the suit did not exceed Rs. 500, as no second appeal could lie in such suit. (See s. 586 of the Code of 1882, now s. 102.) On the other hand, it was held by the High Court of Calcutta that a decision in a suit could operate as *res judicata*, notwithstanding that no second appeal was allowed by law in that suit (e). *Explanation II* is intended to affirm the view taken by the High Court of Calcutta that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decision (f).

Judgment delivered by a Court not competent to deliver.—A judgment delivered by a Court not competent to deliver it cannot operate as *res judicata* [Evidence Act, 1872, s. 44]. For this purpose there is no distinction, so far as Chartered High Courts are concerned, between cases where a Court has no jurisdiction at all to try a suit and cases where it cannot exercise jurisdiction unless leave to sue has been obtained under cl. 12 of the Charter. Therefore, a judgment delivered by a Chartered High Court in a suit which it has no jurisdiction to try unless leave to sue has been obtained

(2) *Ghulappa v. Raghavendra* (1904) 28 Bom. 338 ;
Raja Simhadri v. Ramachandrudu (1902)
 27 Mad. 68 ; *Bodlu v. Mohan Singh* (1917)
 39 All. 717.
 (a) *Bhugwanbhatti v. Forbes* (1901) 23 Cal. 78.
 (b) *Bent Madho v. Indur Sahai* (1909) 32 All. 67.
 (c) *Govind v. Dhondabarav* (1891) 15 Bom. 104.

(d) *Avanasi v. Nachammal* (1906) 29 Mad. 195.
 (e) *Rai Charan Ghose v. Kumud Mohun* (1898)
 25 Cal. 671 ; *Bhugwanbhatti v. Forbes* (1901)
 28 Cal. 78.
 (f) *Ram Fagir v. Bindeshri Singh* (1919) 41 All.
 54, 58.

- S. 11.** cannot operate as *res judicata* if leave to sue was not obtained (g). See notes below, "The decision in the former suit must have been one on the Merits," p. 59.

Judgment obtained by fraud or collusion.—A judgment obtained by fraud or collusion (h) cannot operate as *res judicata* [Evidence Act, 1872, s. 44]. "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal" (i). Where a decree is impeached on the ground of fraud, the fraud alleged must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and the obtaining of the decree by that contrivance. The mere fact that a decree has been obtained by perjured and false evidence is no ground for setting it aside on the ground of fraud (j).

Summary of the above.—We cannot better summarise the rules of *res judicata* hitherto dealt with than by citing the following passage from the judgment in the *Duchess of Kingstone's case* :

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: *first*, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court; *secondly*, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a Court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

CONDITION V: HEREIN OF EXPLANATION V.

The matter directly and substantially in issue in the subsequent suit must have been "heard and finally decided" by the Court in the first suit.

Heard and finally decided.—The mere fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit is not sufficient to constitute the matter *res judicata*. It is further necessary, amongst other conditions, that the matter must have been "heard and finally decided" in the former suit. This does not mean that there should be an *actual* finding on the issue in question; it is enough if the decree necessarily involves a finding of the issue (k). In this connection it is also important to note that if a decree is specific, and is at variance with a statement in the judgment, it is the decree to which we must pay attention, and not to the statement in the judgment (l). And, further, that neither an *obiter dictum* nor a mere expression of opinion in a judgment has the effect of *res judicata* (m).

(g) *Abdul Kadir v. Doolanbibi* (1913) 37 Bom. 563.

(h) See *Bansilal v. Dhapo* (1902) 24 All. 242.

(i) *Duchess of Kingstone's case*, 2 Smith's L.C. 731. See also *Nistarini Dassi v. Nundo Lal* (1899) 26 Cal. 891, 908.

(j) *Janki Kuer v. Lachmi* (1915) 37 All. 535; *Mahomed Golab v. Mahomed Sulliman* (1894) 21 Cal. 612, 619; *Nand Kumar v.*

Ramjiban (1915) 41 Cal. 990; *Chattu Singh v. Rat Radha* (1919) 4 Pat. L. J. 187;

Ram Ratan v. Bhurt (1915) 38 All. 7.

(k) *Soorjomonee Dayee v. Suddanund* (1874) 12 B. L. R. 304, I. A., Sup. Vol. 212; *Ram-Krishna v. Vithal* (1891) 15 Bom. 89.

(l) *Indrajit v. Rieha* (1893) 15 All. 3, 5.

(m) *Avata v. Kuppu* (1885) 8 Mad. 77; *Mohun v. Ram Dial* (1880) 2 All. 843.

A matter will be said to have been "heard and finally decided," notwithstanding that the former suit was disposed of— **S. 11.**

- (i) *ex parte* (n); or
- (ii) by dismissal under O. 17, r. 3 [Code of 1882, s. 158] (o); or
- (iii) by a decree on an award (p); or
- (iv) by oath tendered under s. 8 of the Indian Oaths Act, 1873 (q).

If the plaintiff fails to adduce evidence at the hearing, and the suit is dismissed, it is none the less "heard and finally decided" (r). And a suit will be said to have been "heard and finally decided," though it may have been dismissed as barred by limitation.

The decision in the former suit must have been one on the merits.—

In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been one on the merits. Hence it could not be said of a matter that it was "heard and finally decided," if the former suit was dismissed—

- (i) for want of jurisdiction (s); or
- (ii) for default of plaintiff's appearance under O. 9, r. 8 [Code of 1882, s. 102] (t); or
- (iii) for want of necessary parties (u), or for misjoinder of parties (v), or for multifariousness (w), or on the ground that the suit was badly framed (x), or on the ground of a technical mistake (y); or
- (iv) for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree (z); or
- (v) for failure to furnish security for costs under O. 25, r. 2 [Code of 1882, s. 381] (a); or
- (vi) on the ground of improper valuation (b), or for failure to pay additional court-fees on a plaint which was under-valued (c).

It cannot be said of a suit that it was "heard and finally decided," if the suit was dismissed but the judgment in the suit left it open to the plaintiff to sue again (d). Nor can it be said of a matter that it was "heard and finally decided," if the Court not only did not decide it, but expressly excluded it from decision (e).

The decision in the former suit must have been necessary to the determination of that suit.— A matter directly and substantially in issue cannot be said to have been "heard and finally decided," unless the finding on the issue was necessary to the determination of the suit. A finding on an issue cannot be said to be necessary

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| <p>(n) <i>Modhusudan v. Brae</i> (1889) 16 Cal. 300.
 (o) <i>Venkatchalam v. Mahalakshamma</i> (1887) 10 Mad. 272; <i>Shaik Saheb v. Mahomed</i> (1890) 13 Mad. 510.
 (p) <i>Vyankatesh v. Sakharam</i> (1897) 21 Bom. 465.
 (q) <i>Ahmed v. Moidin</i> (1901) 24 Mad. 444; <i>Sanyasi v. Artaswaro</i> (1913) 36 Mad. 287.
 (r) <i>Watson v. Collector of Rajshahye</i> (1869) 13 M. I. A. 160; <i>Kartick v. Sridhar</i> (1886) 12 Cal. 563.
 (s) <i>Lakshman v. Ramchandra</i> (1881) 5 Bom. 48, 7 I. A. 18; <i>Putali v. Tulja</i> (1879) 3 Bom. 223; <i>Abdul Kadir v. Doolanbi</i> (1913) 37 Bom. 563. See also Evidence Act, 1872, s. 44.
 (t) <i>Chand Kour v. Partab Singh</i> (1889) 16 Cal. 93, 15 I. A. 156; <i>Ramchandra v. Narsinhacharya</i> (1900) 24 Bom. 251.</p> | <p>(u) <i>Sheosagar v. Sitaram</i> (1897) 24 Cal. 616, 24 I. A. 50.
 (v) <i>Muhammad v. Nabian</i> (1886) 8 All. 282.
 (w) <i>Fatleh Singh v. Lachmi</i> (1874) 13 B. L. R. App. 37.
 (x) <i>Deodhari v. Lala Seosaran</i> (1878) 3 Cal. 39 L.R. 5.
 (y) <i>Janakdular v. Ambica Prasad</i> (1917) 2 Pat. L. J. 313.
 (z) <i>Pethaperumal v. Nurugandi</i> (1895) 18 Mad. 466.
 (a) <i>Hariram v. Lalbai</i> (1902) 26 Bom. 637.
 (b) <i>Dullabh v. Narain</i> (1868) 4 Bom. H. C., A. C. 110.
 (c) <i>Irava v. Satyappa</i> (1910) 35 Bom. 38.
 (d) <i>Parsotam Gir v. Naravada Gir</i> (1899) 21 All. 505, 26 I. A. 175; <i>Deviditta v. Nathu</i> (1912) P. R. no. 56, p. 209.
 (e) <i>Madan Mohan v. Borooah</i> (1918) P. R. no. 70, p. 232</p> |
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- S. 11. to the decision of a suit unless the decision was based upon that finding. And a decision cannot be said to have been based upon a finding unless an appeal can lie against that finding. The reason is that "everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of *res judicata*" (f). This leads to the following rules:—

RULE I.—If the plaintiff's suit is wholly dismissed, no issue decided against the defendant can operate as *res judicata* against him in a subsequent suit, for the defendant cannot appeal from a finding on any such issue, the decree being wholly in his favour (g) [see ill. (1)]; but every issue decided against the plaintiff may operate as *res judicata* against him in a subsequent suit, for the plaintiff can appeal from a finding on such issue, the decree being against him (h) [see ill. (2)]. The Allahabad High Court has expressed a doubt whether the second branch of this rule applies to cases where the Court after disposing of the suit against the plaintiff on a preliminary point proceeds to record its findings against the plaintiff on other issues; in such a case, according to the Allahabad Court, the findings on the other issues do not operate as *res judicata* against the plaintiff in a subsequent suit (i).

Illustrations.

(1) In a suit by A against B for ejectment, B contends (1) that no notice to quit was given, and (2) that the land being *majhes* land, he is not liable to be evicted at all. The suit is dismissed on the finding that no notice to quit was given. The Court, however, also finds that the land is not *majhes* land, but this finding does not find a place in the decree. A then sues B to evict him from the land after giving notice to B. B contends that the land is *majhes* land, and that he is not liable to be evicted. Does the finding in the first suit that the land was not *majhes* land operate as *res judicata* so as to preclude B from raising the same contention in the subsequent suit? No, for A's suit having been dismissed, B could not have appealed from the finding that the land was not *majhes* land. The Court having found in the first suit that A had not given notice to quit it was not necessary to the determination of the suit whether the land was *majhes* land or not. The decree against A in the first suit was not based upon the finding that the land was not *majhes* land; on the other hand, it was made in spite of that finding; *Thakur Magundeo v. Thakur Mahadeo* (1891) 18 Cal. 647; *Nundo v. Bidhoo* (1886) 13 Cal. 17.

Suppose that in the case put above, B had not raised the defence that the land was *majhes* land in the first suit. Would he be precluded from raising that defence in the second suit on the ground that he might and ought to have raised that defence in the first suit? No; the reason being that when a point of defence that has been actually raised and disallowed cannot operate as *res judicata* against a defendant, it certainly cannot operate as such when it has not been raised in fact, though it might and ought to have been raised (j).

(2) In a suit by A against B for damages for not removing certain offensive matter from A's land, B contends (1) that no notice was given as required by the Bengal Municipal Act, and (2) that he was not bound to remove the filth from A's land. The suit is dismissed upon two grounds: (1) want of notice under the Act; (2) that B was not

(f) Sav. Syst., s. 293; *Narain Das v. Faiz Shah* (1889) P. R. no. 157 [F. B.].
(g) *Run Bahadur v. Lucho Koer* (1885) 11 Cal. 301, 306, 12 I. A. 23, 34; *Ghela v. Sankalchand* (1894) 18 Bom. 597, 602; *Shib Charan v. Raghu* (1895) 17 All. 174; *Nundo v. Bidhoo* (1886) 13 Cal. 17; *Thakur Magundeo v. Thakur Mahadeo* (1891) 18 Cal. 647;

Parbati v. Mathura (1912) 40 Cal. 29; *Daudbhai v. Daya* (1919) 43 Bom. 588.
(h) *Peary v. Ambica* (1897) 24 Cal. 900; *Venkataraju v. Ramanamma* (1913) 38 Mad. 158; *Babu Lal v. Hari Baksh* (1918) P. R. 60.
(i) *Shib Charan v. Raghu* (1895) 17 All. 174, 195.
(j) *Abdullahan v. Khanmia* (1908) 82 Bom. 315.

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bound to remove the filth. *A* then sues *B* for damages for non-removal of the filth over a subsequent period after giving notice to *B*. *B* contends that he is not liable to remove the filth, and that the question of his liability is *res judicata* by reason of its having been decided against *A* in the first suit. *A* contends that the question is not *res judicata* for the Court having decided in the former suit that the suit must fail for want of notice, it was not necessary for the Court to decide the issue as to *B*'s liability to remove the filth. Held by the Calcutta High Court that the question is *res judicata*, and *A* could not raise it again in the second suit: *Peary v. Ambica* (1897) 24 Cal. 900. The Allahabad High Court would seem to be of a different opinion: *Shib Charan v. Raghu* (1895) 17 All. 174, 195.

RULE II.—If the plaintiff's suit is decreed in its entirety, no issue decided against the plaintiff can be *res judicata*, for the plaintiff cannot appeal from a finding on any such issue, the decree being wholly in his favour; but every issue decided against the defendant is *res judicata*, for the defendant can appeal from a finding on such issue, the decree being against him.

Illustration.

A, alleging that he is the adopted son of *X*, sues *B* to recover certain property granted to him by *X* under a deed and forming part of the estate of *X*. The Court finds that *A* is not the adopted son of *X*, but that he is entitled to the property under the deed and a decree is passed for *A*. The finding that *A* is not the adopted son of *X* will not operate as *res judicata* in a subsequent suit between *A* and *B* in which the question of adoption is again put in issue; for the decree being in favour of *A*, *A* could not have appealed from that finding. The Court having found that *A* was entitled to the property under the deed, the finding on the question of adoption was not necessary to the determination of the suit. The decree, far from being based on the finding as to adoption, was made "in spite of it": *Rango v. Mudiyeppa* (1899) 23 Bom. 296.

RULE III.—Where a suit is (1) for a declaration and (2) consequential relief, and the decree grants the declaration but refuses the consequential relief on account of a technical flaw, the decree to the extent to which it grants the declaration operates as *res judicata* against the defendant, the reason given being that the defendant could have appealed from that part of the decree (*k*).

Illustration.

A, the manager of a temple, sues *B* for a declaration that a mulgeni lease granted by *A*'s predecessor to *B* is void and not binding on him, and that *B* being an annual tenant should be evicted. The defence is that (1) the mulgeni lease is valid, and (2) that no notice to quit having been given by *A*, *B* is not liable to eviction. A decree is passed (1) declaring that the mulgeni lease is valid, and (2) dismissing the rest of the plaintiff's suit for want of notice. *A* then gives notice to *B*, and sues *B* for possession of the land. *B* contends that he holds the land under the mulgeni lease and that the lease is binding on *A* and that *A* is not therefore entitled to evict him. The question as to whether the lease is binding on *A* is *res judicata*, for the finding on that issue having been embodied in the decree, *B* could have appealed from it; *Mota v. Vithal* (1916) 40 Bom. 662.

See also notes to s. 96 under the head "Who may appeal."

"**Finality**" of decree in redemption suits.—There is a conflict of decisions whether a mortgagor, who has brought a suit for redemption and obtained a decree nisi under the provisions of the Transfer of Property Act, which neither the mortgagor nor

(*k*) *Mota v. Vithal* (1916) 40 Bom. 662.

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It has been held by the High Court of Bombay that where a mortgagee obtains a preliminary decree for sale, but does not apply for an order absolute for sale within the period prescribed by the decree, nor is any step taken by the mortgagor to redeem the property, the mortgagor is not precluded from bringing a suit for redemption of the mortgage (q). According to the Madras High Court, he is precluded by the provisions of the present section from bringing such a suit (r). See notes, "Application of the above rules to suits on mortgage," on p. 44 above.

Where a decree is appealed from, it is the appellate decree to which regard must be had to determine whether a matter is *res judicata*, and not the decree appealed from.—A decision *liable to appeal* may be "final" within the meaning of this section until the appeal is made. But once the appeal is made the decision loses its character of "finality," and what was once *res judicata* again becomes *res sub judice* (matter under judicial enquiry). The appeal destroys the finality of the decision, the decree of the lower Court is superseded by the decree of the Court of Appeal, and it is the latter decree that should be looked to to determine the question of *res judicata* (s).

A sues B for damages for cutting and removing certain trees on his land. The suit is dismissed on the grounds (1) that the land did not belong to A, and (2) that B did not cut the trees. A appeals from the decree on both these grounds, but the appeal is dismissed on the ground that A had failed to prove that B had cut the trees. Note that the appellate Court does not decide the question of A's title. A then sues B for possession of the land, claiming that the land belongs to him. B contends that the suit is barred as *res judicata* it having been found by the first Court in the former suit that the land did not belong to A. The suit is not barred, for the question of A's title became *res sub judice* when the appeal was made, and it did not become *res judicata* as the appellate Court did not *adjudicate* upon that question. But a judgment of an appellate Court will operate as *res judicata* as regards all findings of the lower Court which, though not referred to in it, are necessary to make the appellate decree possible only on such findings (t).

Consent decree and estoppel.—The present section does not apply in terms to consent decrees; for it cannot be said in the case of such decrees that the matters in issue between the parties "have been heard and finally decided" within the

(l) See *Sita Ram v. Madho Lal* (1902) 24 All. 44.
 (m) *Ramji v. Pandharinath* (1919) 43 Bom. 334.
Dinu v. Shripad (1919) 43 Bom. 703, in which it was held that the second suit was barred by s. 47, was not a case to which the Transfer of Property Act, 1882, applied.
 (n) *Vedapuratti v. Vallabha* (1902) 25 Mad. 300.
 (o) *Roy Dinkur v. Sheo Golam* (1874) 22 W. R. 172.
 (p) *Siva v. Nundo* (1891) 18 Cal. 139.
 (q) *Rama v. Bhagechand* (1914) 39 Bom. 41.

(r) *Rangu v. Narayana* (1915) 39 Mad. 896.
 (s) *Sheosagar v. Sitaran* (1897) 24 Cal. 616, 24 I. A. 50; *Abdullah v. Ganesh Das* (1918) 45 Cal. 442 [P. C.]; *Nalgaru v. Nyaru* (1882) 6 Bom. 110; *Chunder v. Shibo* (1882) 11 C. L. R. 22; *Kailash v. Gritja* (1912) 39 Cal. 925.
 (t) *Narayanan v. Kannammai* (1905) 28 Mad. 338. *Gokul v. Shrimal* (1904) 6 Bom. L. R. 288; *Muhammad v. Secretary of State for India* (1916) 39 Mad. 1202, 1206.

meaning of this section (u). A consent decree, however, has to all intents and purposes, the same effect as *res judicata* as a decree passed *in invitum* (v). It raises an estoppel as much as a decree passed *in invitum* (w). So long, therefore, as a consent decree stands, it is not open to either party thereto to give the go bye to it, even if it contains clauses that are bad in law (x). A consent decree, however, is a mere creature of the agreement on which it is founded, and it may be set aside on any ground which would invalidate an agreement between the parties (y). But unless all the parties agree, an application cannot be made to the Court of first instance in the original suit to set aside the judgment or order (z) except, apparently, in the case of an interlocutory order (a). See notes to s. 96, "Procedure for setting aside consent decrees."

Explanation V : relief claimed but not expressly granted.—If a relief is claimed in a suit, but it is not expressly granted in the decree, it will be deemed to have been refused, and the matter in respect of which the relief is claimed will be *res judicata*. Thus where in a suit by a mortgagee against his mortgagor (1) for a money decree, and, in default of payment, (2) for sale of the mortgaged property, the mortgagee was content to take a money-decree only, it was held that a subsequent suit by him, on failure of the mortgagor to satisfy the decree, to have the amount of the mortgage-debt paid to him by the sale of the property, was barred as *res judicata*. The relief as to sale having been claimed by the mortgagee, but not having been expressly granted in the former suit, must be deemed to have been refused so as to bar the subsequent suit (b). It is different, however, where there is no relief claimed for sale in the former suit (c).

It sometimes happens that a suit brought in a particular form is dismissed "in the form in which it is brought," that is to say, it ought to have been brought in another form, and it is dismissed because it is not brought in that form. In such a case, if the adjudication was arrived at *on the merits of the case*, the decree dismissing the suit will bar a fresh suit in respect of the same matter (d), though the decree may provide that the plaintiff may institute a fresh suit in proper form (e), the reason is that the Court has no power under the Code to include a reservation of this kind in a decree of dismissal (f). But if the adjudication was not arrived at *on the merits of the case*, a fresh suit in respect of the same matter would not be barred (g).

The provisions of this Explanation do not apply, unless the "relief" claimed was (1) *substantial relief*, and (2) it was such as it is obligatory on a Court to grant:—

1. *The relief claimed must have been substantial, not auxiliary.*—A sues B (1) to recover her share in the estate of D, claiming the same as D's widow, and (2) for a declaration that she was lawfully married to D, a fact which B had denied. A decree is made by consent awarding Rs. 55,000 to A in full satisfaction of her claim against the estate of D. The decree does not contain any declaration as to A's marriage with D. Thus

- (u) *Minalal v. Kharsetji* (1906) 30 Bom. 395, 408. But see *Bhaishanker v. Morarji* (1911) 36 Bom. 283, at p. 287, where it is said that in the case even of a consent-decree the matters in issue in the suit cannot but be said to have been "heard and finally decided." If so, why is it said in the judgment (p. 286) that a consent decree has to all intents and purposes the same effect as *res judicata*?
- (v) *Bhaishanker v. Morarji* (1911) 36 Bom. 283, 286; *In re American and Mexican Co.* [1895] 1 Ch. 37.
- (w) *Nicholas v. Asphar* (1897) 24 Cal. 216, 237; *Lakshmishankar v. Vishnuram* (1900) 24 Bom. 77; *Raja Kumara v. Thatha* (1911) 35 Mad. 75; *Tiruvambal v. Manikkavuchaka* (1915) 40 Mad. 177, 189.
- (x) *Cowaji v. Kisandas* (1911) 35 Bom. 371.

- (y) *Huddersfield Banking Co. v. Henry Lister and Son* [1895] 2 Ch. 273; *Great North-West Central Railway v. Charlebois* [1899] A. C. 114.
- (z) *Harrison v. Rumsey* (1752) 2 Ves. Sen. 488; *Stannard v. Harrison* (1871) 19 W. R. [Eng.] 811; *Ainsworth v. Widding* [1896] 1 Ch. 673.
- (a) *Mullins v. Howell* (1879) 11 Ch. D. 763.
- (b) *Shiba v. Chandra Mohan* (1906) 33 Cal. 849; *Parsi Lal v. Nand Ram* (1909) 31 All. 19.
- (c) *Bhola Nath v. Muhammad Sadiq* (1903) 26 All. 223.
- (d) *Ganesh v. Kalka* (1883) 5 All. 595; *Kudrat v. Dinu* (1887) 9 All. 155.
- (e) *Sukh Lal v. Bhikki* (1889) 11 All. 187.
- (f) *Watson v. Collector of Rajshahye* (1869) 13 M. I. A. 180.
- (g) *Muhammad v. Nabian* (1880) 8 All. 282.

- S. 11. circumstance will not bar a subsequent suit by *A as D's widow*, against *B*, to recover her share in the estate of a deceased relative; for the relief claimed in the former suit in respect of the legality of marriage was not claimed as a "specific" or "substantial" relief, but it was "auxiliary" to the principal relief as to her share in the estate of *D* (*h*).

2. *The relief claimed must have been one which the Court is bound to grant, and not one which it is discretionary with the Court to grant* (*i*)—Thus a relief as to mesne profits subsequent to the date of the suit is one which it is not obligatory on the Court to grant. Therefore, if a suit is brought for possession and for past and future mesne profits, and the Court gives a decree for mesne profits down to the date of suit, but says nothing about subsequent mesne profits, the relief as to subsequent mesne profits will not be deemed to have been refused, and a fresh suit in respect thereof will not be barred (*j*). But it is otherwise as to mesne profits accrued due prior to the date of the suit (*k*). As stated by Wallis, C.J., in a Madras Full Bench case (*l*), "the word 'relief' in the Explanation means relief arising out of a cause of action which had accrued at the date of suit and on which the suit was brought, and [does] not include relief such as mesne profits accruing after the date of suit as to which no cause of action had then arisen, but which the Court was nevertheless expressly empowered to grant" [see O. 20, r. 12]. See notes to O. 2, r. 2, "First suit for possession, subsequent suit for mesne profits."

A relief claimed in a suit will not be deemed to have been "refused" if the Court which decided the suit refused to *adjudicate upon* the relief claimed, and suggested to the plaintiff that he should bring a fresh suit in respect of that relief. In such a case a fresh suit in respect of such relief will not be barred (*m*). "It would be idle to expect that a Court, which had judicially advised the second suit, should punish a plaintiff with dismissal of his suit for simply acting on the Court's advice" (*n*).

Orders in execution proceedings and interlocutory orders.—A applies for execution of a decree obtained by him against *B*. The application is rejected on the ground that it is time-barred. *A* then makes a fresh application for execution of the same decree. The rejection of the first application is a bar to the trial of the second (*o*), not under s. 11 of the Code, for the former application is not a "former suit" within the meaning of that section, but upon general principles of law. These principles are analogous to the principles of *res judicata* (*p*). In other words the principle of law underlying this section applies to proceedings in the execution of decrees. Hence the matters directly and substantially in issue in both the applications must be the same, either actually (*q*) or constructively (*r*). Thus where an order is made for attachment of the properties of a judgment-debtor after notice to him to show cause why the order should not be executed against him, the judgment-debtor is estopped from pleading in a subsequent application for execution that execution of the decree had been barred by

(h) *Fatmabai v. Aishabai* (1880) 13 Bom. 242, 249.

(i) *Ummatha v. Cheria* (1882) 4 Mad. 308, 311.

(j) *Mon Mohun v. Secretary of State* (1890) 17 Cal. 968; *Ran Dayal v. Madan* (1890) 21 All. 425; *Bhivraj v. Sitaram* (1895) 19 Bom. 532; *Hays v. Padmanand* (1905) 32 Cal. 118; *Kuppusamy v. Venkatarao* (1905) 15 Mad. L. J. 462; *Doraiswami v. Subramania* (1918) 41 Mad. 188; *Muhammad Ishaq v. Muhammad Rustam* (1918) 40 All. 292.

(k) *Jiban v. Durga* (1894) 21 Cal. 252; *Kachu v. Lakshmansing* (1901) 25 Bom. 115.

(l) *Doraiswami v. Subramania* (1918) 41 Mad. 188.

(m) *Babu v. Ishri* (1880) 2 All. 582, 586—588; *Emamooddeen v. Shaikh Futeh Ali* (1877) 3 C. L. R. 447; *Sarsu v. Kunj Behari* (1883) 5 All. 345. (Stuart C. J., dissenting); *Ram Charan v. Reazuddin* (1884) 10

Cal. 856.

(n) *Thakore v. Thakore* (1890) 14 Bom. 31, 50; See also *Kachu v. Lakshmansing* (1901) 25 Bom. 115, 119, 121, 124.

(o) *Manjunath v. Venkatesh* (1882) 6 Bom. 54; *Bandey v. Romesh* (1883) 9 Cal. 65.

(p) *Ram Kirpal v. Rup Kuari* (1884) 6 All. 269, 274, 11 I. A. 37; *Mungul Pershad v. Girja Kant* (1882) 8 Cal. 51, 8 I. A. 123; *Bani Ram v. Nanhu Mal* (1885) 7 All. 102, 106, 11 I. A. 181.

(q) *Dinkar v. Hari* (1890) 14 Bom. 206; *Gouri Sunkar v. Abhoyeswari* (1898) 25 Cal. 262.

(r) *Mungul Pershad v. Girja Kant* (1882) 8 Cal. 51, 8 I. A. 123; *Sheoraj v. Kameshar* (1902) 24 All. 282; *Lakshmanan v. Kuttayan* (1901) 24 Mad. 669; *Coventry v. Tulsi Pershad* (1904) 31 Cal. 822; *Nanda Rai v. Raghunandan* (1885) 7 All. 282; *Sher Singh v. Daya Ram* (1891) 13 All. 564.

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limitation at the date of the order (s), even though the order passed may be an *ex parte* order (t). Also, the parties in the subsequent proceeding must have been parties to the former proceeding (u), and must have litigated under the same title (v). Further, the former application must have been heard and finally decided (v), and the decision must have been necessary to the determination of that application (x); therefore, the mere fact that an application for execution of a decree has been dismissed for default does not debar a subsequent application (y). But the principle of Explanation IV does not apply as regards the *amount* for which the decree is sought to be executed; thus if a judgment-debtor does not take exception to the amount erroneously set forth in the application for execution of the decree, he is not precluded from objecting to it on a subsequent application for execution (z). Nor does the principle of Explanation V, namely, that where a relief claimed in the *plaint* is not expressly granted it will be deemed to have been refused, apply to *applications* in execution of decrees (a).

When a decree has once been construed by a Court executing the decree, the construction is binding on the parties in subsequent proceedings in execution. Thus where a Court executing a decree decided in the course of execution proceedings that the decree according to its true construction did award mesne profits, it was held that this decision, not having been appealed from, became final between the parties (b).

Applications for amendment of decree.—Though an application for amendment of a decree is not a “suit” within the meaning of this section, yet if such an application is heard and finally decided, it will debar a subsequent application for the same purpose upon general principles of law analogous to those of *res judicata* (c).

Applications for review.—Where an application is made for a review of judgment, and the application is refused, it does not operate as *res judicata* so as to bar a subsequent *suit* for the same relief and on the same grounds as those put forward in the application for review. Neither s. 11 nor any doctrine of constructive *res judicata* can rightly be applied to such a case (d).

Estoppel against a statute.—“There is no estoppel against an Act of Parliament or in this country against an Act of the Legislature” (e). *Quære* whether the bar of *res judicata* applies to defeat a statutory provision ? (f). It is submitted that it does not.

12. [New.] Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

Bar to further suit.

Rules precluding institution of a further suit in respect of the same cause of action.—This section is new and is necessitated by the transfer of certain

(s) See the first three cases cited in preceding note.
(t) *Subbiah v. Ramanathan* (1914) 37 Mad. 462, 473—476.

(u) *Gnanambal v. Parvathi* (1892) 15 Mad. 477.

(v) *Gourmoni v. Jugut* (1890) 17 Cal. 57.

(w) *Delhi and London Bank v. Orchard* (1878) 3 Cal. 47, 4 I. A. 127; *Gourmoni v. Jugut* (1890) 17 Cal. 57; *Hari v. Yamunabai* (1894) 23 Bom. 35; *Kishore v. Dwarkanath* (1894) 21 Cal. 789, 21 I. A. 89; *Sheik Budan v. Ramchandra* (1887) 11 Bom. 537; *Narayana v. Gopalakrishna* (1905) 28 Mad. 355; *Kashinath v. Ramchandra* (1883) 7 Bom. 408.

(x) *Bholanath v. Prafulla* (1901) 28 Cal. 122.

(y) *Thakur Pershad v. Fakrullah* (1894) 17 All. 106, 22 I. A. 44.

(z) *Kalyan Singh v. Jagan Prasad* (1915) 37 All. 589.

(a) *Nityananda v. Gajapati* (1901) 24 Mad. 681.

(b) *Ram Kripal v. Rup Kauri* (1884) 6 All. 269, 11 I. A. 37; *Beni Ram v. Nanhu Mai* (1885) 7 All. 102, 11 I. A. 181.

(c) *Langat Singh v. Janki Koer* (1911) 39 Cal. 265.

(d) *Shri Chandra v. Triguna* (1913) 40 Cal. 541.

(e) *Shridhar v. Babaji* (1914) 38 Bom. 709, 714.

(f) See *Kashinath v. Dhondshet* (1916) 40 Bom. 675, 677.

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of the provisions of the Code of 1882 to Rules. The following is a list of the Rules that bar a fresh suit in respect of the same cause of action :—

- O. 2, r. 2 [Code of 1882, s. 43]—Omission to sue in respect of part of a claim bars a further suit in respect thereof ;
- O. 9, r. 9 [Code of 1882, s. 103]—Decree against plaintiff by default bars a fresh suit ;
- O. 22, r. 9 [Code of 1882, s. 371]—Abatement of suit bars a fresh suit ;
- O. 23, r. 1 [Code of 1882, s. 373]—Withdrawal of suit without leave of Court bars a fresh suit.

13. [S. 14.] A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

When foreign judgment
not conclusive.

- (a) where it has not been pronounced by a Court of competent jurisdiction ;
- (b) where it has not been given on the merits of the case ;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable ;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice ;
- (e) where it has been obtained by fraud ;
- (f) where it sustains a claim founded on a breach of any law in force in British India.

Alterations in the section.—Clause (a) is new. Other alterations are merely verbal.

Scope of the section.—The expression “foreign judgment” is defined in s. 2 as meaning the judgment of a foreign Court, that is, a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council. The present section provides that a foreign judgment may operate as *res judicata* except in the six cases specified in the section. In matters of foreign judgments the Courts here are guided by very much the same principles as those adopted by the courts of England (g). An “act of State” is not a judgment, and it cannot therefore have the effect of *res judicata*. Thus it has been held that an order of the Political Agent of Meywar and the Maharana of Udepore deposing a high priest from his *gadi* is not a foreign judgment, but merely an “act of State,” and it cannot, therefore, operate as *res judicata* (h).

(g) *Nalla v. Mahomed* (1897) 20 Mad. 112, 114.
(h) *Shriman Goswami Govardhanlalji v. Goswami* |

Shri Girdharlalji (1893) 17 Bom. 620.

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How a foreign judgment may be enforced in British India.—A judgment of a Court of British India can only be enforced by proceedings in execution. A foreign judgment, however, may be enforced by *proceedings in execution* in certain specified cases only (s. 44). In other cases, a foreign judgment can only be enforced by a *suit* upon the judgment. That is to say, if *A* has obtained a decree against *B* for Rs. 5,000 in a French Court at Pondicherry, and if *B* has got no property in Pondicherry to satisfy the decree, but has got property in Bombay. *A* may bring a suit against *B* in Bombay to recover the amount of the *judgment*. The suit must be brought within six years from the date of the judgment (*i*), and if a decree is passed in favour of *A*, he may proceed to execute the same by attachment and sale of *B*'s property in Bombay.

It was at one time doubtful whether a suit would lie in British India upon the *judgment* of a Court of a *Native State* in India, or whether the plaintiff should sue upon the *original cause of action*. On the one hand, it was held by the Madras High Court that a suit did lie in British India upon the judgment of a Court of a *Native State* (*j*). On the other hand, it was held by the Bombay High Court that such a suit did not lie (*k*). According to the Bombay Court, the suit ought to be brought *de novo* on the *original cause of action*, as distinguished from the *judgment*, to enable the Court to decide the case *on its merits*. The ground of the Bombay decision was that a Court which tries a suit upon a foreign judgment cannot institute an inquiry into the merits of the original suit, and hence it would result in grave miscarriage of justice if a suit were allowed to be brought on the judgment of tribunals of *Native States* where judicial inquiries were not ordinarily conducted with intelligence and integrity. To remove this doubt, and to obviate the danger contemplated by the Bombay Court, a clause was added into section 14 of the Code of 1882, which made it quite clear that a suit could be instituted in British India on the judgment of a Court of a *Native State* or of any other foreign Court in Asia or Africa (*l*). But it was at the same time provided by the said clause that a British Indian Court in which a suit might be brought on the judgment of a Court of a *Native State* or any other foreign Court in Asia or Africa *should not be precluded from inquiry into the merits of the case* in which the judgment sued upon was passed (*m*). The danger of miscarriage of justice referred to by the Bombay Court was thus effectively provided for. There was no such danger, however, in the case of the judgment of a foreign Court in Europe or America, and hence it was that the said clause was confined to judgments of foreign Courts in Asia and Africa including judgments of Courts of *Native States* in India. That clause has now been omitted for the simple reason that it is not possible to maintain the distinction above referred to in the case of all Asiatic Courts, for there are some Asiatic Courts, for instance, the Courts of Japan, that are entitled to be treated on the same footing as European Courts. The result is that a suit will lie upon a foreign judgment of any Court in Asia or Africa, and such a suit now stands upon the same footing as a suit brought on the judgment of a foreign Court in Europe or America.

Though a foreign judgment may be enforced by a suit in British India, it is not to be supposed that British Indian Courts are bound in all cases to take cognizance of the suit, and they may refuse to entertain it on grounds of expediency (*n*).

Operation of the section.—The operation of the section may be illustrated by the following cases:—

(a) *A* sues *B* in a foreign Court. If the suit is dismissed, the decision will operate as a bar to a fresh suit by *A* in British India on the original cause of action, *unless* the

(i) Limitation Act, 1877, Sch. II, art. 117.

(j) *Sama Rayar v. Annamalai* (1884) 7 Mad. 164.

(k) *Himmat Lall v. Shivajirav* (1884) 8 Bom 503.

(l) *Gurdial Singh v. Raja of Faridkot* (1895)

22 Cal. 222, 237, 21 I. A. 171.

(m) *Mayaram v. Nacji* (1900) 24 Bom. 36.

(n) *Murugesu v. Annamalai* (1900) 23 Mad. 458.

- S. 13. decision is inoperative by reason of one or more of the circumstances specified in the section (o). If a decree is passed in favour of *A* in the foreign Court, and *A* sues *B* on the judgment in British India, *B* will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign Court unless the decision of the foreign Court is inoperative by reason of one or more of the circumstances specified in the section.

(b) *A* obtains a decree against *B* in the Cochin Court, and applies for execution of the decree in the High Court of Bombay. [Decrees of the Cochin Court may be executed in British India under s. 44.] It is proved by *B* that the decree at Cochin was obtained by *A* by fraud [see cl. (c) of the section]. The Bombay Court may refuse execution (p).

A British Indian Court will not give effect to a foreign judgment where it is pronounced by a Court without jurisdiction.—The leading case on the subject is *Gurdial v. Raja of Faridkot* (q). In that case *A* sued *B* in the Court of the Native State of Faridkot, claiming Rs. 60,000, being the amount alleged to have been misappropriated by *B* while in *A*'s service at Faridkot. *B* did not appear at the hearing, and a decree *ex parte* was passed against him. *B* was a native of another Native State, Jhind. In 1869 he left Jhind, and went to Faridkot to take up service under *A*. In 1874 he left *A*'s service, and returned to Jhind. The suit was brought against him in 1879. At the date of the suit *B* neither resided in Faridkot, nor was he a domiciled subject of the Faridkot State, nor did he owe allegiance to that State. Such being the case, the Faridkot State had no jurisdiction, on general principles of International Law, to entertain the suit against *B* in respect of the claim, which it should be noted, was a mere personal claim as distinguished from a claim relating to land or movables (r). The decree of the Faridkot Court was therefore an absolute nullity. *A* then sued *B* in a British Indian Court on the judgment of the Faridkot Court. The Court of first instance dismissed the suit on the ground that the Faridkot Court had no jurisdiction to entertain the suit. This decision was upheld by their Lordships of the Privy Council. The mere fact that the alleged embezzlement took place at Faridkot was not sufficient to give jurisdiction to the Faridkot Court. The result would be the same, if the suit were for damages for breach of a contract entered into by *B* with *A* at Faridkot (s). In other words a foreign Court cannot assume jurisdiction in cases where the claim is a personal one merely because the cause of action arose within its jurisdiction. But if *B* was residing at Faridkot at the date of the suit, the Faridkot Court would have had complete jurisdiction. In the case of personal claims, it is residence alone that gives jurisdiction in a suit against a foreigner (t). The same rule applies where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owing allegiance to the same Sovereign. Thus a decree passed by the Ceylon Court [which is a foreign Court within the meaning of s. 2] in a suit on a contract against a native of British India who was not at the time of the action residing in Ceylon is a nullity, so that it cannot be enforced by a suit in a Court of British India (u).

Suppose now that in the above case there was an Act in force passed by the Faridkot Legislature empowering the Courts of Faridkot to entertain suits in cases where the cause of action had arisen in Faridkot though the defendant was a foreigner neither residing in Faridkot nor owing any allegiance or obedience to the Faridkot State. Could effect be then given to the judgment of the Faridkot Court in a suit brought upon the judgment in a Court in British India? It has been held that no effect could be given

(o) *Hababhat v. Narharbhat* (1889) 13 Bom. 224.

(p) *Hajimusa v. Purnanand* (1891) 15 Bom. 210.

(q) (1895) 22 Cal. 222, 21 L. A. 171.

(r) *Lakshmishankar v. Vishnuram* (1900) 24 Bom.

77; *Nalla v. Mahomed* (1897) 20 Mad. 112.

(s) *Mathappa v. Chellappa* (1876) 1 Mad. 196.

(t) *Jivappa v. Jeerga* (1916) 40 Bom. 551.

(u) *Shahk Atham v. Dawud* (1909) 32 Mad. 400.

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to the judgment even under these circumstances, because no one State can by its legislation confer jurisdiction upon its Courts to entertain a suit in respect of a *personal* claim against foreigners who at the date of the suit neither resided in that State nor owed any allegiance or obedience to that State (*v*). But British Indian subjects owe allegiance to the Sovereign of Great Britain, and the *British Parliament* may therefore by legislation confer jurisdiction upon the Courts of England, as it has in fact done, against British Indian subjects in British India (*w*). Hence where an *ex parte* decree is passed by the Queen's Bench Division of the High Court of Justice of England (a foreign Court) against a British Indian subject residing in British India in an action founded on *breach of a contract* committed within the jurisdiction of that Court, the decree is not a nullity, and effect may be given to it in a suit on the judgment instituted in British India (*x*).

In the last-mentioned case, as also in the case of the *Raja of Faridkot*, the decree passed against the defendant by the foreign Court was an *ex parte* decree; that is to say, the defendant did not appear before the foreign Court, and the decree was passed in his absence. But what if the defendant had appeared and defended the suit in the foreign Court? This question is considered in the following paragraph.

Submission to jurisdiction of foreign Court.—Where a suit is instituted in British India on the judgment of a foreign Court, effect will be given to the judgment, though that Court *had no jurisdiction* over the defendant, if the defendant appears and defends the suit brought against him in that Court without making any objection to its jurisdiction. But if he *protests against* the jurisdiction, and the suit is then proceeded with against him, the judgment is a nullity, and no effect will be given to it in a suit brought on the judgment. The protest against jurisdiction must be made at an early stage of the proceedings; hence where no objection to the jurisdiction was made until the case had reached the stage of appeal, it was held that it amounted to submission to jurisdiction (*y*). Nice questions may sometimes arise as to what amounts to submission to jurisdiction. A defendant who employs a pleader in a suit against him in a foreign Court will not be said to have submitted himself to the jurisdiction of that Court if the pleader states at the hearing that he has received no instructions from his client in the case (*z*). But a defendant who in addition to the objection to jurisdiction raises other defences, and does not withdraw after the protest, but takes the chance of getting a decree in his favour, will be deemed to have submitted himself to the jurisdiction of the Court (*a*). *A fortiori*, a defendant who appears in a foreign Court in answer to the process of the Court without any protest whatever, and applies for leave to defend a summary suit brought against him on a promissory note, will be deemed to have submitted himself to the jurisdiction of that Court (*b*). It must, however, be noted that submission is not voluntary if the appearance is made only to release property seized by a foreign tribunal in attachment or other proceedings. If it is not voluntary, the judgment of the foreign tribunal is not binding on the party. Whether submission was for the purpose of saving property or voluntary is a question of fact in each case (*c*).

Agreement to submit to foreign jurisdiction.—Where there is an *express* agreement to submit to the jurisdiction of a foreign Court, a judgment pronounced by such Court binds the parties, and effect will be given to such judgment in British Indian Courts (*d*).

(*v*) *Christien v. Delanney* (1899) 26 Cal. 931;
Hinde v. Ponnath (1882) 4 Mad. 369.
(*w*) Order 11 of 1883, rule 1, sub-rule (e).
(*x*) *Hossein Khan v. Raphael* (1901) 28 Cal. 641.
See also *Viswanadha Reddi v. Keymer*
(1916) 39 Mad. 95, 100, *affd.* 40 Mad.
112, 44 I. A. 6.
(*y*) *Kaliyugam v. Chokalinga* (1884) 7 Mad. 105
(*z*) *Sivaraman v. Iburam* (1896) 18 Mad. 327.

(*a*) *Harchand v. Gulabchand* (1914) 39 Bom. 34;
Rama v. Krishna (1916) 39 Mad. 733 [F. B.],
overruling *Parry & Co. v. Appasami* (1880)
2 Mad. 407.
(*b*) *Shaik Atham v. Davud* (1902) 32 Mad. 469
(*c*) *Veeraraghava Ayyar v. Muga Sali* (1916)
39 Mad. 24.
(*d*) See *Copin v. Adamson* (1874) L. R. 9 Ex. 345.

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The mere fact of entering into a contract of partnership in a foreign country does not involve an agreement that all matters and disputes arising in connection with the partnership shall be submitted to, and therefore *lie within*, the jurisdiction of the Courts of that country (e).

Carrying on business in a foreign country through an agent.—Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the Courts of that country by giving the agent a power of attorney containing very wide powers including the right to institute or defend suits relating to any matters connected with their business or otherwise (f).

Possession of immovable property in a foreign country.—The possession of immovable property in a foreign country gives the Courts of that country jurisdiction *to deal with the property (g), itself* but not jurisdiction *in personam* over the possessor, even in regard to obligations connected with that property (h).

In cases where a foreign Court has jurisdiction, or where the defendant has submitted himself to the jurisdiction of a foreign Court, the judgment of such Court is not vitiated by irregularities which do not affect the jurisdiction of the Court even when they are such as would, in the view of the foreign Court, render the judgment there a nullity (i).

Foreign judgment against a foreign firm.—A, B, and C carry on business at Singapore in partnership in the name of X. Y. D, a creditor of the firm, brings a suit against the firm in the supreme Court of Singapore, but A alone is served with the writ of summons. B and C are British Indian subjects, and they did not reside at Singapore at the time of the suit or at any other time. A decree is passed against the firm by the Singapore Court. A suit is then brought by D in British India on the judgment of the Singapore Court against A, B, and C for a personal decree against them. No personal decree can be passed against B and C as they were not served, though a personal decree may be passed against A (j). Compare O. 21, r. 50.

Foreign judgment on a decree of a British Indian Court.—The judgment of a foreign Court, obtained on a decree of a Court in British India, is no bar to the execution of the original decree in British India (k).

Clause (b)—In order that a foreign judgment may operate as *res judicata*, it is necessary that it must have been *given on the merits* of the case [see notes to s. 11, “Heard and finally decided,” p. 58 above] whether it be the judgment of a foreign Court in Europe or America or of a foreign Court in Asia or Africa. If the foreign judgment is not given on the merits of the case, the plaintiff must prove his case independently of the judgment (l). Where in an action in the King’s Bench Division of the High Court of Justice in England to recover a liquidated amount, the defendant having failed to comply with an order to answer interrogatories his defence was struck out and judgment was entered for the amount claimed for the plaintiff [O. 11, r. 21 below], and the plaintiff subsequently instituted a suit on the judgment in the Madras High Court, it was held that the judgment sued on was one which had “not been given on the merits of the case” within the meaning of this clause, and that the suit was not maintainable (m). But a wrong view as to the burden of proof

(e) *Emanuel v. Symon* [1908] I. K. B. 302.
 (f) *Ramanathan v. Kalimuthu* (1912) 37 Mad. 163, 172-174.
 (g) *Douglas v. Forrest* (1823) 4 Bing. 686; *London and North-Western Ry. Co. v. Linsay* (1858) 3 Macq. 90.
 (h) *Emanuel v. Symon* [1908] I. K. B. 302.
 (i) *Guzdar v. Maradugula* (1907) 30 Mad. 292;

Pemberton v. Hughes [1899] 1 ch. 781.
 (j) *Sahib Thambi v. Hamid* (1911) 36 Mad. 414.
 (k) *Fakuruddeen v. Official Trustees of Bengal* (1881) 7 Cal. 82.
 (l) *Santa Singh v. Ralla Singh* (1919) P. R. no. 14, p. 30.
 (m) *Keymer v. Vasvanatham* (1917) 44 I. A. 6, 40 Mad. 112, affirming 39 Mad. 95.

or as to the legal liability of a party does not render a foreign judgment one "not given on the merits of the case" within the meaning of this clause (n). Where the writ of summons in an action in the High Court of Justice in England was accepted by the defendant's solicitor and an appearance was entered by the solicitor on behalf of the defendant, a judgment passed against the defendant in his absence could not be said not to have been given on the merits of the case within the meaning of this clause, the defendant having been called away from England to India suddenly owing to the war (o).

Clause (c)—The mistake must be *apparent on the face* of the proceedings. In England it has been held that a mere mistake as to English law will not vitiate a foreign judgment, even though the mistake may appear on the face of the proceedings (p).

Clause (d)—The term 'natural justice, in this clause refers rather to the form of procedure than to the merits of the particular case. The mere fact that a foreign judgment is wrong in law does not make it opposed to 'natural justice.' There must be something in the procedure anterior to the judgment which is repugnant to natural justice (q). Thus a foreign judgment obtained *without notice* of the proceedings to the defendant is contrary to natural justice, and a suit on such judgment is not maintainable in a British Indian Court (r).

Limitation.—Whereas is the case of a suit on a contract limitation merely bars the remedy, but does not extinguish the right, the judgment of a foreign Court is not open to the objection that the suit was barred by the law of limitation applicable in the country where the contract was made (s).

14. [S. 13. Expl. VI.] The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

Presumption as to foreign judgments.

See s. 13, cl (a).

PLACE OF SUING.

15. [S. 15.] Every suit shall be instituted in the Court of the lowest grade competent to try it.

Scope and object of the section.—The object of the section in requiring a suitor to bring his suit in the Court of the lowest grade competent to try it, is that Courts of higher grades shall not be overcrowded with suits. This section is a rule of *procedure, not of jurisdiction*, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it *does not oust the jurisdiction* of the Courts of higher

(n) *Rama Shenoi v. Hallagna* (1918) 41 Mad. 205.

(o) *Cole v. Harper* (1919) 41 All. 521.

(p) *Godard v. Gray* (1870) L. R. 6 Q. B. 139.

(q) *Rama Shenoi v. Hallagna* (1918) 41 Mad. 205.

(r) *London Bank v. Hormaeji* (1871) 8 B. H. C. 200; *London Bank v. Govind* (1881) 5

Bom. 223; *London Bank v. Burjorji*

(1885) 9 Bom. 346; *Eduji v. Manekji*

(1887) 11 Bom. 241; *Bangarusami v.*

Balasubramanian (1890) 13 Mad. 496.

(s) *Nallatambi v. Ponnusami* (1879) 2 Mad. 400.

See also Limitation Act, 1908, s. 28.

- S. 15. grades which they possess under the Acts constituting them (*t*). Although therefore, as a *matter of procedure* a suit below a certain value ought to be instituted in the Court of the Munsif, the Subordinate Judge has still *jurisdiction* to try it (*u*). As a *matter of procedure*, however, he ought not to entertain the suit, but should return the plaint to the plaintiff to be presented to the Munsif as provided by O. 7, r. 10 [Code of 1882, s. 57] (*v*). This is explained more fully below.

Jurisdiction.—The word “competent” used in this section has reference to the jurisdiction of a Court. Jurisdiction means the extent of the authority of a Court to administer justice. Thus a Presidency Small Cause Court has no jurisdiction to try suits in which the amount or value of the subject-matter exceeds Rs. 2,000; this is said to be the jurisdiction of a Court as regards its *pecuniary* limits. Nor can the said Court try suits for the specific performance of a contract or to obtain an injunction or for a dissolution of partnership. This is said to be the jurisdiction of a Court as regards the *subject-matter* of a suit.

The jurisdiction of a Court may again be *original* or *appellate*. In the exercise of its *original* jurisdiction, a Court entertains original suits; in the exercise of its *appellate* jurisdiction, it entertains appeals from decrees passed in original suits. The High Courts of Allahabad, Patna and Lahore have no *original* jurisdiction.

Court of lowest grade competent to try a suit.—We have in British India a great number of Courts. The High Courts of Madras, Calcutta, Bombay, Allahabad, Patna and Lahore, have been established each by a Royal Charter. Other Courts in India have been constituted by Acts of the Governor-General of India in Council. One main feature of the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction.

In each of the three presidency towns, we have a High Court and a Small Cause Court. As regards High Courts, they are empowered in the exercise of their ordinary original civil jurisdiction to try suits of any value except suits falling within the jurisdiction of Presidency Small Cause Courts of which the value does not exceed Rs. 100 (*w*). The pecuniary jurisdiction of Presidency Small Cause Courts is confined to suits of which the value does not exceed Rs. 2,000 (*x*). From the above it is clear that both a High Court and a Small Cause Court *are competent* to try a suit, say for Rs. 500, for damages for breach of a contract. But of these two Courts it is the Small Cause Court that is the “Court of the lowest grade” in a presidency town competent to try the suit. The suit, therefore, “shall” be instituted in the Small Cause Court as required by the present section. This does not mean that the High Court has no jurisdiction to entertain the suit. It *has* jurisdiction to try the suit, but in order that the High Court may not be overcrowded with suits, the legislature has established Small Cause Courts, and the present section requires that suits which a Small Cause Court is competent to try shall be brought in that Court. We say “suits which a Small Cause Court is competent to try” for there are certain suits which a Small Cause Court is not competent to try such as suits for the recovery or partition of immovable property, or for the foreclosure or redemption of a mortgage of immovable property or suits for injunction or for specific performance (*y*). In presidency-towns these suits must be brought in the High Court, though the value of the suit may be *under* Rs. 100.

(*t*) *Nidhi Lal v. Mazhar* (1885) 7 All. 230.

(*u*) *Matra Mondal v. Hari* (1890) 17 Cal. 155;
Krishnasami v. Kanakasabai (1891) 14
 Mad. 188.

(*v*) *Nidhi Lal v. Mazhar* (1885) 7 A

(*w*) Cl. 12 of the Charter, Appendix II.

(*x*) Presidency Small Cause Courts Act, 1882, s. 18.

(*y*) *Id* s. 19.

Outside the Presidency-towns, we have in each presidency a number of Courts of different grades which may be divided into three classes as shown in the following table :—

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<i>Bombay Presidency.</i> Act 14 of 1869.	<i>Madras Presidency.</i> Act 3 of 1873.	<i>Bengal, N. W. P., and Assam</i> Act 12 of 1887.
1. District Courts.	District Courts.	District Courts.
2. Courts of Subordinate Judges of the first class.	Subordinate Judges' Courts	Subordinate Judges' Courts.
3. Courts of Subordinate Judges of the second class.	District Munsifs' Courts.	Munsifs' Courts.

The jurisdiction of District Judges and Subordinate Judges, except Subordinate Judges of the second class in the Bombay Presidency, extends to all original suits, whatever may be the value of the suit. But a District Court is a Court of superior grade to a Subordinate Judge's Court, for a District Court is the principal Court of original civil jurisdiction in the district, and it is also the Court of appeal from decrees and orders in certain suits passed by other Courts in the district including Courts of Subordinate Judges. The jurisdiction of a Subordinate Judge of the second class in the Bombay Presidency extends to all original suits of which the value does not exceed Rs. 5,000. The jurisdiction of a District Munsif in the Madras Presidency extends to all original suits (not otherwise exempted from his cognizance) of which the value does not exceed Rs. 2,500. The jurisdiction of a Munsif in Bengal, North-Western Provinces, and Assam extends to all original suits of which the value does not exceed Rs. 1,000.

From the above it is clear that both a Subordinate Judge and a Munsif *have jurisdiction* to try a suit, say, to recover Rs. 500, for arrears of rent. But of these two Courts it is the Munsif's Court that is "the Court of the lowest grade" competent to try the suit. The suit therefore "shall" be instituted in the Munsif's Court as required by the present section.

As to Civil Courts in the Central Provinces, see Act 16 of 1885; in Oudh, Act 13 of 1879; in Jhansi, Act 18 of 1867. As to Provincial Small Cause Courts, see Act 9 of 1887.

Where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of higher grade.—Suppose that a suit which under the provisions of this section ought to have been instituted in a Munsif's Court is brought in the Court of a Subordinate Judge, and the Subordinate Judge, instead of returning the plaint under O. 7, r. 10, tries the suit notwithstanding objection taken by the defendant, and that a decree is passed against the defendant. Is the decree a nullity? No, for the Subordinate Judge *has* jurisdiction to try the suit. It is a case of *irregularity* not affecting the jurisdiction of the Court within the meaning of s. 99 below (z). As to the case where a suit is by reason of *over-valuation* brought in a Court of higher grade, see below notes, "Over-valuation and under-valuation."

(2) See *Nidhi Lal v. Mazhar Husain* (1885) 7 All. 230, and *Matra Mondal v. Hari* (1890) 17 Cal. 155, both cases of over-valuation

but decided without reference to the Suits Valuation Act, 1887.

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Where a suit which ought to have been instituted in a Court of higher grade is instituted in a Court of lower grade.—In such a case the Court of lower grade ought to return the plaint to the plaintiff to be presented to the Court of higher grade [O. 7, r. 10]. If this is not done, and the suit is heard by the Court of lower grade, the decree will be set aside in appeal as one passed without jurisdiction. This is a case of *want of jurisdiction* as distinguished from a mere *irregularity* within the meaning of s. 99 below (a). As to the case where a suit is by reason of *under-valuation* brought in a Court of lower grade, see notes below “Over-valuation and under-valuation.”

Principles regulating pecuniary jurisdiction.—It is the *plaintiff's valuation in his plaint* which fixes the jurisdiction of the Court, and not the amount which may be found and decreed by the Court (b). But jurisdiction may be destroyed, if the plaint is so amended as to exceed the pecuniary limits of the Court in which the suit is instituted (c). There is a difference of opinion, however, as to whether jurisdiction is ousted if interest or mesne profits claimed in a suit when ascertained and added to the value of the suit exceed the pecuniary limits of the jurisdiction of the Court in which the suit is instituted. See notes to s. 6, “Pecuniary jurisdiction in passing decrees,” and notes to s. 96, “Forum of appeal.”

Over-valuation and under-valuation.—Although it is the value put by the *plaintiff* on his suit that *prima facie* determines jurisdiction, it does not follow that a plaintiff is at liberty to assign any arbitrary value on the suit and thus be free to choose the Court in which he should bring the suit (d). Cases do occur in which a plaintiff sometimes over-values his suit and sometimes under-values it. The over-valuation or under-valuation may be erroneous, or it may be done intentionally by the plaintiff for the purpose of bringing his suit in a Court different from that in which it should have been brought had the suit been properly valued. If the over-valuation or under-valuation is patent on the face of the plaint, it is the duty of the Court to which the plaint is presented to return it to the plaintiff to be presented to the proper Court under O. 7, r. 10. If the over-valuation or under-valuation is not patent on the face of the plaint, but the defendant contends that the suit has been over-valued or under-valued, the plaintiff may be required to satisfy the Court that the suit has been properly valued, provided there are *prima facie* grounds for believing that the suit has not been properly valued (e), but not otherwise (f).

Suppose that a suit has been over-valued or under-valued, so that it is brought in a Court whose grade is higher or lower than that of the Court which would have been competent to try it if the suit were properly valued. Will the decree be set aside or reversed by the appellate Court as a matter of course? No, not unless (1) the objection as to jurisdiction by reason of over-valuation or under-valuation was taken by the defendant in the Court of first instance at or before the hearing at which issues were framed, or (2) the over-valuation or under-valuation is found by the appellate Court to have prejudicially affected the disposal of the suit on the merits (g). It has been so enacted by the Suits Valuation Act, 1887, s. 11. It does not make any difference that the over-valuation or

(a) See *Matra Mondal v. Hari* (1890) 17 Cal. 155, 180; a case of over-valuation, but decided without reference to the Suits Valuation Act, 1887.

(b) *Lakshman v. Babaji* (1883) 8 Bom. 31; *Mahabir Singh v. Behari Lal* (1891) 13 All. 320; *Madho Das v. Ramji* (1894) 16 All. 286.

(c) *Chandu v. Kombi* (1886) 9 Mad. 208.

(d) *Boldya Nath v. Makhan Lal* (1890) 17 Cal. 680, 683; *Dayaram v. Gordhandas* (1906) 31

Bom. 73, 78; *Raj Krishna v. Bipin* (1912) 40 Cal. 245, 249.

(e) *Appa Rao v. Sobhanadri* (1891) 24 Mad. 158; *Hamidunnissa v. Gopal* (1897) 24 Cal. 661; 687.

(f) *Koti Pujari v. Manjaya* (1898) 21 Mad. 271.

(g) *Sheo Deni v. Tulshi* (1893) 15 All. 378, 380; *Raman v. Secretary of State* (1904) 24 Mad. 427; *José Antonio v. Francisco* (1910) 35 Bom. 24.

under-valuation was erroneous or intentional (*h*). On this point the law was somewhat different before the passing of the Suits Valuation Act.

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It has been held by the High Court of Calcutta that where a suit is under-valued, with the result that the *appeal* from the decree in the suit is heard and decided by a District Court instead of by a High Court, the decree of the District Court is one passed by a Court without jurisdiction and it is therefore nullity. This happens in cases where a suit of which the true value exceeds Rs. 5,000 is valued at less than Rs. 5,000. *A* brings a suit against *B* for possession of immovable property in the Court of a Subordinate Judge. The real value of the suit exceeds Rs. 5,000, but the suit is valued at Rs. 2,100 only. A decree is passed in the suit for *A*. *B* files an appeal in the District Court, but the appeal is dismissed. According to the Calcutta decisions, the decree of the District Court is a nullity as being one passed without jurisdiction. The reason given is that the true value of the suit being more than Rs. 5,000, the proper *forum* of appeal, if the suit had been properly valued, would have been the High Court, and not the District Court, and that the result of the under-valuation was that the jurisdiction of the High Court as the Court of Appeal was ousted (*i*). See notes to s. 21, "Objection to jurisdiction, when to be raised."

Where the subject-matter of a suit does not admit of being satisfactorily valued.—There are several suits in which the subject-matter is not capable of being estimated at a money value, *e.g.*, suits for restitution of conjugal rights, suits to remove a *karnavan* (*j*), suits to direct registration of a document under the Registration Act, 1908, s. 77 (*k*), etc. The court fee in such suits is Rs. 10 as provided by the Court Fees Act, 1870, Sch. II, art. 17, cl. vi. There is a distinction, however, between valuation for the purpose of jurisdiction and valuation for the purpose of ascertaining court fee. What we are here concerned with is valuation for purposes of jurisdiction.

We have stated above that the jurisdiction of a Court to try a suit is determined by the value of the suit. Since jurisdiction depends on the value of a suit, it follows that every suit must be valued for purposes of jurisdiction. When the subject-matter of a suit is capable of valuation, it is the *plaintiff's* valuation in his plaint which fixes the jurisdiction subject to what has been stated in the preceding paragraphs. But there are cases where the subject-matter of a suit does not admit of being satisfactorily valued. Suits in which the subject-matter is not capable of being estimated at a money value are prominent instances of this class. How then are such suits to be valued for purposes of jurisdiction? The case is provided for by s. 9 of the Suits Valuation Act, 1887, which enacts that in such cases the value of the suit is what the High Court may specify by rules made under that section. But no rules have yet been framed by the High Court under that section. It has been held by the High Courts of Allahabad and Calcutta that in the absence of any rules passed under that section the safest and the most convenient course to follow is to hold that the valuation made by the plaintiff of his suit should be *prima facie* considered as the true valuation; but if, from improper motives, he either under-values or over-values it, the Court must decide what should be considered to be the proper value (*l*). The cases in which the above rule was laid down were suits for restitution of conjugal rights. In a recent case it was held by the High Court of Madras that though the rule laid down by the High Courts of Allahabad and Calcutta

(*h*) *Hamidunnissa v. Gopal* (1897) 24 Cal. 661; *Krishnasami v. Kanakasabai* (1891) 14 Mad. 183.

(*i*) *Rajlakshmi v. Katyayani* (1910) 38 Cal. 630, 666-668.

(*j*) *Govindan Nambiar v. Krishnan Nambiar* (1882) 4 Mad. 146.

(*k*) *Savarimuthu v. Alagium* (1902) 12 Mad. L. J. 88; *Ramu Aiyar v. Sankara Aiyar* (1908) 31 Mad. 88.

(*l*) *Zair Husain Khan v. Khurshed Jan* (1906) 28 All. 545; *Jan Mahomed v. Mushar Bivi* (1907) 34 C. I. 352.

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might be the best rule in suits for restitution of conjugal rights, it was not the best rule in suits which affected *property*, and that the best rule in such cases was to value the suit according to the value of the property that might possibly be affected thereby (*m*). Thus it has been held by that Court that for purposes of jurisdiction a suit to compel registration of an instrument whether the instrument be registrable compulsorily (*e.g.*, an instrument of gift) or voluntarily (*e.g.*, a will) is to be valued according to the value of the property that would be affected by the suit (*n*). Similarly it has been held by that Court that though a suit for the removal of a karnavan is incapable of valuation, and the court fee leviable is only Rs. 10, it does not follow that a District Munsif has jurisdiction over every suit for the removal of a karnavan, though the *value of the tarvad property* may exceed the pecuniary limits of the jurisdiction of the Munsif's Court (*o*). And it has been held by the same Court that a Munsif has no jurisdiction to entertain a suit to set aside an adoption, if the *value of the property*, which would be lost to the adopted son if the adoption were set aside, exceeds the pecuniary jurisdiction of that Court (*p*). The High Courts of Allahabad and Calcutta would, it seems, hold differently. In fact, the High Court of Allahabad has held that the value, for the purposes of jurisdiction, of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his plaint by the plaintiff (*q*). But whichever view be correct, it is certain since the enactment of the Suits Valuation Act (s. 11) that when once a suit of this class is decided on its merits by the lower Court, the decision will not be reversed in appeal on the ground of want of jurisdiction, unless the cognizance of the suit by that Court has prejudicially affected its disposal on the merits.

16. [S. 16.] Subject to the pecuniary or other limitations prescribed by any law, suits—

Suits to be instituted where subject-matter situate.

- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,
- (f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

(m) *Ramu Aiyar v. Sankara Aiyar* (1908) 31 Mad. 89.

(n) *Ramkrishnama v. Bhagamma* (1890) 13 Mad. 56 (deed of gift); *Ramu Aiyar v. Sankara Aiyar* (1908) 31 Mad. 88.

(o) *Krishna v. Raman* (1888) 11 Mad. 266.

(p) *Keshava v. Lakshminarayana* (1883) 6 Mad. 192.

(q) *Sheo Devi Ram v. Tulshi Ram* (1893) 15 All. 378.

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Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation—In this section “property” means property situate in British India.

Alterations in the section.—The words “with or without rent or profits” in cl. (a) are new. The word “sale” in cl. (c) has been newly added.

Chartered High Courts.—This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s. 120). The High Courts of Calcutta, Madras, Bombay, Allahabad, Patna and Lahore are Chartered High Courts, each having been established by a royal charter. The nature and extent of the jurisdiction of these Courts is defined by the charter for each of these Courts. As to the extent of the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay, see clause 12 of the charter for these Courts set forth in Appendix II. The High Courts of Allahabad, Patna and Lahore have no original jurisdiction. As to the meaning of “original” jurisdiction, see notes to s. 15, “Jurisdiction,” on p. 72 above.

Scope of the section.—This section indicates the Court in which suits relating to *immovable property* and suits for the recovery of *movable property actually under distraint or attachment* are to be instituted. Section 19 indicates the Courts in which suits for compensation for wrong done to the person or to movable property are to be instituted. Section 20 is a general section.

Clause (a): suits for recovery of immovable property.—A suit for the recovery of immovable property situate in Bombay must be instituted in a Court *in Bombay* having *jurisdiction* to entertain the suit. The Small Cause Court in Bombay has no jurisdiction to try such suit (r). The suit must therefore be brought in the High Court of Bombay. Hence it is that the section commences with the words “subject to the pecuniary or *other limitations* prescribed by any law.” The insertion of the words “with or without rent or profits” is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the Courts within whose jurisdiction the property is situate.

Clause (c): suit for foreclosure, sale or redemption.—A mortgages certain immovable property to B to secure repayment of a sum of money lent to him by B. Here A is the mortgagor and B is the mortgagee. If A does not repay the amount of the loan on the due date, B may institute a suit against A for *sale* of the mortgaged property, so that the mortgage-debt may be paid out of the sale-proceeds of the property, or he may sue for *foreclosure* of the mortgage. The decree in a foreclosure suit provides that if the mortgagor fails to pay the amount that may be found due to the mortgagee within a time specified by the Court (generally six months), the mortgagor shall be absolutely debarred of all right to redeem the property (s). If A offers payment of

(r) See Presidency Small Cause Court Act, 1882, s. 19.

(s) Transfer of Property Act, 1882, ss. 86, 87, now O. 34, rr. 2-3.

- S. 16. the mortgage-debt to *B*, but *B* disputes the amount, *A* may sue *B* for *redemption* of the mortgage, and the Court will pass a decree ordering an account to be taken of what will be due to *B*, and directing that upon *A* paying to *B* the amount so due, *B* shall reconvey the property to *A* (t). Suits for foreclosure, sale or redemption must be instituted in the Court within the local limits of whose jurisdiction the mortgaged property is situate.

Clause (d): Suits for the determination of any other right to or interest in immovable property.—There is no definition of immovable property in the Code. “Immovable property” is defined in the General Clauses Act, 1897, s. 3, cl. (25), as including land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. Trees standing on land are immovable property (u). But once the trees are severed from the land, they assume the character of movable property. Growing crops are movable property (see s. 2, cl. 13). “Immovable property,” we have said, includes “benefits to arise out of land.” Rent that has *already* accrued due is movable property, for it is a benefit that has *arisen* out of land, but rent that is *to* accrue due is immovable property, for it is a benefit *to arise* out of land. Hence a suit for *arrears* of rent is governed not by the provisions of this section but by those of s. 20, and it may be instituted in any one of the Courts specified in that section, although in such suit the plaintiff’s *title* to the property of which the rent is claimed may incidentally come in question (v). But a suit for a *declaration* of the plaintiff’s right to rent comes under cl. (d) of the present section, and must be instituted in the Court within the local limits of whose jurisdiction the property is situate (w). A suit to recover a share of the *sale-proceeds* of land that *have already been realized* is a suit for money governed by the provisions of s. 20 (x). But a suit by a vendor of land for the recovery of *unpaid purchase money* against a buyer who *refuses to complete the purchase*, is a suit “for the determination of any right to or interest in immovable property” within the meaning of cl. (d) (y). A suit by a mortgagee to recover the mortgage-debt from the mortgagor *personally* is a suit for debt governed by the provisions of s. 20. But if in addition to the claim against the mortgagor personally the mortgagee seeks to recover the mortgage-debt by *sale* of the mortgaged property, the suit will come under cl. (c) of the present section (z). A suit for maintenance is governed by the provisions of s. 20. But if in addition to the claim for maintenance the plaintiff claims that she is entitled to a *charge on immovable property* in the hands of the defendant, the case is one within cl. (d) of this section (a). A suit for dissolution of partnership with the usual ancillary reliefs is not a suit within cl. (d) merely because part of the partnership assets consists of a factory (b).

Clause (e): wrong to immovable property.—This refers to torts affecting immovable property, such as trespass (c), nuisance, infringement of easements, etc.

Proviso to the section.—The last paragraph of the section provides that suits to obtain relief respecting, or compensation for wrong to, immovable property, may be instituted *at the plaintiff’s option* either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose

(t) Transfer of Property Act, ss. 92-93, now O. 34, rr. 7-8.

(u) *Sakharam v. Vishram* (1895) 19 Bom. 207.

(v) *Chintaman v. Madhavrao* (1869) 6 B. H. C., A.C. 29.

(w) *Keshav v. Vinayak* (1899) 23 Bom. 22.

(x) *Venkata v. Krishnasami* (1883) 6 Mad. 314 ;

Ahmad v. Abdul Rehman (1904) 26 All. 603.

(y) *Maturi v. Kota* (1905) 28 Mad. 227.

(z) See *Vithalrao v. Vaghaji* (1893) 17 Bom. 570.

(a) *Sitabai v. Lazmitai* (1916) 40 Bom. 337.

(b) *Durga Das v. Jai Narain* (1917) 41 All. 513.

(c) *Crisp v. Watson* (1893) 20 Cal. 689.

jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain, provided—

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- (1) the property is held by or on behalf of the defendant ;
- (2) the relief sought can be *entirely* obtained through the personal obedience of the defendant (d), and
- (3) the property is situate in, and not beyond, British India (e).

Equity acts in personam.—We have in this proviso an application, though in a highly modified form, of the maxim *Equity acts in personam*. When it is said that *Equity acts in personam* what is meant is that the Court of Equity in England (now the Chancery Division of the High Court of Justice) has jurisdiction to entertain certain suits [suits in cls. (a), (b), and (e) of the present section being entirely excluded] respecting immovable property, though the property may be situate *abroad*, if the relief sought can be obtained through the *personal* obedience of the defendant. The *personal* obedience of the defendant can be secured only if the defendant resides within the local limits of the jurisdiction of the Court, or carries on business within those limits. For in the one case, the *person* of the defendant being within the jurisdiction, and, in the other, his *personal* property, if he does not comply with the judgment, the Court may *arrest the defendant* and commit him to jail, or *attach his goods* until he complies with the judgment of the Court (f). But if neither the person of the defendant nor his personal property is within the jurisdiction, the Court will not entertain a suit to obtain relief respecting immovable property situate beyond its jurisdiction, for the Court cannot in that event execute its decree either *in rem* or *in personam*, and a Court will not entertain a suit if it cannot enforce its own decree (g).

Suits in personam.—Suits in respect of which the Court of Equity in England exercises jurisdiction *in personam* are called suits *in personam*. The essential feature of suits *in personam* is that the land in respect of which the suit is brought is situate *abroad*, but the person of the defendant or his personal property is *within the jurisdiction* of the Court in which the suit is brought. The land being situate abroad, the decree cannot be executed *in rem*, that is to say, it cannot be executed against the *land*. But the person or the personal property of the defendant being within the jurisdiction, the decree can be executed *in personam*, that is to say, against the person or personal property of the defendant. It must, however, be noted that the only class of cases in which the Court of Equity in England has jurisdiction over suits relating to land situated abroad, are cases of *contracts, fraud, and trust*. Thus suits for specific performance of contracts for sale of land (h) and suits for foreclosure (i), sale (j) or redemption (k) in the case of a mortgage of land, are cases of *contract*, and the English Court of Equity will take cognizance of such suits, if the contract is made in England, and the defendant resides or carries on business in England, though the land may be situate abroad. Similarly, where lands abroad have been acquired by the *fraud* of a party residing in England, a suit to set aside the transaction will be entertained by the English Court of Equity (l). And the English Court of Equity will likewise entertain a suit to enforce *express trusts* affecting land situate in a foreign country, if the trustee is resident in England (m). But the Court of Equity in England has no jurisdiction to entertain suits for

(d) Westlake's Private International Law, p. 58.
 (e) *Krishnaji v. Gajanan* (1909) 33 Bom. 373.
 (f) *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444.
 (g) See *Trimbak v. Lackshman* (1896) 20 Bom. 495.
 (h) *Colyer v. Finch* (1856) 5 H. L. Ca. 905.
 (i) *Paget v. Ede* (1874) L. R. 18 Eq. 118.

(j) 2 Spence's Eq. Jur. 678.
 (k) *Bent v. Young* (1838) 9 Sim. 180, 190.
 (l) *Lord Cranstown v. Johnston* (1796) 3 Ves. 170.
 (m) *Nelson v. Bridport* (1846) 8 Beav. 547.

- S. 16. recovery (n) or for partition (o) of land, or for damages for trespass to land (p). [Compare with this cls. (a), (b), and (e) of this section.]

Actually and voluntarily "resides."—Clause 12 of the Charter provides that suits other than those for land may be brought in the Chartered High Courts if the defendant at the time of the commencement of the suit "*dwells or carries on business or personally works for gain*" within the local limits of the ordinary original jurisdiction of those Courts. There is no distinction between "residing" and "dwelling" used in its ordinary signification (q). The word "reside" is used in other parts of the Code sometimes in a narrower and sometimes in a more extended meaning; see s. 136, O. 3, r. 2, and O. 25, r. 1. But there does not appear to be any difference between "residing" within the meaning of ss. 16, 19 and 20 and "dwell" within the meaning of cl. 12 of the Charter. We therefore proceed to note the decisions bearing on the term "dwell."

"Dwell" within the meaning of cl. 12 of the Charter.—The dwelling or residence contemplated by clause 12 must be of a more or less permanent character. It must be of such a nature as to show that the High Court in which a defendant is sued is his natural *forum* (r). Hence it follows that where a party has got a permanent place of dwelling in one place, he cannot be said to "dwell" at a place where he has lodged for a temporary purpose only, *e.g.*, to defend a suit brought against him (s), or for a change while on leave (t). Every person is deemed in law to have a dwelling or place of residence, and where a person has no permanent place of residence, he will be deemed to "dwell" where he is actually staying at the time. Thus where a defendant, who was Political Agent at Kolhapur left Kolhapur, *en route* for England on a year's furlough, after having sold off his furniture and other effects at Kolhapur, where he lived in a house belonging to Government, and stayed in Bombay for three days before sailing for England, it was held that he "dwelled" in Bombay so as to give jurisdiction to the High Court in a suit instituted against him during his stay in Bombay (u). And in a Calcutta case, a racing man, who had come to Calcutta for a month for racing, was held to dwell in Calcutta, he having no other residence at the time when the suit was instituted against him (v).

A person may have more than one permanent place of residence at the same time. In such a case he will be deemed to "dwell" in any one of the places where he is actually staying for the time being, and he may be sued in that place. In *Orde v. Skinner* (w) the defendant, who had a dwelling-place at Mussoorie, was held under the circumstances of the case to have another dwelling-place at Bilaspur. Similarly, where a defendant spent his time alternately in Calcutta and the mufassal, it was held that he could be sued in Calcutta where he was residing at the time (x). But a person who has been living and carrying on business in Bombay for twenty years cannot be said to be residing at Ahmedabad because he has a family house at Ahmedabad which he visits occasionally; in such a case Ahmedabad cannot be said to be one of his places of residence (y). Where an *Acharya* (Hindu head-priest), who had his permanent place of residence at Nathdwara, came to Bombay in April 1889 at the invitation of his devotees, it being his first visit to Bombay since his installation on the *gadi* in 1875, and while in Bombay exchanged visits with his followers, and stayed in a house purchased by him in 1888,

(n) *In re Hawthorn* (1883) 23 Ca. D. 748.
 (o) *Cartwright v. Pettus* (1875) 2 Ch. Ca. 214.
 (p) *British South Africa Co. v. Companhia de Mocambique* (1893) A. C. 602, [1892] 2 Q. B. 558.
 (q) *Mahomed v. Laldin* (1879) 3 Bom. 227, 229; *Goswami v. Govardhanlalji* (1890) 14 Bom. 541, 547.
 (r) 14 Bom. 541, 552, *supra*.

(s) *Emritoll v. Kidd* (1864) 2 Hyde 119.
 (t) *Kavayi v. Wallace* (1863) 1 B. H. C. 113.
 (u) *Fernandez v. Wray* (1901) 25 Bom. 176.
 (v) *Morris v. Baumgarten* (1865) Coryton, 152.
 (w) (1881) 3 All. 91, 7 T. A. 196.
 (x) *Nishadiney v. Kalli* (1864) Coryton, 24.
 (y) *Ugar Chand v. Suraymal* (1900) 2 Bom. L. R. 605; *Gurandutta Mal v. Ram Das* (1916) P. H. no. 112, p. 343.

it was held in a suit brought against him in Bombay in May 1889, that he did not “dwell” in Bombay, it not having been shown that he had purchased the house for a Bombay residence intending to come to Bombay from time to time and live in it (z). Where a person who was domiciled and resided in Mysore left his house in charge of a servant, and hired a house in Madras to which he brought his wife and family, and apprenticed himself for a year to a Vakil in Madras, it was held in a suit brought against him in Madras some months after his residence there, that inasmuch as he had taken up his abode in Madras, meaning to remain there for several months, and was actually living there when the suit was instituted, he “dwelled” in Madras within the meaning of cl. 12 of the Charter (a).

Carries on business.—These words also occur in cl. 12 of the Charter, and the decisions under that clause will apply equally to cases arising under ss. 16, 19 and 20. For a person to be said to “carry on business” at a place, it is not necessary that he should have an office or a regular place of business there. Thus a person residing in the mufassal who goes once or twice a week from the mufassal to a friend’s house in Calcutta, and does business there, will be said to “carry on business” in Calcutta (b). Nor is it necessary that the business should be conducted by him *personally* (c). It may be carried on by an *agent* employed by him, but it is necessary in that event that the following three conditions should concur, namely,—

(1) The agent must be a *special agent* who attends *exclusively* to the business of the principal, and carries it on in the name of the principal, and not a *general agent* who does business for any one that pays him. Thus a trader in the mufassal, who habitually sends grain to Madras for sale by a firm of commission agents whose business it is to sell goods *for others* on commission, cannot be said to “carry on business” in Madras (d). So a firm in England, carrying on business in the name *A. B. & Co.*, which employs upon the usual terms a Bombay firm carrying on business *in the name of C. D. & Co.*, to act as the English firm’s commission agents in Bombay, does not “carry on business” in Bombay, so as to render itself liable to be sued in Bombay (e).

(2) The person acting as agent must be an *agent in the strict sense of the term*. The manager of a joint Hindu family is not an “agent” within the meaning of this condition (f).

(3) To constitute “carrying on business” at a certain place, the *essential* part of the business must take place in that place. Therefore, a retail dealer in the mufassal who gains his livelihood by the profit upon sales of his goods in the mufassal cannot be said to “carry on business” in Bombay, merely because he has an agent in Bombay to receive his goods from Europe, and to make purchases for him in Bombay and to forward the same to him up-country. In order that such a dealer may be said to “carry on business” in Bombay, it must also be shown that the agent made *sales* on behalf of the dealer in Bombay (g).

Has a British Indian Court jurisdiction to entertain a suit against a foreigner, who does not reside in British India, upon a cause of action that has arisen in a foreign country, if the foreigner carried on business through an agent in the local limits of that Court’s jurisdiction? This question was raised in a recent case before the Judicial Committee of the Privy Council, but it was not decided by their Lordships (h).

(z) *Goswami v. Goverdhanlalji* (1890) 14 Bom. 541.
 (a) *Srinivasa v. Venkata* (1911) 34 Mad. 257,
 38 I. A. 129.
 (b) *Greeschundar v. Collins* (1864) 2 Hyde 79.
 (c) *Muthaya v. Allan* (1881) 4 Mad. 209.
 (d) *Chinnammal v. Tulukannatammal* (1866)
 6 M. H. C. 146.

(e) *Khimji v. Forbes* (1871) 8 B. H. C. 102.
 (f) *Annamalai v. Murugasa* (1903) 26 Mad. 544,
 30 I. A. 220.
 (g) *Framji v. Hormasji* (1865) 1 B. H. C. 220.
 (h) *Annamalai v. Murugasa* (1903) 26 Mad. 544,
 30 I. A. 220.

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Business.—A Hindu priest, who receives presents and offerings from his followers in Bombay, and keeps an account thereof, cannot be said to “carry on business” in Bombay, though the offerings may be on so large a scale as to oblige him to employ servants to collect and keep an account of them. The expression “carry on business” is intended to relate to business in which a man may contract debts and ought to be liable to be sued by persons having business transactions with him (*r*). Zamindari business is not business of the kind contemplated by s. 20 (*j*) or by s. 16 or s. 19.

Personally works for gain.—The Government of this country cannot be said to “work for gain,” for whatever income is obtained by it is held for the benefit the Indian Exchequer (*k*).

17. [S. 19.] Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Suits for immoveable property situate within jurisdiction of different Courts.

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

Scope and object of the section.—The provisions of this section are intended for the benefit of suitors, the object being to avoid plurality of suits (*l*). *A* sues *B* in a Court in district *X* on a mortgage of two properties one situate in district *X* and the other in district *Y*. The Court in district *X* has jurisdiction under this section to order the sale not only of the property in district *X*, but the property in district *Y*, and also to sell in execution of its decree the property in district *Y* (*m*). It is not necessary for *A* to bring two suits one in the Court in district *X* and the other in the Court in district *Y*. In the above case there are two properties situate in different districts. It does not make any difference if it is one entire property situate in different districts (*n*). The same principle applies to suits for partition (*o*) and to suits for the recovery of immoveable property (*p*). But no partition can be made of property situated outside British India (*pp*).

A sues *B* in a Court in district *X* to recover possession of two properties one situate in district *X* and the other in district *Y*. The suit is compromised as regards the property situate in district *X*. This does not take away the jurisdiction of the Court in district *X* to proceed with the suit as regards the property situate in district *Y*, unless it be shown that the compromise was a mere contrivance to defeat the policy of the rule of procedure as to local jurisdiction (*q*).

Chartered High Courts.—This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s. 120). See notes to s. 16, “Chartered High Courts”.

(*q*) *Goswami v. Goverdhanlalji* (1890) 14 Bom. 204.

(*j*) *Nobin Chunder v. Buroda* (1873) 19 W. R. 341 ; *Anonymous Case* (1875) 23 W. R. 223.

(*k*) *Doya Narain v. Secretary of State* (1887) 14 Cal. 256, 273-74.

(*l*) *Harchand v. Lal Bahadur* (1894) 16 All. 359.

(*m*) *Maseyk v. Steel* (1887) 14 Cal. 661 ; *Gopi Mohan v. Doybaki* (1892) 19 Cal. 13 ; *Tinkouri v. Shib Chandra* (1894) 21 Cal. 630.

(*n*) *Shurroop Chunder v. Amirrunissa* (1882) 8 Cal. 703.

(*o*) *Khatija v. Ismail* (1880) 12 Mad. 380.

(*p*) *Kubra Jan v. Ram Bali* (1908) 30 All. 500.

(*pp*) *Ramacharya v. Anantacharya* (1893) 18 Bom. 389.

(*q*) *Khatija v. Ismail* (1889) 12 Mad. 380 ; *Kubra Jan v. Ram Bali* (1908) 30 All. 500.

18. [S. 16A.] (1) Where it is alleged to be uncertain Ss.
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Place of institution of
suit where local limits of
jurisdiction of Courts are
uncertain.

within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

“ And there has been a consequent failure of justice.”—These words are new. They have been added in order still further to restrict the taking of technical objections as to jurisdiction.

19. [S. 18.] Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Suits for compensation
or wrongs to person or
moveables.

Illustrations.

(a) *A*, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

Torts committed beyond British India.—This section contemplates torts committed in British India. Cases of torts committed beyond the limits of British India

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fall, it is submitted, within s. 20, and a Court in British India has jurisdiction to entertain a suit for damages for such tort, provided the defendant resides within the local limits of the jurisdiction of the Court at the time of the suit (r).

Other suits to be instituted where defendants reside or cause of action arises.

20. [S. 17.] Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain ; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution ; or
- (c) the cause of action, wholly or in part, arises.

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

○

Illustrations.

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

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(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Benares, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

Alterations in the section.—The words “wholly or in part” in cl. (c) are new. Explanation III to s. 17 of the Code of 1882, which related to causes of action in case of contracts, has been omitted in view of the addition of the words “wholly or in part” in cl. (c). See notes below “Cause of action in suits on contracts.”

Chartered High Courts.—This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s. 120).

Scope of the section.—The provisions of this section are to be read subject to the provisions of sections 16 and 19 (s). At common law, actions are transitory, such as actions on tort or contract, or local, such as actions of ejectment from land. Section 16 deals with local actions. Sections 19 and 20 deal with transitory actions. If we divide actions into real, personal, and mixed, we may say that section 16 deals with real and mixed actions. Mixed actions stand midway between real and personal actions; suits for compensation for wrong to immoveable property are an example of this kind. Real actions, that is, actions against the *res* or property, must be brought in the *forum rei sitæ*, that is, the place where the property is situate; and so must mixed actions. But personal actions may be brought in any place where the defendant can be found and hence they are called *transitory* actions as distinguished from *local* actions.

The present section provides that suits falling under it may be brought *at the plaintiff's option* (1) either where the cause of action arises or (2) where the defendant resides, or carries on business, or personally works for gain (t).

Actually and voluntarily resides.—See notes under the same head on p. 80 above. Note that the word “residence” in *this section* comprises also the *temporary* lodging of a defendant in respect of a cause of action arising at the place where he has such temporary lodging: see Explanation I to the section.

Carries on business.—See notes under the same head on p. 81 above. With this read Explanation II.

Acquiesce.—Under the Code of 1882 it was held that if a defendant, who did not reside within the local limits of the Court in which the suit was brought, did not apply for a stay of proceedings under section 20 of that Code, he should be deemed to have “acquiesced” within the meaning of clause (b) (u). But section 20 of the Code of 1882 has been omitted from this Code, there being sufficient provision made for transfers under section 22 of this Code. It would, therefore, seem that a defendant, who does not apply for a transfer under section 22 will be deemed to have “acquiesced” within the meaning of clause (b) of the present section.

Leave of Court.—The leave to sue referred to in clause (b) may be given even after the institution of the suit (v).

(s) *Fazlur Rahim v. Dwarka Nath* (1903) 30 Cal. 453.

(t) *Ratnagiri v. Syed Vava* (1896) 19 Mad. 477.

(u) *Venkata v. Krishnasami* (1883) 6 Mad. 344;

Ramappa v. Ganpat (1906) 30 Bom. 81.

(v) *Narayan v. Secretary of State* (1906) 30 Bom. 570.

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Cause of action.—"Cause of action" means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle him to a decree (*w*). It is a bundle, in other words, of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit (*x*). It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour (*y*). A cause of action, it need hardly be stated, must be *antecedent* to the institution of the suit (*z*).

Cause of action in suits on contracts.—In a suit for damages for breach of contract, the cause of action consists of the *making* of the contract and of its *breach* in the place where it ought to be performed (*a*). Hence in the case of a contract, the *whole* cause of action would be said to have arisen at a particular place, say Poona, if the contract was made in Poona and the breach of it also took place at Poona. But if the contract was made in Belgaum, and the breach took place at Poona (where it was to be performed), or if it was entered into in Poona, and the breach took place in Belgaum (where it was to be performed), part of the cause of action would be said to have arisen in Belgaum and part in Poona. If the *whole* cause of action arose in Poona, a suit on the contract could be brought in the Court at Poona. If part only of the cause of action arose in Poona, and part in Belgaum the suit may be instituted in the Poona Court or in the Belgaum Court (*b*) [see cl. (c)].

As regards the making of a contract it may be said that a contract will be presumed to have been "made" at the place where, on the face of it, it purports to have been made, though it may have been actually made elsewhere. Thus a promissory note dated at Bellary will be presumed to have been made at Bellary, though it may have been actually signed at another place (*c*). When a contract is concluded by postal communication, it will be deemed to have been "made" at the place where the letter of acceptance is posted (*d*). And where the acceptance of a proposal consists of the performance of the condition of the proposal, the contract will be deemed to have been "made" at the place where the condition is performed (*e*). A, residing at Karwar sends a sum of money to his agent in Bombay to pay the same to B, a resident of Bombay, if B undertakes to purchase goods for him in Bombay and ship them to him at Karwar. B receives the money, but fails to ship the goods. A sues B at Karwar to recover the amount paid to him. The Court at Karwar has no jurisdiction to entertain the suit, for the whole cause of action arose in Bombay. The contract is *made* in Bombay, for the money is received by B in Bombay. And the place of *performance* is also Bombay, for the goods are to be purchased in Bombay and shipped from that place (*f*).

(w) *Read v. Brown* (1888) L. R. 22 Q. B. D. 128, 131; *Murti v. Bhola Ram* (1893) 16 All. 165 [F. B.]

(x) *Dhanjishaw v. Ffords* (1887) 11 Bom. 649; *Musa v. Mamlat* (1905) 29 Bom. 368; *Raghoonath v. Gobindnarain* (1895) 22 Cal. 451.

(y) *Chand Kour v. Partab Singh* (1889) 16 Cal. 98, 102, 15 I. A. 156.

(z) *Mahat Gobind v. Ranir Debendrabala* (1919) 4 Pat. L. J. 387, 393.

(a) *Dhunjisha v. Ffords* (1887) 11 Bom. 649, 652; *Rampurab v. Premeuk* (1891) 15 Bom. 93.

Dobson v. Bengal Spg. and Wey. Co. (1897) 21 Bom. 126; *Seshagiri v. Nawab Askar* (1904) 27 Mad. 494.

(b) *Bhag Singh v. Labh Singh* (1916) P. R. no. 93, p. 281; *Punjab Mutual Hindu Family Relief Fund v. Sardari* (1918) P. R. no. 93, p. 325; *Sita Ram v. Ram Chandra* (1918) P. R. no. 26, p. 105.

(c) *Meenakshi v. Muls* (1905) 28 Mad. 19.

(d) *Kamisetti v. Katha* (1904) 27 Mad. 355.

(e) *Sitaram v. Thompson* (1905) 32 Cal. 884.

(f) *Dadabhai v. Diogo* (1894) 18 Bom. 43.

As regards *breach* of a contract, it is to be noted that where a place is named in the contract for its performance, the suit may be brought in the Court within the local limits of whose jurisdiction the contract was to be performed or performance thereof completed. Where no place of performance is named in the contract, the intention of the parties must guide the Court in determining the place of performance (*g*). The mere fact that the creditor is described in a promissory note as residing at *K* does not make *K* the place of payment so as to give jurisdiction to the Court at *K* (*h*). Further, if any money is or becomes payable by one party to a contract to another in performance of the contract, and the money is not paid, the suit may be brought in the Court within the local limits of whose jurisdiction such money was expressly or impliedly payable. Thus where *A* and *B* entered into an agreement at Rutlam to carry on business in partnership at Muttra, and after the business was carried on for some time the partnership was dissolved, and a sum of Rs. 1,00,000 was found due by *B* to *A* on taking the accounts at Muttra, it was held by their Lordships of the Privy Council that *A* could sue *B* at Rutlam to recover the amount, that being the place where the contract was made, or he could sue him at Muttra, that being the place where the balance was struck and the amount became due and payable (*i*). Similarly, if goods are sold according to sample in Bombay and they are paid for in Bombay, but under the contract they are to be delivered at Allahabad, the purchaser may sue the vendor in the Allahabad Court for recovering back the price of the goods if they are not according to the sample. The question in such a case is whether the place of delivery is an essential part of the contract (*j*). In a Bombay case, *A*, a merchant in Bombay, ordered goods from *B*, a commission agent at Phulgaon. *A* sued *B* in Bombay for the amount due to him at the foot of the accounts between him and *B*. The Court held that as (1) instructions were sent by *A* to *B* from Bombay, (2) accounts were rendered to *A* at Bombay, and (3) demand was made for the payment of the amount due from Bombay, the payment of money was to be in Bombay, and a material part of the cause of action arose in Bombay (*k*). But where *A* sued *B* at Madras for services rendered to *B* at Hyderabad where also the contract was made, alleging that after the work had been done, *B* promised to pay in Madras, it was held that as there was no consideration for the promise to pay in Madras, there was no contract in law to pay in Madras, and therefore there was no breach of a contract in Madras so as to enable *A* to sue *B* in Madras (*l*).

D draws a hundi at Benares on his firm at Bombay in favour of B. P. & Co., a firm at Calcutta. The hundi is then endorsed by B. P. & Co. at Calcutta to *P*. The endorsement having taken place in Calcutta, part of the cause of action arose at Calcutta. *P* may therefore sue *D* in the Calcutta High Court after obtaining leave to sue under clause 12 of the Charter (*m*). No leave would be necessary under the present section if the endorsement took place outside the limits of the original jurisdiction of a Chartered High Court.

Before leaving this subject it may be observed that the corresponding section of the Code of 1882 contained an Explanation being Explanation III, which ran as follows:

“*Explanation III*.—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely:

- (i) the place where the contract was made;

(*g*) *Dhunjisha v. Ffords* (1887) 11 Bom. 640;
Muhammad v. Muhammad (1916) P. R.
 no. 2, p. 3.
 (*h*) *Raman v. Gopalachari* (1908) 81 Mad. 223.
 (*i*) *Lucknee Chund v. Zohour Mul* (1880) 8
 M. I. A. 291; *Darragh & Co. v. Purshotam*
 (1881) 4 Mad. 372.

(*j*) *Sheo Charan v. Taj Bhai* (1917) 39 All. 368.
 (*k*) *Motilal v. Surajmal* (1906) 30 Bom. 167.
 (*l*) *Seshagiri Row v. Nawab Askur Jung* (1907)
 30 Mad. 438. See also *Kamiseti v. Katha*
 (1904) 27 Mad. 355.
 (*m*) *Raghoonath v. Gobindnarrain* (1895) 22 Cal.
 451.

- S. 20. (ii) the place where the contract was to be performed or performance thereof completed ;
- (iii) the place where, in performance of the contract, any money to which the suit relates was expressly or impliedly payable."

That Explanation was added into the old section in the year 1888 to remove a doubt as to whether a suit on a contract could be instituted in the Court within the local limits of whose jurisdiction the cause of action arose only *in part*. The doubt arose from the fact that that section provided for the institution of a suit in the Court within the local limits of whose jurisdiction "the cause of action" arose, and it was not clear whether the expression "cause of action" meant the whole cause of action or included also a part of the cause of action. Explanation III left no doubt that a suit on a contract could be instituted in a Court within the local limits of whose jurisdiction the cause of action arose *wholly or in part*. As Explanation III was confined to suits on contracts only the question arose whether a suit other than one on a contract could be instituted in a Court within the local limits of whose jurisdiction the cause of action arose *in part only*, and it was held that as in the case of suits arising out of contract, so in the case of other suits, it was enough to give a Court jurisdiction over the suit if the cause of action arose in part only within the local limits of the Court (*n*). The addition of the words "wholly or in part" in cl. (c) after the words "cause of action" makes it quite clear that a suit, *whether it arises out of contract or not*, may be instituted in a Court within the local limits of whose jurisdiction the cause of action arose *wholly or in part* (*o*). It has also rendered Explanation III unnecessary, and the same has accordingly been omitted. But decisions bearing on that Explanation are still good law, and they have been retained in the present commentary.

Cause of action in other suits.—A suit for restitution of conjugal rights may be brought in the Court of the place where the husband resides, or it may be brought in the Court of the place where the wife resides (*p*). A suit by a guardian for the custody of his ward removed by the defendant from Allahabad to Lahore may be brought in the Court at Lahore, or it may be brought in the Court at Allahabad (*q*). A suit for damages for infringement of a trade mark may be brought in the Court of the place where the defendant resides or in the Court of the place where the defendant publishes advertisements constituting infringement of the trade mark (*r*).

Place of suing where a decree is impeached on the ground of fraud :—

(1) *A* obtains a decree against *B* in the Court at Krishnagar (in Nadia). The decree is sent for execution to the Court at Katwa (in Burdwan). In execution of the decree *B*'s property in Katwa is sold by the Katwa Court. *B* sues *A* in the Katwa Court (1) to have the decree set aside on the ground that it was obtained by fraud, and (2) to set aside the sale. The question is whether the Katwa Court has jurisdiction to entertain the suit. Here the cause of action consists of two parts, one of which arose at Krishnagar, being the passing of the decree, and the other at Katwa, being the sale of *B*'s property there. Part of the cause of action having arisen at Katwa, the Katwa Court has jurisdiction to entertain the suit under this section, though the decree sought to be set aside was passed by the Krishnagar Court (*s*).

(n) See *Banke Behari Lal v. Pokha Ram* (1903) 25 All. 48.

(o) *Salig Ram v. Chaha Mal* (1911) 34 All. 49, 53.

(p) *Lalitagor v. Bai Suraj* (1894) 18 Bom. 316. As to suits under the Indian Divorce Act, 1869, see *Nusserwanjee v. Elenora* (1913)

38 Bom. 125, at p. 148.

(q) *Sarat Chandra v. Forman* (1890) 12 All. 213.

(r) *Kheshta Pal v. Pancham Singh* (1915) 37 All. 44.

(s) *Kedar Nath v. Prosonna Kumar* (1901) 5 Cal. W. N. 559.

(2) *A* obtains a decree against *B* in the High Court of Calcutta. The decree is transmitted for execution to the District Court of Cawnpore. *A* applies for execution of the decree to the District Court of Cawnpore by attachment and sale of *B*'s property in Cawnpore. *B* sues *A* in the District Court of Cawnpore (1) for a declaration that the decree is inoperative the same having been obtained by fraud, and (2) for an injunction restraining *A* from executing the decree against his property in Cawnpore. Here also part of the cause of action having arisen at Cawnpore, namely, the application by *A* to the Cawnpore Court to attach *B*'s property in Cawnpore, the Cawnpore Court has jurisdiction to entertain the suit, though the decree impeached as fraudulent was passed by the High Court of Calcutta (*t*).

(3) *A* obtains a decree against *B* in the Small Cause Court at Calcutta. The decree is transferred for execution to the Munsif's Court at Agra. *B* sues *A* in the Munsif's Court at Agra to have the decree set aside on the ground that it was obtained by fraud. Has the Agra Court jurisdiction to entertain the suit? It has been held that it has not, for the suit being *solely* to set aside the decree, there is no part of the cause of action that has arisen in Agra. The only cause of action is the obtaining of the decree by fraud and it arose in Calcutta where the decree was obtained (*v*).

Suits against corporations: Explanation II.—Irrespective of the Companies Act, the domicile of a trading company is fixed by the situation of its principal place of business (*v*), that is to say, its chief office, where the central management and control are actually to be found (*w*). In the case of a company registered under the Companies Act the controlling power is, as a fact, generally exercised at the registered office, and that office is therefore, not only for the purposes of the Act, but for other purposes, the principal place of business (*x*). This is not, however, necessarily the case (*y*); and the question whether that or some other place is the principal place of business of the company is in each case a pure question of fact to be determined upon a scrutiny of the course of business and trading (*z*).

Clause 12 of the Charter.—As already stated, sections 16 and 20 do not apply to Chartered High Courts. Under clause 12 of the Charter, the High Courts of Calcutta, Madras and Bombay are empowered to try the following suits in the exercise of their ordinary original civil jurisdiction :—

I. *Suits for land*, if the land is situated wholly within the local limits of the said jurisdiction; or, if a *part* thereof only is situated within the said limits, with the leave of the Court previously obtained.

II. *Suits other than those for land*,

- (i) if the whole cause of action has arisen within such limits;
- (ii) if *part* only of the cause of action has arisen within such limits with the leave of the Court previously obtained;
- (iii) if the defendant, at the time of the commencement of the suit, dwells, or carries on business, or personally works for gain, within such local limits.

(*t*) *Banke Behari v. Pokhe Ram* (1903) 25 All. 48;
Jawahar v. Nekiram (1914) 37 All. 189;
Khashali Ram v. Gokul Chand (1917) 39 All. 607. Contra *Dan Dayal v. Munnatal* (1914) 36 All. 564.
(*u*) *Umrao Singh v. Hardeo* (1907) 29 All. 418.
(*v*) *Jones v. Scottish Accident Insurance Co.* (1886) 17 Q. B. D. 421.
(*w*) *Ibid*; *De Beers Consolidated Mines, Ltd. v*

Howe [1906] A. C. 455, 458.
(*x*) *Watkins v. Scottish Imperial Insurance Co.* (1889) 23 Q. B. D. 285.
(*y*) *Keynsham Blue Lias Co. v. Barker* (1863) 2 H. & C. 720.
(*z*) *De Beers Consolidated Mines, Ltd. v. Howe* [1906] A. C. 455. Halsbury vol. V, p. 15, Art. 6.

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20, 21.

Distinguishing cl. 12 of the Charter from the provisions of the present section, it may be said that in the case of a suit other than a suit for land, a Chartered High Court has no jurisdiction to entertain the suit, unless the whole cause of action has arisen within the local limits of its ordinary original civil jurisdiction, or if part only of the cause of action has arisen within such limits, *unless the leave of the Court has been previously obtained*. No such leave is necessary if the suit is brought in a Court to which the provisions of the present section apply : see cl. (c).

Suits against non-resident foreigners.—We now proceed to consider the applicability of the section where the defendant is a foreigner residing out of British India. If a foreigner (that is, a non-British subject) resides, or *himself* carries on business, or *personally* works for gain, in British India, it is clear that he is amenable to the jurisdiction of British Indian Courts. But what if a foreigner does not reside or does not *himself* carry on business, or *personally* work for gain, in British India, and

- (1) the *cause of action* arises within the local limits of a British Indian Court, or
- (2) the cause of action also does not arise within the local limits of any British Indian Court (i.e., it arises in a foreign country), but he carries on business *through his agent* within the local limits of a British Indian Court ?

As to case (1), it is settled that a non-resident foreigner, who is a subject of a protected Native State, may be sued in the Court of British India, if the *cause of action* arises within the jurisdiction of such Court (a). Thus if A, a subject of the Native State of Sangli, and resident therein, borrows money from B at Belgaum, B may sue A for recovery of the money in the Belgaum Court, for the cause of action has arisen at Belgaum.

As to case (2), the point was raised in a recent case before their Lordships of the Privy Council, but was not decided by their Lordships (b).

21. [New.] No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

Objections to jurisdiction.

This section is new. It proceeds on the lines of the Suits Valuation Act, 1887, s. 11.

Scope of the section.—This section relates to objections *as to the place of suing* and has reference to sections 15 to 20 above. The section does not deal with objections going to the nullity of a decree or order on the ground of want of jurisdiction. Thus the Court of a district subject to the Code of Civil Procedure has no jurisdiction under s. 17 to entertain a suit so far as it claims a sale of mortgaged land situated in a scheduled district [see. s. 1 (3)]. If a decree, therefore, is passed by such a Court for a sale of land so situated, it can be set aside although no objection was taken to the jurisdiction in the Court of first instance (c).

(a) *Ram Ravji v. Pralhaddas* (1896) 20 Bom. 133 ;
Girahar v. Kassigar (1893) 17 Bom. 662 ;
Tadepalli v. Nawab Sayed (1906) 29 Mad.
 69 ; *Annamalai v. Murugasa* (1903) 26
 Mad. 544, 30 I. A. 220 ; *Rambhai v. Shan-*
kar (1901) 25 Bom. 528.

(b) *Annamalai v. Murugasa* (1903) 26 Mad. 544,
 30 I. A. 220.
 (c) *Setruchariv v. Maharaja of Jeypur* (1919)
 46 I. A. 151, 42 Mad. 813.

Absence of jurisdiction.—Where a Court has no inherent jurisdiction over the subject-matter of a suit, its decree is a nullity, though the parties may have consented to the jurisdiction of the Court (d). The reason is that jurisdiction over the subject-matter of a suit is given only by law, and cannot be conferred by consent of parties. “When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper *judicial* process, although they may constitute the Judge their *arbitrator*, and be bound by his decision on the merits when those are submitted to him” (e). See notes below, “Waiver of plea to jurisdiction.” See also Presidency Small Cause Court Act, 1882, s. 20.

Objection to jurisdiction, when to be raised.—The plea of want of jurisdiction may be taken at any stage of the proceedings (f). Thus it may be taken for the first time in appeal (g), or in second appeal (h), or revision (i), and even after remand by the High Court in second appeal (j), provided that in all these cases the objection is *patent on the face of the proceedings*. When a decision given by a Court having no inherent jurisdiction to try a case is sought to be set aside in revision, the High Court may, in the exercise of its discretion, refuse to set aside the order if greater evil will result from setting aside the order than from allowing the order to stand (k).

In a recent case, when the objection to jurisdiction was taken in the Court of the first instance, but it was not taken on appeal to the High Court nor on the appeal to the King in Council, and the point was again raised in argument before the Privy Council their Lordships entertained the objection, and said: “Seeing that it is a question of jurisdiction, and *depends on no disputed facts*, their Lordships are of opinion that they cannot decline to entertain it although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument” (l).

There are two cases, however, in which an objection on the ground of want of jurisdiction will not be allowed by an appellate or revisional Court, namely:—

1. Where a suit has been instituted in a Court which, having regard to the provisions of ss. 15 to 20, has no jurisdiction to entertain it. In such a case it is provided by the present section that the objection as to jurisdiction will not be allowed in appeal or in revision, (1) unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and (2) unless there has been a consequent failure of justice (m). Note that the section is confined to objections to jurisdiction as regards the *place of suing*.

2. Where a party has under-valued his claim, and brought the suit in a Court which would have had no jurisdiction to try the suit had the suit been properly valued. In such case, it is provided by the Suits Valuation Act, 1887, s. 11, that the objection as to jurisdiction will not be entertained in appeal or in revision, (1) unless the objection was taken before the Court of first instance at or before the settlement of issues, or (2)

(d) *Rajlakhmi v. Katyayani* (1910) 38 Cal. 639, 668-669.

(e) *Ledgard v. Bull* (1887) 9 All. 191, 13 I. A. 134. *Minakshi v. Subramanya* (1888) 11 Mad. 26, 14 I. A. 100; *Babaji v. Lakshmi Bai* (1885) 9 Bom. 266; *Prabhakarbhut v. Vishwambhar* (1884) 8 Bom. 313, 317; *Government of Bombay v. Ramalinga* (1872) 9 B. H. C. 242. See Halsbury's Laws of England, Vol. 1, p. 442.

(f) *Nidhi Lal v. Mazhar Husain* (1885) 7 All. 230.

(g) *Ramaya v. Subbarayudu* (1890) 13 Mad. 25; *Motilal v. Jamnadas* (1865) 2 B. H. C. 40.

(h) *Bapuji v. Umedbhai* (1871) 8 B. H. C. A. C. 245; *Sudheswar v. Harihar* (1888) 12 Bom. 155; *Sayad v. Nana* (1889) 13 Bom. 424; *Velayudam v. Arunachala* (1890) 13 Mad. 273; *Narayan v. Gangaram* (1909) 33 Bom. 664, 667.

(i) *Bibi Ladli v. Bibi Raja* (1889) 13 Bom. 650.

(j) *Keshav v. Vinayak* (1889) 23 Bom. 22.

(k) *Dayaram v. Govardhandas* (1904) 28 Bom. 458.

(l) *Maha Prasad v. Ramani Mohan* (1914)

42 Cal. 116, 136, 41 I. A. 197, 204.

(m) *Ratti Ram v. Kundan Lal* (1914) P. R. no. 87, p. 316.

- S. 21. unless the under-valuation has prejudicially affected the disposal of the suit on its merits (n).

In a recent case a suit which, having regard to its *pecuniary value*, ought to have been instituted in a Court of a lower grade was instituted in a Court of a higher grade, but no objection was taken to it by the defendant. An appeal from the decree was preferred to the High Court. The defendant contended that having regard to the value of the subject-matter of the suit, the appeal lay only to the District Court and that the appeal to the High Court was not competent. The Judicial Committee held that the defendant not having objected to the jurisdiction of the trial Judge, could not dispute the jurisdiction of the High Court to entertain the appeal (o).

Waiver of plea to jurisdiction.—Where a Court has *no jurisdiction* over the subject-matter of a suit, no waiver on the part of the defendant can confer jurisdiction upon the Court. “When no jurisdiction exists no action on the part of the plaintiff, no inaction on the part of the defendant, can invest the Court with any of the elements of power or of vitality, so as to convert the proceeding before it into a proper judicial process” (p). The question of waiver to the plea of jurisdiction can only arise where a Court *has* jurisdiction over the subject-matter, but there are *irregularities in the initial procedure* which, if objected to at the time, would have led to the dismissal of the suit. As observed by their Lordships of the Privy Council “when in a cause which the Judge is *competent* to try, the parties without objection join issue and go to trial *upon the merits* the defendant cannot subsequently dispute his jurisdiction upon the ground that there were *irregularities in the initial procedure* which, if objected to at the time, would have led to the dismissal of the suit” (q). A sues B for infringement of a patent in the Court of a Subordinate Judge. The Subordinate Judge has no jurisdiction to try the suit and it ought to have been instituted in the District Court. A then applies to the District Court under s. 24 below for a transfer of the suit to its file. B may object to the transfer, for an order of transfer under s. 24 could not be made *unless the suit was in the first instance brought in a Court having jurisdiction*. If B does not object, and the order of transfer is made, it is open to him to object even after the order has been made, and the Court is bound to entertain the objection. But if he *waives* his objection to the trial of the suit by the District Court, and agrees that the case should be tried on its merits by that Court, he will be precluded by reason of his consent from subsequently disputing the jurisdiction of the Court. Note that here the District Court *has* jurisdiction to try the suit. But the suit having been first brought in the Court of a Subordinate Judge which had no jurisdiction to try the suit, the District Court could not transfer the suit to its file. If the order of transfer is made, it is an “irregularity in the initial procedure,” and if no objection is made thereto, the decree will bind the parties. In the undermentioned case, there was no evidence of waiver of the plea to the jurisdiction on the part of B, and the Privy Council held that A’s suit having been brought in the Court of the Subordinate Judge should be dismissed (r).

Objection to jurisdiction : procedure to be followed.—Where a suit is instituted in a Court that has no jurisdiction to entertain it, the proper course is not

- (n) See *Hamidunnissa v. Gopal* (1897) 24 Cal. 661 [a case of over valuation] *Jose Antonio v. Francisco* (1910) 35 Bom. 24. See also *Rajlakhmi v. Katyayani* (1910) 38 Cal. 638, 666-672.
(o) *Rachappa v. Shidappa* (1919) 46 I. A. 24; 21 Bom. L. R. 459.
(p) *Rajlakhmi v. Katyayani* (1910) 38 Cal. 630, 669.
(q) *Ledgard v. Bull* (1887) 9 All. 191, 13 I. A. 134; *Naro v. Anpurnabai* (1887) 11 Bom. 160, 170, 171; *Sankamani v. Ikoran* (1890)

- 13 Mad. 211; *Kondaji v. Anau* (1888) 7 Bom. 448; *Fakharuddin v. Official Trustees of Bengal* (1882) 8 Cal. 178, 191-192, 8 I. A. 197; *Khenna v. Budoloo* (1881) 6 Cal. 251; *Sadasiva v. Ramalinga* (1875) 15 B. L. R. 383, 2 I. A. 219; *Jose Antonio v. Francisco* (1910) 35 Bom. 24; *Raghu Singh v. Usuf Ali* (1919) 4 Pat. L. J. 202.
(r) *Ledgard v. Bull* (1887) 9 All. 191, 200, 13 I. A. 134, 142.

to dismiss the suit, but to return the plaint to the plaintiff to be presented to the proper Court, and this may be done *at any stage* of the suit (s). See O. 7, r. 10.

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22. [S. 22.] Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

Power to transfer suits which may be instituted in more than one Court.

Power of Court to stay suit pending before it.—Sections 22-24 deal with the power of the Court to transfer, not with the power of the Court to stay. But a Court has inherent jurisdiction to stay any suit which is an abuse of the process of the Court. Whether the institution of a suit in a particular Court is an abuse of the process of the Court is a question of fact in each case. *A* sued *B* in the Bombay High Court for damages for defamation alleged to be contained in the *Bombay Gazette*, a daily journal published in Bombay. *A* and *B* both reside at Wardha in the Central Provinces. *B* applies for an order that the suit be stayed and the plaint returned to *A* in order that, if *A* thought proper, it may be presented to the Court at Wardha. The grounds of the application are that neither he (*B*) nor the plaintiff (*A*) resides or carries on business in Bombay, and that all his (*B*'s) witnesses reside at Wardha. These facts are not sufficient to support *B*'s application for a stay of the suit in the Bombay Court (*t*).

After notice and at or before settlement of issues.—The words of this section are mandatory, and therefore notice must be given before the application is made, and the application must be made, in a case where issues are settled, at or before such settlement (*u*).

Power of High Court to stay suit pending in another Court.—See notes under the same head to O. 39, r. 1.

23. [Ss. 22, 23, 24.] (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

To what Court application lies.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(s) See *Prabhakarbhat v. Vishwambhar* (1884) 8 Bom. 313; *Babaji v. Lakshmi Bai* (1885) 9 Bom. 286; *Ladhaji v. Hari* (1899) 23 Bom. 679; *Muttirulandi v. Kottanyan* (1887) 10 Mad. 211.
(t) *Gefferet v. Ruckchand* (1889) 13 Bom. 178;

Hindustan Assurance, Ltd. v. Rai Mulra (1914) 27 Mad. L. J. 645; *Shiv Parshad v. Kanhaya* (1910) P. R. no. 187, p. 444. See also *Norton v. Norton* [1908] 1 Ch. 871.
(u) *Gulab Chand v. Sher Singh* (1917) P. R. no. 11, p. 40.

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23, 24.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

Note that s. 20 of the Code of 1882, which provided for a stay of proceedings, has been omitted, as sufficient provision has been made for transfers under the present section.

Two suits in two Courts under different High Courts.—Where two suits between the same parties are pending in two Courts under two different High Courts, either High Court may direct the suit pending in the Court subordinate to it to be transferred to the other Court (*v*).

24. [S. 25.] (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

General power of transfer and withdrawal.

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or
- (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
 - (i) try or dispose of the same ; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same ; or
 - (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

S. 24.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Alterations in the section.—These have been noted in their appropriate place in the commentary below.

Form.—For form of notice of application, see App. H, form no. 2.

Jurisdiction.—An order for the transfer of a suit from one Court to another cannot be made under this section unless the suit has been *in the first instance* brought in a Court *having jurisdiction*; such an order, if made, is void. And even though it may have been made by *consent* of parties, it is open to either party, notwithstanding such consent, to contend that it is void. But if, after the transfer is made, the parties without objection join issue and go to trial *upon the merits*, the order of transfer cannot subsequently be impeached (*w*). See notes to s. 21, “Waiver of plea to jurisdiction”, p. 92 above. The same rule applies to appeals (*x*).

General powers of transfer.—It is a well-known maxim of law that the plaintiff is the person to choose where his suit shall be brought provided that he chooses a *forum* which the law allows him to choose. The transfer of a suit is an extraordinary matter, and the Court should not transfer a suit against the plaintiff's will without good cause. Where an application, therefore, was made by the defendants for the transfer of a suit on a mortgage from the Court of the Subordinate Judge of Benares to the Court of the Subordinate Judge of Allahabad on the ground that a very large proportion of the properties mortgaged by the defendants to the plaintiff was situated in Allahabad and that most of their witnesses resided in Allahabad, it was held that those facts did not constitute a good cause for transferring the case and the application was refused (*y*).

“After giving notice.”—Want of notice does not render the order of transfer void (*z*).

“At any stage.”—Under the corresponding section of the Code of 1882, it was held by the High Courts of Bombay, Madras and Allahabad that a suit could be transferred or withdrawn at any stage, though it might be *part heard*, and even in the course of *execution proceedings* (*a*). On the other hand, it was held by the High Court of Calcutta that no order of transfer could be made after the hearing had once commenced, and that the Court had no power to make an order of transfer in execution proceedings (*b*). The words “at any stage” have been added to make it clear that a suit can be transferred even after the hearing has commenced.

“Pending before it.”—Under the corresponding section of the Code of 1882 it was held that a District Judge had no power to transfer to a Subordinate Court a suit pending before himself (*c*). Under cl. (a) of the present section the High Court and the District Court have the power conferred upon them to transfer a suit or appeal, though it may be pending before them.

District Court.—District Court in this section means a Court of *unlimited* pecuniary jurisdiction. An order of transfer under this section cannot therefore be made by an Assistant Judge whose pecuniary jurisdiction is *limited* to suits of a certain value (*d*).

(*w*) *Ledgard v. Bull* (1887) 9 All. 101, 13 I. A. 134.

(*x*) *Ram Narain v. Parmeshwar* (1898) 25 Cal. 39.

(*y*) *Madho Prasad v. Moti Chand* (1910) 41 All. 381.

(*z*) *Sankumani v. Ikoran* (1890) 13 Mad. 211.

(*a*) *In re Balaji* (1881) 5 Bom. 680; *Nasarranji v. Kharsetji* (1898) 22 Bom. 778; *Mulla-*

lapuri v. Muttayyar (1883) 6 Mad. 357; *Pala-*

nasami v. Thondama (1903) 26 Mad. 595;

Bandhu v. Lakhi (1885) 7 All. 342.

(*b*) *Kishori Mohun v. Gul Mohamed* (1888) 15

Cal. 177.

(*c*) *Sakharam v. Gangaram* (1889) 13 Bom. 654.

(*d*) *Haji Umar v. Gustadiji* (1910) 34 Bom. 411.

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24, 25.

"Clause (a): Court subordinate to it."—*W* obtains a decree in a suit filed by her in the Court of the Divisional Judge, Nagpur Division, for dissolution of marriage under the Indian Divorce Act 4 of 1869. The decree is then confirmed by the High Court of Bombay. *A* then applies for alimony to the High Court of Bombay. The proper Court to entertain the application is not the High Court, but the Nagpur Court. Nor has the High Court power under this section to transfer the proceedings to the Nagpur Court, the latter Court not being a Court subordinate to the High Court within the meaning of cl. (a) of sub-s. (1) of this section (*e*).

Clause (b): other proceeding.—A District Court has power under this clause to withdraw to its own file proceedings in execution transmitted by it to a Subordinate Court (*f*).

Re-transfer.—Under the corresponding section of the Code of 1882 it was held that where a District Judge had once transferred a case to his own file from the file of a Subordinate Court, he could not afterwards re-transfer the case to that Court (*g*). Under the present section he has such power: see cl. (b), sub-cl. (iii).

Suit transferred or withdrawn from a Court of Small Causes.—It has been held by the High Court of Allahabad (*h*) and Madras (*i*), that the expression "Court of Small Causes" in the last clause of this section includes a Court vested with the powers of a Court of Small Causes. On the other hand, it has been held by the High Courts of Bombay and Calcutta that that expression means a Court of Small Causes constituted under the Provincial Small Cause Courts Act, 1887, and that it does not include a Court vested with the powers of a Court of Small Causes under another Act (*j*).

As a result of the provisions of sub-s. (4), the procedure of the Court to which a suit is transferred from a Court of Small Causes is governed by the provisions of the Provincial Small Cause Courts Act (*k*), and, further, no appeal lies from the decree of that Court in cases in which no appeal lies from decrees of a Court of Small Causes (*l*).

Transfer of suit from Presidency Small Cause Court to High Court.—See notes to cl. 13 of the Letters Patent.

Power of Court to stay suit pending before it.—See notes under the same head to s. 22 above.

Power of High Court to stay suit pending in another Court.—See notes under the same head to O. 39, r. 1.

25. [Ss. 20-21.] (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the

Power of Governor-General in Council to transfer suit.

(*e*) *Wallace v. Wallace* (1916) 40 Bom. 109.
(*f*) *Vellappa v. Subrahmanyam* (1916) 39 Mad. 486.
(*g*) *Amir v. Prahlad* (1902) 24 All. 304; *Nandan v. Kenney* (1902) 24 All. 356.
(*h*) *Mangal v. Rup Chand* (1891) 13 All. 324; *Sukha v. Raghunath Das* (1917) 39 All. 214; *Chatur Singh v. Musammal Rania* (1918) 40 All. 525.

(*i*) *Sankararama v. Padmanabha* (1915) 38 Mad. 26.
(*j*) *Ramchandra v. Ganesh* (1899) 23 Bom. 382; *Dulal v. Ram Narain* (1904) 31 Cal. 1057.
(*k*) *Chhotey Lal v. Lakshmi Chand* (1916) 38 All. 425. See also *Ugrah Singh v. Motihari Co., Ltd.* (1919) 4 Pat. L. J. 13.
(*l*) Provincial Small Cause Courts Act 9 of 1887, s. 27.

Governor-General in Council, who may, by notification in the *Gazette of India*, transfer such suit, appeal or proceeding to any other High Court. Ss.
25-29.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

The object of this section is to empower the Governor-General in Council to transfer cases from one High Court to another under certain circumstances. The section proceeds on the analogy of s. 527 of the Code of Criminal Procedure, 1898.

INSTITUTION OF SUITS.

26. [S. 48.] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Institution of suits.

Changes introduced by the section.—The words “or in such other manner as may be prescribed” are new.

See O. 4, r. 1.

SUMMONS AND DISCOVERY.

27. [S. 64.] Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

Summons to defendant.

Issue and service of summons.—See O. 5 below.

28. [S. 85.] (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

Service of summons where defendant resides in another province.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

See notes to O. 5, r. 23.

29. [S. 650A.] Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts :

Service of foreign summonses.

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29-32. Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor-General in Council, or that the Governor-General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts.

By notification.—For notifications issued under this section, see General Statutory Rules and Orders, Vol. I, pp. 642-655, and Vol. IV, pp. 682-684.

30. [*New.*] Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

Power to order discovery and the like.

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence ;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid ;

(c) order any fact to be proved by affidavit.

Delivery and answering of interrogatories.—See O. 11 below.

Admission of documents and facts.—See O. 12 below.

Discovery and inspection.—See O. 11 below.

Production, impounding and return of documents.—See O. 13 below.

Summonses to persons to give evidence.—See O. 16 below.

Proof of facts by affidavits.—See O. 19 below.

31. [*New.*] The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

Summons to witness.

32. [*New.*] The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

Penalty for default.

(a) issue a warrant for his arrest ;

- (b) attach and sell his property ;
- (c) impose a fine upon him not exceeding five hundred rupees ;
- (d) order him to furnish security for his appearance and in default commit him to the civil prison.

Ss.
32-34.

JUDGMENT AND DECREE.

33. [S. 198.] The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

Judgment and decree.

See O. 20, r. 1.

On such judgment a decree shall follow.—Under this section it is imperative that a decree shall follow the judgment and that it is the duty of the Court to comply with the provisions of the law. Hence where no decree is drawn up, and an appeal is preferred from the judgment, the appeal should not be dismissed, but time should be given to the appellant to apply to the Court which passed the decree for drawing up the decree (*m*).

INTEREST.

34. [S. 209.] (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as

Interest.

the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rates as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

Scope of the section.—This section applies only where the decree is for the payment of "money." It does not apply where the decree is for the enforcement of a mortgage or charge. See notes below under the head "Interest in suits for enforcement of mortgage."

S. 34. The three divisions of Interest.—Interest that may be awarded to a plaintiff in a suit for money may be divided into three heads, according to the *period* for which it is allowed, namely—

- (1) interest accrued due *prior to the institution of the suit* on the principal sum adjudged (as distinguished from the principal sum claimed);
- (2) additional interest on the principal sum adjudged, from the *date of the suit* to the *date of the decree*, “at such rate as the Court deems reasonable;”
- (3) further interest on the aggregate sum adjudged, *i.e.*, the principal sum *plus* interest, from the *date of the decree* to (i) the *date of realization* or (ii) to such earlier date as the Court thinks fit, “at such rate as the Court deems reasonable.”

This section does not apply to the first head of interest. It applies only to the second and third heads.

1. Interest prior to date of suit.—As has just been said, this head of interest does not come within the purview of the present section. It is governed by other enactments to be presently noted. The subject may be considered under the following two heads :

- (1) where there is a stipulation for the payment of interest at a fixed rate ;
- (2) where there is no stipulation at all for the payment of interest.

1. If the rate of interest is stipulated, the Court must allow that rate up to the date of the suit, however high it may be [Usury Laws Repeal Act 28 of 1855, s. 2]. But if the rate is penal, the Court may award interest at such rate as it deems reasonable [Indian Contract Act, 1872, s. 74]. Even if the rate is not penal, the Court may reduce it if the interest is excessive *and* the transaction was substantially unfair [Usurious Loans Act 10 of 1918, s. 3].

2. If there is no stipulation for payment of interest, the plaintiff is not entitled to interest except in the following three cases :—

(i) *Mercantile usage.*—When there is no stipulation to pay interest, it may be awarded if there is a mercantile usage to pay interest (*n*), but not otherwise (*o*).

(ii) *Negotiable Instruments Act* 26 of 1888, s. 80.—When no rate of interest is specified in a promissory note or bill of exchange, interest will be awarded at the rate of 6 per cent. per annum from the date on which the amount claimed became due and payable.

(iii) *Interest Act* 32 of 1839.—Where there is no stipulation to pay interest, but the amount claimed is a sum certain (as distinguished from unascertained damages) *and is payable at a certain time* by virtue of some “written instrument,” the Court will allow interest at a rate not exceeding the current rate of interest *from the date on which the amount became payable*. If no time is fixed for the payment of the amount, the Court will award interest at the rate aforesaid *from the time the creditor demands payment in writing intimating* to the debtor that interest will be claimed from the date of such demand up to the date of payment.

II. Interest from date of suit to date of decree.—The rate of interest from the date of the suit to the date of the decree is in the discretion of the Court, and this discretion is not excluded even if a fixed rate is mentioned in the contract as

(n) *Doolubdas v. Ramlall* (1850) 5 I. A. 109, 136 (Bombay); *Juggomohun v. Manickchund* (1859) 7 M. I. A. 263 (Calcutta).

(o) *Juggomohun v. Kaisreechund* (1862) 9 M. I. A. 260 (Calcutta).

payable "up to realization" (*p*). But though the rate of interest for the aforesaid period is discretionary, the Court should, in the exercise of that discretion, award interest at the *contract rate*, unless it would be inequitable to do so (*q*).

III. Interest from date of decree to date of realization.—The rate of interest from the date of the decree to the date of realization is also in the discretion of the Court. "The plaintiff getting *security* of a decree, has his interest reduced in the generality of cases" (*r*). If the Court awards interest from the date of the decree, but no *rate* is specified, the decree-holder will be entitled to interest at the Court rate, which is 6 per cent. (*s*). But if such interest is not given in the decree, it will be deemed to have been refused: see sub-sec. (2).

Illustration of the above rules.—*A* lends Rs. 5,000 to *B* to be repaid with interest at the rate of 24 per cent. per annum. In a suit by *A* to recover the amount of the loan with interest at the rate aforesaid, it is contended on behalf of *B* that the rate of interest is penal (Contract Act, s. 74). The Court finds that the rate of interest is not penal nor is the transaction substantially unfair. Hence—

- (1) as regards interest [on Rs. 5,000] from the date of the loan to the date of the suit, the Court *must* allow it at the contract rate, that is, at the rate of 24 per cent. per annum: Usury Laws Repeal Act, s. 2.
- (2) as regards interest [on Rs. 5,000] from the date of the suit to the date of the decree, the Court *may* allow it at the contract rate, that is, at the rate of 24 per cent. per annum, or it may in its discretion allow it at a lower rate or may disallow it altogether.
- (3) as regards interest from the date of the decree to the date of realization on the aggregate sum adjudged [*i.e.*, Rs. 5,000 *plus* the interest adjudged under the above two heads], the Court may allow interest at such rate as it deems reasonable. This rate is usually 6 per cent. As to interest on costs, see s. 35, cl. (3).

Interest in suits for enforcement of mortgage.—The section does not apply to decrees for the enforcement of a mortgage or charge. A decree for foreclosure of a mortgage or for the sale of mortgaged property passed under sections 86 and 88, respectively, of the Transfer of Property Act, now O. 34, rr. 2 and 4, is a decree for the enforcement of the mortgage. Where such a decree is passed, the Court is *bound* to award to the mortgagee—

- (1) interest on the principal *prior to the date of the suit* at the rate provided by the mortgage [Usury Laws Repeal Act, s. 2], unless the rate is penal, in which case the Court may award such interest as it deems proper (*t*) [Contract Act, s. 74], or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it [Usurious Loans Act, 1918, s. 3]; and
- (2) interest on the principal from the *date of the suit* up to the date fixed by the Court for payment of the mortgage-debt, also at the rate provided by the mortgage [Transfer of Property Act, ss. 86, 88, now O. 34, rr. 2 and 4] unless

(*p*) *Magnam v. Dhowtal Roy* (1886) 12 Cal. 569; *Carvalho v. Nurbibi* (1879) 3 Bom. 202; *Umes Chunder v. Fatima* (1891) 18 Cal. 164, 180, 17 I. A. 201. The decision to the contrary in *Ramachandra v. Devu* (1889) 12 Mad. 485, is no longer law.

(*q*) *Orde v. Skinner* (1878) 3 All. 91, 106, 107

7 I. A. 196.

(*r*) *Umes Chunder's case supra*.

(*s*) *Rani Lalum v. Behari* (1871) B. L. R. App. 30.

(*t*) *Khagaram v. Ramsankar* (1914) 42 Cal. 652 [Interest reduced from 75 per cent. to 24 per cent.].

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the rate is penal, in which case the Court may award interest at such rate as it deems proper (u), or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it;

further, where the decree is for the sale of the mortgaged property, the Court may in its discretion award—

- (3) interest on the aggregate amount of principal, interest and costs, from the date fixed for the payment of the mortgage-debt up to the date of realization or actual payment, at such rate as the Court deems proper. It may be allowed at the Court rate, that is, 6 per cent. per annum (v) or at any other rate (w). The Court is not bound to award it at the contract rate (x).

As to item (3) above, it was contended on behalf of the mortgagor before their Lordships of the Privy Council in *Maharaja of Bhartpur v. Kanno Dei* (y) that, according to the true construction of s. 88 of the Transfer of Property Act, the Court had no power to award interest subsequent to the date fixed for payment of the mortgage-debt, but this contention was over-ruled, and it was held that that section did not preclude the payment of such interest, and this view was reiterated by their Lordships in *Sundar Koer v. Rai Sham Kishen* (z) and *Raja Gokuldas v. Sheth Ghasiram* (a). O. 34, r. 4 which is in the main a reproduction of s. 88 of the Transfer of Property Act, now contains an express provision for the payment of such "subsequent" interest.

As to the rate at which such interest may be allowed, it was contended on behalf of the mortgagee in *Sundar Koer v. Rai Sham Kishen* (b) that the Court was bound to award the same at the rate provided by the mortgage, and not at the Court rate as was done by the Court below, but this contention was over-ruled, their Lordships holding that the rate was entirely in the discretion of the Court.

Rule of Damdupat.—This is a rule of Hindu Law according to which interest exceeding the amount of the principal sum cannot be recovered at any one time. This rule is in force in the Bombay Presidency (c) and in the Presidency Town of Calcutta (d), but it is not recognized outside that town (e) or in the Madras Presidency (f). The meaning of the rule is that if a Hindu lends Rs. 500 to another Hindu, and the loan is not repaid till the interest amounts to Rs. 600, the lender cannot sue the borrower for more than Rs. 500 for principal and Rs. 500 for interest. But the Court may, under this section award further interest to the lender from the date of the suit, though the aggregate interest may thereby exceed Rs. 500. The reason is that the rule of *damdupat* ceases to operate from the date of the suit (g). It has been held by the High Court of Madras that the rule of *damdupat* does not apply where interest is claimed under a mortgage governed by the Transfer of Property Act, 1882 (h). A different view has been taken by the High Courts of Bombay (i) and Calcutta (j). The rule of *damdupat* does

- (u) *Rameswar v. Mehdi Hossein* (1899) 26 Cal. 39, 25 I. A. 170, as explained in *Sundar Koer v. Rai Sham Kishen* (1907) 34 Cal. 150, 34 I. A. 9; *Surya v. Jogendra* (1898) 20 Cal. 360; *Chaturbhai v. Harbhanji* (1896) 20 Bom. 744; *Subbaraya v. Ponnusami* (1898) 21 Mad. 364; *Rajwanta v. Shiam* (1914) 36 All. 220.
(v) *Sundar Koer v. Rai Sham Kishen* (1907) 34 Cal. 150, 34 I. A. 9; *Subbaraya v. Ponnusami* (1898) 21 Mad. 364; *Suminathan v. Swamiappa* (1900) 29 Mad. 170; *Venkatachalapathy v. Thavasi* (1918) 42 Mad. 465.
(w) *Lachmi Narain v. Uman Dat* (1907) 29 All. 322 [where the Court awarded simple interest at the contract rate, which was 10½ per cent. per annum]; *Bhagat Singh v. Jai Ram* (1915) P. R. no. 22, p. 125

- [9 per cent. per annum allowed].
(x) *Sundar Koer v. Rai Sham Kishen* (1907) 34 Cal. 150, 34 I. A. 9.
(y) (1901) 23 All. 181, 28 I. A. 35.
(z) (1907) 34 Cal. 150, 34 I. A. 9.
(a) (1908) 35 Cal. 221, 35 I. A. 28.
(b) (1907) 34 Cal. 150, 34 I. A. 9.
(c) *Ali Saheb v. Shabji* (1897) 21 Bom. 85.
(d) *Nobin Chunder v. Romes Chunder* (1887) 14 Cal. 781.
(e) *Het Narain v. Ramdeni* (1883) 12 C. L. R. 590.
(f) *Annaji v. Raghubai* (1871) 6 M. H. C. 400.
(g) *Dhondanet v. Ravji* (1898) 22 Bom. 86; *Hari Lal Mullick, in the matter of* (1906) 33 Cal. 1209.
(h) *Madhwa v. Venkata* (1903) 26 Mad. 662.
(i) *Jeevanbai v. Manordas* (1910) 35 Bom. 199.
(j) *Kunja Lal v. Narsamba* (1915) 42 Cal. 826.

not also apply where the mortgagee has been placed in possession, and is *accountable* for the rents and profits received by him as against the interest due (k).

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34, 35.

COSTS.

35. [Ss. 218-221. Jud. Act, 1890, s. 5, R. S. C., O. 45, r. 1.]

Costs.

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

“Costs of and incident to suits.”—This expression includes not only costs of suits, but costs of applications in suits.

As regards costs of *applications*, the Court may make an order as to costs—

- (1) at the time of disposing of the application; or
- (2) it may reserve the consideration of such costs for any future stage of the proceedings, in which case the form of the order as to costs is either—
 - (a) “costs (of the application) reserved,” or
 - (b) “costs (of the application) costs in the cause.”

The costs of applications in a suit, like the costs of a suit, are in the discretion of the Court, whether the order be in form (a) or form (b). The expression “costs costs in the cause” means that *if no other order is made* at the hearing of the suit as to the costs of the application, the party to whom the costs of the cause or suit are awarded is entitled to the costs of the application. It does not mean that the party to whom the costs of the suit are awarded is entitled as a *matter of course* to the costs of the application. The Court has a complete discretion to deal with those costs in any manner it thinks fit (l).

Costs to be in the discretion of the Court.—The section provides that the costs of suits and applications shall be in the discretion of the Court. Having regard to this provision, no hard-and-fast rule can be laid down as to costs. But the discretion conferred is very wide. Thus the Court may order the costs to be paid by the parties in definite proportions, or it may order one party to pay to the other a fixed

(k) *Sundarabai v. Jayavant* (1900) 24 Bom. 114. (l) *Templeton v. Lauris* (1901) 25 Bom. 230.

S. 35. sum in lieu of taxed costs (*m*). Similarly it may disallow costs to a successful plaintiff, as where the rate of interest claimed by the plaintiff and allowed to him under the Usury Laws Repeal Act (*n*) is usurious (*o*); or it may make a successful plaintiff pay the whole costs of the other side (*p*). But though the discretion conferred upon the Courts by this section is wide, it is a judicial discretion, and must be exercised on fixed principles. Where there are no materials before the Court on which it can exercise its discretion, it is not justified in depriving a successful party of his costs (*q*). The following are the leading rules on the subject :—

1. *Costs shall follow the event.*—The general rule is that costs shall follow the event unless the Court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him (*r*). The Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation (*s*). A refusal to go to arbitration is no ground for refusing costs (*t*); nor is the fact that the plaintiff brought his action without previous communication with the defendant (*u*). An offer of compromise which the Court considers insufficient is no bar to a plaintiff's right to costs (*v*).

It is provided by O. 45, r. 1, of the English Rules that “where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order.” It has been recently held by the House of Lords that the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word “event” should be read distributively and the costs of any particular issue go to the party who succeeds upon it. An issue, in this sense, need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part. *A* sued *B* for 164*l.* for the price of 34 bags of goat's hair sold to *B*. *B*, by his defence, pleaded (1) that the goods were not according to sample and were consequently worth 24*l.* less, (2) that there was an overcharge on the bags for 2*l.*, and (3) payment into Court of the balance. *B* succeeded upon the first issue, but failed on the second. The Court of first instance gave judgment for *A* for 2*l.* with costs. On appeal it was held by the House of Lords, reversing the decision of the Court of Appeal, that the issue as to quality (1st issue) was an “event”

(*m*) *Willmott v. Barber* (1881) 17 C. D. 772, 774; *Mayor of Bradford v. Pickles* [1894] 3 Ch. 53.

(*n*) Act 28 of 1855.

(*o*) *Carvalho v. Nurbibi* (1879) 3 Bom. 202.

(*p*) *Harris v. Petherick* (1879) 4 Q. B. D. 611; *Fane v. Fane* (1879) 13 C. D. 288.

(*q*) *Civil Service Co-operative Society v. General St. Nav. Co.* [1908] 2 K. B. 756 (O. A.)

(*r*) *Kuppuncami v. Zamindar of Kalahasti* (1904) 27 Mad. 341; *Cooper v. Whittingham* (1880) 16 C. D. 601; *Rodeshwar v. Manroop* (1886) 13 I. A. 31 (successful plaintiff); *Manohur v. Romanauth* (1878) 3 Cal. 484; *Rhubaneswari v. Nileomul* (1886) 12 Cal. 18,

24, 12 I. A. 137 (successful defendant); *Forster v. Farquhar* [1893] 1 Q. B. 564; *Huxley v. West London Extension Ry. Co.* (1889) 14 App. Cas. 26, 32.

(*s*) *Boslock v. Ramsey Urban District Council* [1900] 1 Q. B. 357, 360, affirmed [1900] 2 Q. B. 616; *Sukumari v. Gopi Mohan* (1918) 43 Cal. 190.

(*t*) *Beckett v. Stiles* (1888) 5 Times Rep. 88.

(*u*) *Goodhart v. Hyett* (1883) 25 C. D. 182; *Wittman v. Oppenheim* (1884) 27 C. D. 260. See in this connection the remarks of North, J. in *Walter v. Steinkopf* [1892] 3 Ch. 489.

(*v*) *Fernessy v. Day and Martin* (1886) 55 L. T. 161.

within the meaning of the expression "the costs shall follow the event," and that *B* was entitled to the costs of that issue (*w*).

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2. Where a party successfully enforces a legal right, and in no way misconducts himself, he is entitled to costs as of right (*x*).
3. The fact that a successful defendant has set up the Gaming Act as an answer to the plaintiff's claim is not good cause for depriving him of his costs (*y*). Nor is the fact that he has pleaded the Statute of Limitations (*z*).
4. If a plaintiff substantially succeeds, he is entitled to his costs, though he may not have got the precise form of relief he wanted (*a*).
5. If a plaintiff recovers a less (but not a trifling less) amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed (*b*).
6. Where a plaintiff succeeds on part of his claim, but fails on the most important and expensive heads of controversy, he may be made to pay the whole costs of the suit to the defendant (*c*).
7. A successful party ought not to be deprived of part of his costs because some of his witnesses were guilty of exaggeration (*d*).
8. A person wrongfully made a party should get his costs (*e*).
9. Where both the parties advance pleas far in excess of their legal rights, each party will be made to bear his own costs (*f*).
10. Separate costs should not be allowed to defendants if the defence is common to all, or their interests are the same (*g*).
11. Where two defendants join in defending an action, and judgment is entered for one and against the other, the successful defendant is *prima facie* entitled to receive from the plaintiff half the costs incurred in the joint defence (*h*).
12. Where two plaintiffs join in one action, claiming for separate and distinct causes of action, and judgment is entered in favour of one plaintiff and against the other, the successful plaintiff is entitled to recover from the defendant the whole of his general costs of the action, and the defendant is only entitled to recover from the unsuccessful plaintiff the costs occasioned by joining such plaintiff (*i*).
13. Where the decree of the lower Court is confirmed by the appellate Court, the mere fact that the grounds upon which the confirmation proceeds are not the same as the *ratio decidendi* of the Court below, is no ground for departing from the rule that the costs shall follow the result (*j*).

(w) *Reid, Hewitt & Co. v. Joseph* [1918] A. C. 717;
Myers v. Defries (1880) 5 Ex. D. 180; *Ellis v. Le Silva* (1881) 6 Q. B. D. 521; *Abbot v. Andrews* (1882) 8 Q. B. D. 648; *Jones v. Curling* (1884) 13 Q. B. D. 282.
 (x) *Cooper v. Whittingham* (1880) 15 C. D. 501;
Upmann v. Forester (1883) 24 C. D. 231;
Civil Service Co-operative Society v. General St. Nav. Co. [1903] 2 K. B. 756 (C. A.).
 (y) *Granville v. Firth* [1903] 72 L. J. K. B. 152 (C. A.).
 (z) *Elmes v. Hedges* (1906) W. N. 114.
 (a) *Ghanasham v. Moroba* (1894) 18 Bom. 473.
 (b) *Mudhun Mohun v. Gokul Dass* (1866) 10 M. I. A. 563; *Velu v. Ghoss* (1894) 17 Mad. 298, 296.

(c) *Forster v. Farquhar* [1893] 1 Q. B. 564.
 (d) *Lipman v. Pulman* (1904) W. N. 130, 91 L. T. 132.
 (e) *Bishen Dayal v. Bank of Upper India* (1891) 13 All. 295.
 (f) *Ramkumar v. Kalikumar* (1887) 14 Cal. 99, 108, 13 I. A. 116; *Lachmeshwar v. Manowar* (1892) 19 Cal. 253, 266, 19 I. A. 48.
 (g) *Francisco v. Dos Anjos* (1872) 17 W. R. 188 (common defence); *Rossella v. Beharee* (1869) 12 W. R. 70 (separate interests).
 (h) *Beaumont v. Senior* [1903] 1 K. B. 282.
 (i) *Viscount Gort v. Rowney* (1886) 17 Q. B. D. 625.
 (j) *Pesk v. Gurney* (1873) L. R. 6 H. L. 377, 413-414.

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14. *Costs in an administration suit.*—See Williams on Executors, 12th ed., Vol. II, p. 1667 *et seq.*; Inghen on Executors, p. 312 *et seq.*
15. *Costs in a partnership suit.*—See Lindley on Partnership 7th ed., pp. 561-563.
16. *Costs of mortgagee.*—See Fisher's Law of Mortgage, 6th ed., paras. 1894-1897.
17. *Costs of trustee.*—See Lewin's Law of Trusts, 12th ed., p. 1265 *et seq.*
18. *Costs of proceedings in Probate Court.*—See Inghen on Executors, pp. 86-88.

Discretion not to be delegated.—The discretion given to the Court under this section cannot be delegated to the taxing officer (*k*).

Costs against person not a party to the suit.—An order for costs cannot be made against persons who are not parties to the suit (*l*). As regards an action for costs against a third person on the ground that he was the mover of and had an interest in a suit, it has been held by the Privy Council that such an action cannot be maintained in the absence of malice and want of probable cause (*m*).

Costs where relief claimed against defendants in the alternative.—See notes under the same head to O. 1, r. 3.

No separate suit for costs.—If costs are not awarded to a party, he cannot bring a separate suit for costs. If costs are awarded, no separate suit will lie to realise these costs. The proper procedure in such case is if the costs are awarded by a *decree*, to realise the costs by execution of the *decree*, and if the costs are awarded by an *order*, to realise them by executing the order as if it were a decree for the payment of money (*n*).

"Subject to such conditions and limitations as may be prescribed."—"Prescribed" means prescribed by rules contained in or made under this Act (see s. 2, cls. 16 and 18). As to rules dealing expressly with costs, see O. 11, r. 3 (costs of interrogatories), O. 24, r. 4 (costs on payment into Court), O. 35, r. 3 (costs in interpleader suits).

"The provisions of any law for the time being in force."—The rule contained in this section, which leaves costs to the discretion of the Court, does not affect the provisions of special enactments giving costs in particular cases. Thus it is provided by s. 27 of the Land Acquisition Act, 1894, that when the award of the Collector is not upheld by the Court, the costs shall ordinarily be paid by the Collector, unless the Court shall be of opinion that the claim of the party whose property has been acquired was so extravagant, or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made, or that he should pay a part of the Collector's costs. These provisions are not affected by the rule contained in the present section: see Land Acquisition Act, s. 53, and the undermentioned case (*o*).

Whether an appeal lies for costs only?—The decisions of a Court of law may be divided into three classes, namely,—

- I. Decrees. [Every decree is appealable (s. 96)].
- II. Appealable orders (s. 104).
- III. Non-appealable orders (s. 105).

(*k*) *Lambton v. Parkinson* (1886) 35 W. R. 545.

(*l*) *James Bevis v. Turner* (1889) 7 Bom. 486.
The decision turned upon the word "party" which is omitted in the present section.

(*m*) *Ram Coomar Goondoo v. Chunder Kanto Mookerji* (1878) 2 Cal. 233, 4 I. A. 28.

(*n*) *Referred Case* no. 5 of 1867, 3 M. H. C. 341.

(*o*) *Ekambara v. Muniswamy* (1908) 31 Mad. 328.

I. *It is settled that an appeal will lie for costs only when the costs are awarded by a "decree," if the order as to costs involves a question of principle; but it is not settled whether such an appeal will lie, if no question of principle is involved.*—A decree contains—

1. a decision on the *rights* of parties in the suit—this we shall call item No. 1—and
2. a direction as to *costs*—this we shall call item No. 2.

A party, while appealing from item No. 1 or any part thereof, may appeal also from item No. 2. He may at the hearing abandon the appeal from item No. 1, and yet he is entitled to proceed with the appeal from item No. 2 (*p*). But can he appeal from item No. 2 alone without appealing from item No. 1? In other words, does an appeal lie on a matter of costs only?

All the High Courts are agreed that such an appeal does lie—

- (1) *where the order as to costs involves a matter of principle (q), as where a formal party to a suit against whom no relief is claimed is made to pay the costs of the suit (r): or*
- (2) *where there has been no real exercise of discretion in making the order as to costs. This may happen when a successful party is made to pay the costs of the losing party (s).*

So long as the discretion was in fact exercised, an appellate Court will not interfere, merely because it would itself have exercised the discretion differently (*t*);

- (3) *where the order as to costs proceeds upon a misapprehension of fact or law (u).*

For brevity's sake we shall describe all the three cases as cases where a question of "principle" is involved. We may therefore say that it is settled law that an appeal will lie for costs only, where the order as to costs involves a question of principle. But it is not settled whether an appeal will lie for costs only, where no question of principle is involved. The earlier decisions of the Calcutta Court are against allowing an appeal in such a case (*v*). In a recent Calcutta case, however, the point was regarded as a doubtful one (*w*). On the other hand, it has been held by the Bombay High Court that an appeal will lie for costs only whether the order as to costs involves a question of principle or not (*x*). The ground of the Bombay decisions is that every decree being appealable, *any part* of it is also appealable, though it be the part relating to costs, whether there is a matter of principle involved or not. But even according to the Bombay decisions, though an appeal may lie for costs only, the appellate Court will not as a rule vary or set aside the order of the lower Court as to costs, unless there is a principle involved and the principle has been violated. From a practical point of view, it may be said that the distinction between the Calcutta and Bombay decisions is a distinction without a difference.

(p) *Vasudev v. Bhavan* (1892) 16 Bom. 241.
 (q) *Girāharīal v. Sunder Bibi* (1886) B. L. R. Sup. Vol. 496; *Secretary of State v. Marjum* (1885) 11 Cal. 359; *Dudar Ali Khan v. Bhawan Sahai Singh* (1907) 34 Cal. 878.
 (r) *Bunwari Lal v. Drup Nath* (1886) 12 Cal. 179.
 (s) *Moshingan v. Mozari* (1886) 12 Cal. 271;
Edmund v. Martel [1908] 1 K. B. 24;

Lalman v. Chantamani (1919) 41 All. 254.
 (t) *Parshram v. Dorabji* (1900) 2 Bom. L. R. 254.
 (u) *Ranchordas v. Bai Kasi* (1892) 16 Bom. 676.
 (v) *Bunwari Lal v. Drup Nath* (1886) 12 Cal. 179.
 (w) *Amirul Hossain v. Khairunnessa* (1901) 28 Cal. 567.
 (x) *Ranchordas v. Bai Kasi* (1892) 16 Bom. 676;
Khushai v. Punamchand (1898) 22 Bom. 164.

S. 35. Does a second appeal lie on a matter of costs only? It has been held that it does lie, but only if there is a question of law or principle involved (y); see s. 100, cl. (a).

II. *Appeal from direction as to costs contained in an "appealable order."*—The law as to appeal from a decision as to costs contained in an appealable order is the same as that for costs awarded by a decree (z). Substitute "appealable order" for "decree" in the notes under head I above, and we have the statement of law relating to appeals for costs awarded by an appealable order. But no second appeal lies on a matter of costs awarded by an appealable order, for no second appeal lies from *any order*: see s. 104, sub-sec. (2).

III. *Appeal from direction as to costs contained in a "non-appealable order."*—Since no appeal lies from a non-appealable order, no appeal can lie from a direction as to costs contained in such order. Thus if an order is made adjourning the hearing of a suit, and one of the parties is directed to pay the costs occasioned by the application for adjournment, he cannot appeal from the direction as to costs, for an order adjourning the hearing of a suit is not an appealable order, not being included in s. 104 below (a).

Letters Patent, clause 15.—An order as to costs is not a "judgment" within the meaning of clause 15 of the Letters Patent, and is not appealable as such (b).

Suit for contribution towards costs.—A defendant is not entitled as against a co-defendant to contribution in respect of costs to which both are liable unless there be some equity existing between him and the co-defendant (c).

(y) *Bunwari Lall v. Drup Nath* (1886) 12 Cal. 179;
Dasrat Ram v. Durga Prasad (1893) 15 All.
 333; *Desaji v. Bhavanidas* (1871) 8 B. H.
 C. A. C. 100; *Futeek v. Mohender* (1876)
 1 Cal. 385.
 (z) *Balkissen v. Luchmiput* (1882) 8 Cal. 91 94;

Vasudev v. Bhavan (1892) 16 Bom. 241.
 (a) *Balkissen v. Luchmiput* (1882) 8 Cal. 91.
 (b) *Manali Seravana Mudalkar v. Rajagopala*
Chetty (1907) 17 Mad. L. J. 569.
 (c) *Mulla Singh v. Jagannath* (1910) 32 All. 585.

PART II.

Execution.

GENERAL.

36. [New.] The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. S. 36.

Application to order.

What decrees may be executed.—(i) *The only decree capable of being executed is the decree of the Court of last instance.*—When an appeal is preferred from a decree, and a decree is passed in appeal, the question frequently arises as to which decree is the one capable of execution, the decree of the lower Court or the decree of the appellate Court. The question above referred to arises in the following cases :—

- (a) Where a decree has to be amended. [The decree to be amended must be the *decree capable of execution.*
- (b) Where the question is whether the execution of a decree is barred by limitation. [Time runs from date of *decree capable of execution.*
- (c) Where the lower Court has by its decree fixed a time for the payment of money, as in a suit for redemption. [Time runs from date of *decree capable of execution.*]
- (d) Where under O. 20, r. 12, mesne profits are awarded from the date of the suit until the expiration of three years *from the date of the decree.* [Here 'decree' means *decree capable of execution.*]
- (e) Where notice is to be given under O. 21, r. 22, when execution is applied for more than one year after the *date of the decree.* [Here 'decree' means *decree capable of execution.*]

In answering the question—which decree is capable of execution, it is important to bear in mind the provisions of O. 41, rr. 11 and 32. By O. 41, r. 11, it is provided that the appellate Court may *dismiss* an appeal (1) without serving notice of the appeal on the respondent in the circumstances there indicated; also (2) if the appellant does not appear when the appeal is called on for hearing. But when the case goes on to a hearing, then the powers of the Court are defined in O. 41, r. 32, which provides, not that the appeal is to be dismissed, but that "the judgment may be for *confirming, varying or reversing* the decree from which the appeal is preferred." It may be that when the appeal is incompetent as being out of time or as coming within the provisions of s. 102, the proper course is to *dismiss* it. Apart from that the proper course is to *confirm, vary or reverse* the decree from which the appeal is preferred as provided by O. 41, r. 32 (d)

S. 36. Bearing these observations in mind, it may be stated that where an appeal is *dismissed simpliciter*, the decree capable of execution is the *decree appealed from* (e). But where the appellate Court acting under O. 41, r. 32, confirms, varies or reverses the decree appealed from, the decree capable of execution is the *decree of the appellate Court* (f). Similarly where the decree of the Court of first instance is confirmed by the High Court on appeal, and the latter decree is confirmed by the Privy Council, the decree capable of execution is the decree of the Privy Council (g). The result is that even where the decree of the lower Court is confirmed on appeal, the period of limitation to execute the decree runs from the date of the decree of the appellate Court. Similarly when time is fixed by the lower Court for the payment of money, and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the appellate Court, though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree (h). There are, however, two cases in which the decree of the lower Court was confirmed on appeal, but the Court held that the time for payment commenced to run from the date of the decree of the lower Court (i). But these cases seem to be of doubtful authority.

(ii) *The decree to be executed must be a subsisting decree.*—A obtains a decree against B and C. B subsequently sues A to set aside the decree on the ground of fraud, and the decree is set aside as against him. A cannot execute the decree as against B, for the decree does not subsist as against B. But he may execute the decree as against C, for the decree is a subsisting decree as against C (j).

(iii) *The decree to be executed must be a decree of which execution is not barred by the law of limitation.*—See Limitation Act, 1908, arts. 182 and 183, and see notes to s. 48 below.

Execution of orders.—The term “order” is defined in s. 2, cl. 14, as the formal expression of any decision of a civil Court which is not a decree. An order under s. 34 of the Guardians and Wards Act 8 of 1890 directing a guardian to pay a sum of money out of his ward’s estate for the marriage expenses of a person dependent on his ward is not an ‘order’ within the meaning of s. 2, cl. 14, and it cannot be enforced against the ward after he has attained majority and the guardian has been discharged (k).

Merger of decree.—As to merger of decree of the first Court in the decree of the appellate Court, see *Gajraj v. Swami Nath* (l) where all the cases are reviewed. See also notes to O. 9, r. 13, “Hearing of application after disposal of appeal.”

(e) *Abdul Majid v. Jawahir Lal* (1914) 36 All. 350 (P. C.); *Batuk Nath v. Munni Dei* (1914) 36 All. 284, 41 I. A. 104; *Palloji v. Ganu* (1890) 15 Bom. 370 [appeal withdrawn]; *Bhola Nath v. Kanti* (1897) 25 Cal. 311 [quere whether the correct order should not have been one confirming the decree]; *Shyam Mandal v. Satinath* (1917) 44 Cal. 954 [dismissal of appeal for default—notice under O. 21, r. 22 (1) (a)]; *Nandkumar v. Bilas Ram* (1918) 3 Pat. L. J. 116 [mesne profits under O. 20, r. 12 (1) (c) (iii)].

(f) Amendment of decree—*Shohrat v. Bridgman* (1882) 4 All. 376 (F. B.); *Muhammad v. Muhammad* (1888) 11 All. 267 (F. B.)

(g) Limitation—*Luchmun v. Kishun* (1882) 8 Cal. 218; *Mahomed v. Mohini Kanta* (1907) 34 Cal. 874; *Sakhalchand v. Velchand* (1893) 18 Bom. 203. Where time fixed

for payment.—*Noor Ali v. Koni Meah* (1836) 13 Cal. 13; *Raja Bhup Indar v. Bijai Bahadur* (1900) 5 C. W. N. 52, 27 I. A. 209 [mesne profits]; *Nanchand v. Vitlu* (1894) 19 Bom. 258; *Satwaji v. Sakharlal* (1914) 39 Bom. 175.

(h) *Bhup Indar v. Bijai* (1901) 23 All. 152, 27 I. A. 209; *Nandkumar v. Bilas Ram* (1918) 3 Pat. L. J. 116 [mesne profits under O. 20, r. 12 (1) (c) (iii)].

(i) See the cases cited in the last note.

(j) *Rameswami v. Sundara* (1907) 31 Mad. 28; *Chanshyamal v. Ram Narain* (1909) 31 All. 379.

(k) *Pasupati v. Nando Lal* (1903) 30 Cal. 718, *Chetritatil v. Kunhi Koru* (1906) 29 Mad. 175.

(l) *Parvatammal v. Chokkalinga* (1918) 41 Mad. 241.

(m) (1917) 30 All. 13.

37. [S. 649, 2nd para.] The expression "Court which S. 37.
 passed a decree," or words to that effect,
 shall, in relation to the execution of decrees,
 unless there is anything repugnant in the
 subject or context, be deemed to include,—

Definition of Court
 which passed a decree.

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and
- (b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Changes introduced by the section.—This section differs from the corresponding section 649 of the Code of 1882 in that the expression "the Court of first instance" in clause (a) has been substituted for the expression "the Court which passed the decree against which the appeal was preferred." As to the effect of this alteration see notes below.

Court by which decree may be executed.—Section 38 indicates the Courts by which decrees may be executed. A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. The present section explains the meaning of the expression "Court which passed a decree."

The expression "Court which passed a decree" includes not only the Court which actually passed the decree, but the Courts mentioned in clauses (a) and (b) of the present section. Reading sections 37 and 38 together, we obtain the following rules:—

1. Where the decree to be executed is a decree of a Court of first instance, the proper Court to execute it is the Court of first instance.
2. Where the decree to be executed is a decree passed by a Court of first appeal, the proper Court to execute it is also the Court of first instance [see cl. (a) of the section].
3. Where the decree to be executed is a decree passed by the High Court in second appeal, then also the proper Court to execute it is the Court of first instance. Thus where a suit is instituted in the Court of a Subordinate Judge, and an appeal from the decree is preferred to the District Court, and a second appeal to the High Court, the proper Court to execute the decree of the High Court is the Court of first instance, that is, the Court of the Subordinate Judge. Under the Code of 1882, s. 649, para. 2, of which the present section is in the main a reproduction, the proper Court to execute the decree in the case put above would be the District Court, the expression there used being "the Court which passed the decree against which the appeal was preferred." As a matter of practice, however, the Court of intermediate appeal never executed decrees passed by the High

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Court in second appeal. The substitution of the expression "Court of first instance" in clause (a) of the present section for the expression "Court which passed the decree against which the appeal was preferred," gives legislative recognition to the practice hitherto followed.

4. Where the Court of first instance has *ceased to exist*, the only Court that can execute the decree is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree sought to be executed was passed. A Court does not cease to exist merely by reason that its head-quarters are removed to another place, or merely because the local limits of the jurisdiction of such Court are altered (*m*).
5. Where the Court of first instance has *ceased to have jurisdiction to execute the decree*.—A decree is passed by Court X directing the sale of immoveable property within its jurisdiction. After the decree and before the application in execution for sale, the property directed to be sold is transferred by the Local Government's notification from the jurisdiction of Court X to the jurisdiction of Court Y. Has Court X jurisdiction to entertain the application in execution and to order the sale of the property? According to the Calcutta decisions, both Court X and Court Y have jurisdiction to entertain the *application* in execution for the sale of the property, but if the application is made to Court X, it should not itself order the sale of the property, but transfer the application to Court Y for passing and executing the order for sale (*n*). According to an earlier decision of the Madras High Court, Court X *has* jurisdiction to entertain the application in execution, but the question whether it could itself order the sale of the property was not decided (*o*). In a later Madras case, the opinion was expressed that Court X had no jurisdiction to entertain the application for execution (*p*), but this view was overruled by a Full Bench of the same High Court, the Full Bench taking the same view as the Calcutta High Court (*q*).

"Ceased to have jurisdiction."—A Court does not cease to have jurisdiction to execute its decree, merely because its business is transferred by the District Judge under the Act constituting it to another Court (*r*). Where an order was made by the High Court of Calcutta rejecting a petition for leave to appeal to the Privy Council, and directing the petitioner to pay the respondent's costs, but the order was silent as to the Court by which it was to be executed, it was held that the circumstance that the High Court on its appellate side does not in practice execute its own decrees and orders, did not make that Court, as regards the execution of the order, a Court that had "ceased to have jurisdiction to execute" its decree (*s*). Nor does a Court which passed a decree "cease to have jurisdiction to execute it," because after the passing of the decree a party [*e. g.*, Court of Wards] is added in execution who, had he been a party when the *suit* wherein the decree was passed was instituted, would have deprived the Court of its

(*m*) *Latchman v. Maddan Mohan* (1881) 6 Cal. 513, 517.

(*n*) *Latchman v. Maddan Mohan* (1881) 6 Cal. 513; *Premchand v. Mokhoda* (1890) 17 Cal. 699 (F. B.); *Jahar v. Kamini Debi* (1901) 28 Cal. 238; *Udit Narain v. Mathura Prasad* (1908) 35 Cal. 974. The case of *Kaish Pado v. Dino Nath* (1898) 25 Cal. 315, which is sometimes cited in this connection, is not a case of transfer of jurisdiction; there was in that case an order merely

for the distribution of business between two Courts each of which had jurisdiction; see 28 Cal. 238, 240-241, and 35 Cal. 974, 977.

(*o*) *Panduranga v. Vythilinga* (1907) 30 Mad. 537.

(*p*) *Subbiah v. Ramanathan* (1914) 37 Mad. 462, 471.

(*q*) *Seeni Nadan v. Muthusami* (1919) 42 Mal. 821, 832-833, 835, 842.

(*r*) *Kaish Pado v. Dino Nath* (1898) 25 Cal. 315.

(*s*) *Hurro Pershad v. Bhupendro* (1881) 6 Cal. 201

jurisdiction (t). In a recent Madras case (u), the Court said with reference to cl. (b) of the section: "In fact this portion of section 37 of the Civil Procedure Code clearly has reference to transfers of territorial jurisdiction from one Court to another."

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37, 38.

In applying this section it is to be noted that the nature of the cause which put an end to the jurisdiction of a Court is immaterial (v).

What decrees may be executed.—See note under the same head to s. 36

COURTS BY WHICH DECREES MAY BE EXECUTED;

38. [S. 223, 1st para.] A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

Court by which decree
may be executed.

Court which passed a decree.—See s. 37 and notes thereto.

Jurisdiction of Court executing decree.—The following are the leading rules relating to the jurisdiction of Courts executing decrees:—

RULE I.—No Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situate "entirely" outside the local limits of its jurisdiction.—Territorial jurisdiction, in other words, is a condition precedent to a Court executing a decree (w).

Exception I.—The Court which passed a decree for the "enforcement of a mortgage of immoveable property" included therein has power in execution of its decree to order the sale of such property, though the whole of it may be situate "beyond" the local limits of its jurisdiction.—A sues B in a Court in district X on a mortgage of two properties, one situate in district X and the other in district Y. A decree is passed for the sale of both the properties. The Court in district X having jurisdiction to entertain the suit in respect of the property situate in district Y (s. 17), has also jurisdiction to sell that property in execution of its decree, though the property is situate beyond its jurisdiction. It is not bound to send the decree for execution as respects the property in district Y to the Court of that district under cl. (c) of s. 39, but it may do so (x). In the latter case the decree as respects the property in district Y may be executed by the Court of district Y (y). See also notes to s. 17.

Exception II.—Where "after the passing of a decree" in a "suit for the enforcement of a mortgage" the whole of the immoveable property included therein falls, by transfer of jurisdiction, within the local limits of the jurisdiction of another Court, the application for execution of the decree, according to the Calcutta decision, may be made either to the Court which passed the decree (though the property is no longer within its jurisdiction), or to the Court within the local limits of whose jurisdiction the immoveable property falls by such transfer, but where the application is made to the former Court, it should not itself order the property to be sold, but should transfer it to the latter Court for passing and executing the order

(t) *Bandoo v. Narsingrao* (1914) 38 Bom. 662.
(u) *Venkatarami Naik v. Sivani Mudali* (1919) 42 Mad. 461, 464.
(v) *Gauskha v. Abdul* (1893) 17 Bom. 162.
(w) *Prem Chand v. Mokhoda Debi* (1890) 17 Cal. 699, 703.
(x) *Maseyk v. Steel* (1887) 14 Cal. 661; *Karticki*

Nath v. Tihkdhari (1888) 15 Cal. 607;
Gopi Mohun v. Doybaki (1892) 19 Cal. 13;
Tincouri v. Shib Chandra (1894) 21 Cal. 639.
(y) *Aziz Bakhs v. Sultan Singh* (1918) P. R. no. 43, p. 152; *Jagernath v. Dip Rani* (1895) 22 Cal. 871.

- S. 38.** *for sale (z). In a recent Madras decision, the opinion was expressed that it is the latter Court alone that has jurisdiction to execute the decree, and that it is to that Court alone that the decree-holder should apply for execution (a). But this view was overruled by a Full Bench of the same High Court, the Full Bench taking the same view as the Calcutta High Court (b). In the Full Bench case it was observed by Wallis, C.J., that the fact that s. 150 of the present Code confers upon the Court of the transferred area power to entertain the application in the first instance does not take away from the Court which passed the decree the power which it had according to the unbroken current of decisions for many years, namely, the power to entertain the application (c). See notes to s. 37.*

Exception III.—The salary of a public officer or of a servant of a Railway company of local authority may be attached by a Court though the disbursing officer may not be within the local limits of the Court's jurisdiction. See O. 21, r. 48, and notes thereto.

RULE II.—Where a decree has been passed for the payment of money, and the decree-holder applies for attachment and sale of immovable property (belonging to the judgment debtor) which forms one estate of which a part is situated within the local limits of the jurisdiction of the Court executing the decree and part beyond such local limits, the Court executing the decree has the power to attach and sell the whole estate including the portion situated beyond the local limits of its jurisdiction. See O. 21, r. 3, and notes thereto.

RULE III.—Whether a Court to which a decree has been sent for execution under s. 39 has jurisdiction to execute the decree, if the amount of the decree exceeds the limits of the pecuniary jurisdiction of the Court? To put the question in a concrete form, whether if a decree for Rs. 7,000 is sent for execution to a Court whose pecuniary jurisdiction does not exceed Rs. 5,000, the latter Court can execute the decree? Yes, according to Madras decisions (d). No, according to Calcutta and Bombay decisions (e). See notes to s. 6 "Pecuniary jurisdiction in passing decrees."

RULE IV.—Where the decree sought to be executed is passed by a competent Court, the Court will not be deemed to be incompetent to execute the decree merely because by reason of the amount of interest or mesne-profits ascertained for a period "subsequent" to the institution of the suit, the pecuniary limits of the jurisdiction of such Court are exceeded.—A obtains a decree against B for Rs. 4,000 and interest in a Court of which the pecuniary jurisdiction is limited to Rs. 5,000. A then applies to the Court for execution. At the date of the application for execution, the total amount of the decree by reason of accumulation of interest exceeds Rs. 5,000. Has the Court jurisdiction to execute the decree, regard being had to the fact that the amount sought to be recovered in execution exceeds the pecuniary limits of its jurisdiction? It has been held that it has (f). See notes to s. 6, "Pecuniary jurisdiction in passing decrees."

The Court executing a decree cannot go behind the decree.—The Court executing a decree must take the decree as it stands (g). It has no power to go behind the decree, in other words, it cannot entertain any objection as to the legality or correctness of the decree (h). The reason is that a decree though it may not be

- (z) *Latchman v. Maddan* (1881) 6 Cal. 513; *Jahar v. Kamini Debi* (1901) 28 Cal. 238.
 (a) *Subbiah v. Ramanathan* (1914) 37 Mad. 462, 471.
 (b) *Seeni Nadan v. Muthusami* (1919) 42 Mad. 821, 832-833, 835, 842.
 (c) 42 Mad. 821, at p. 833, *supra*.
 (d) *Narasayya v. Venkata* (1884) 7 Mad. 297
Shanmuga v. Ramanathan (1894) 17 Mad. 309.
 (e) *Durga v. Umatala* (1889) 16 Cal. 445; *Gokul v. Aukhi* (1889) 16 Cal. 457; *Shamsundar v. Anath Bandhu* (1910) 37 Cal. 574; *Sidheshwar v. Marthar* (1888) 12 Bom. 165.

- (f) *Shamray v. Nilofi* (1886) 10 Bom. 200; *Rameswar v. Dhu* (1894) 21 Cal. 550; *Pancharan v. Kinoo* (1912) 40 Cal. 56.
 (g) *Ramphal v. Ram Baran* (1883) 5 All. 53; *Muttia v. Virammal* (1887) 10 Mad. 288; *Sheik Budan v. Ramchandra* (1887) 11 Bom. 537; *Venkatachala Reddi v. Venkatachala Reddi* (1891) 24 Mad. 665; *Appa Rao v. Krishna* (1892) 25 Mad. 537.
 (h) *Ohloti v. Rameshwar* (1902) 6 O. W. N. 796; *Griha Chunder v. Shoshi Shikarshwar* (1900) 27 Cal. 951, 967, 27 I. A. 110; *Jar Gobind v. Patesri Partap* (1907) All. W. N. 286.

according to law, is binding and conclusive between the parties, if it is not appealed from (i). For the same reason the Court executing a decree cannot alter, vary, or add to the terms of the decree (j). It is different, however, where the decree sought to be executed is a nullity as where it is passed against a party to a suit who had died before the hearing was concluded; in such a case there is no decree to be executed (k). See notes to s. 47, p. 123, case (4).

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38, 39.

Construction of decree by executing Court.—But though a Court executing a decree cannot go behind the decree, it is quite competent to construe the decree where the terms of the decree are ambiguous, and to ascertain its precise meaning for unless this is done, the decree cannot be executed. The construction of a decree must be governed by the pleadings and the judgment (l). And the Court should, if possible, put such a construction upon the decree as would make it in accordance with law (m). Where a certain construction is put on a decree on a former application for execution, it is not competent to the Court on a subsequent application to treat that construction as erroneous and put another construction on the decree (n).

Agreement between parties to execution proceedings.—An agreement arrived at between the parties to an execution proceeding with the sanction of the Court cannot be subsequently altered by the Court without the concurrence of both the parties (o).

Inconsistent decisions in execution proceedings—Where there are two inconsistent decisions in the course of execution proceedings, the later must prevail against the earlier (p).

39. [S. 223, 2nd and 3rd paras.] (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

Transfer of decree.

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
- (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(i) *Papamma v. Vira Pratapa* (1896) 19 Mad. 249, 252, 23 I. A. 32, 33.

(j) *Udovant v. Tokhan Singh* (1901) 28 Cal. 353, 28 I. A. 57; *Forester v. Secretary of State* (1878) 3 Cal. 161, 4 I. A. 137; *Hurro v. Surut* (1882) 8 Cal. 332, 9 I. A. 1; *Ishwargar v. Ohudasama* (1888) 13 Bom. 106; *Subhana v. Krishna* (1891) 15 Bom. 644; *Ranmalsanghi v. Kundankwar* (1902) 26 Bom. 707.

(k) *Jungli Lal v. Laddu Ram* (1910) 4 Pat. L. J. 240 (F. B.).

(l) *Ram Kirpal v. Rup Kwart* (1884) 6 All. 269, 275, 11 I. A. 37; *Kali Krishna v. Secretary*

of State (1889) 16 Cal. 173, 183, 15 I. A. 186; *Jagatjit v. Sarabjit* (1892) 19 Cal. 159, 18 I. A. 165; *Lachmi v. Jwala* (1896) 18 All. 344; *Shizlal v. Jumaklal* (1894) 18 Bom. 542.

(m) *Amolak v. Lashmi* (1897) 19 All. 174; *Bakar v. Udit Narain* (1899) 21 All. 361; *Radha Kishen v. Collector of Jaunpur* (1901) 23 All. 220, 226, 28 I. A. 28.

(n) *Venkatanarasimha v. Papammah* (1896) 19 Mad. 54.

(o) *Chandrabala v. Prabodh* (1909) 86 Cal. 422.

(p) *Damber Singh v. Munassar* (1915) 97 All. 531.

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39, 40.

- (e) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or
- (d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

Transmission of decree for execution.—A decree passed by one Court may be transmitted for execution to another Court either on the *application* of the decree-holder on one of the grounds stated in this section, or by the Court which passed it *of its own motion*. When a decree is sent by the Court which passed it for execution to another Court, the Court sending the decree shall send a copy of the decree and other documents mentioned in O. 21, r. 6, to the Court by which the decree is to be executed. The latter Court shall, on receiving the copy of the decree and the other documents, cause the same to be filed (O. 21, r. 7). The decree-holder may then apply to that Court for execution (O. 21, r. 10). The Court executing a decree sent to it for execution has the same powers in executing such decree as if it had been passed by itself (s. 42).

Clause (d).—In a Bombay case, doubt was expressed whether clause (d) of this section enabled a Subordinate Judge to transfer a decree for execution to a Small Cause Court, where the property attached was within the local jurisdiction of the Subordinate Judge (q).

A decree may be executed simultaneously in more places than one.—A Court passing a decree has the power to send its decree to more Courts than one for concurrent execution. But this power should be sparingly exercised, and, when exercised, it would be in many cases proper to impose terms on the decree-holder that he should not proceed to a sale under all the attachments at once (r).

Appeal.—An appeal lies from an order rejecting an application for the transfer of a decree. The reason is that questions relating to the transfer of decrees are questions relating to "execution" within the meaning of s. 47 [Code of 1882, s. 244] (s). See s. 2, cl. (2).

Jurisdiction.—See notes to s. 38 under the head "Jurisdiction of Court executing decree," p. 113 above.

40. [New.] Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

Transfer of decrees to
Court in another Province.

(g) *Krishna v. Bhau* (1894) 18 Bom. 61.

(r) *Saroda Prasad v. Luchmepul* (1872) 14 M. I. A. 529; *Krishto Kishore v. Rooplall* (1882)

8 Cal. 627.

(s) *Bhabani Charan v. Pratar Chandra* (1904) 8 C. W. N. 575.

"Executed in such manner as may be prescribed by rules in force in that province."—The manner of execution is that of the Court which executes the decree, but as to whether execution of the decree is barred by limitation or not it is the law governing the Court which passed the decree that applies (i).

41. [S. 223, 4th para.] The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure.

Result of execution proceedings to be certified.

42. [S. 228.] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Powers of Court in executing transferred decree.

Powers of Court in executing transferred decree.—A Court executing a transferred decree has no power to entertain any objection regarding—

- (a) the legality or propriety of the order directing execution, or
- (b) the right of the person shown in the order as the person entitled to execute the decree.

By reason of the rule contained in cl. (a), the Court executing a transferred decree cannot refuse execution on the ground that the order directing execution was wrong or improper, and that it ought not to have been made under the particular circumstances of the case (u). Nor can it refuse execution on the ground that the execution of the decree was barred by limitation on the date on which the order for execution was made and that the order was therefore illegal (v). It is otherwise, however, where the transferring Court has made *no order* for execution, but has merely transferred the decree for execution, and sent a certificate of non-satisfaction. In the latter case, the Court to which the decree is transferred for execution has the power to decide whether execution is barred by limitation (w), or it may stay execution (O. 21, r. 26) so as to leave the objection to be decided by the Court which passed the decree (x). See notes to s. 11 under the head "Orders in execution proceedings" on p. 64 *ante*. As to decrees of Courts of Native States, see notes to s. 44 below.

By reason of the rule contained in cl. (b), the Court executing a transferred decree cannot entertain any question as to the validity of an assignment of the decree (O. 21, r. 16) if the assignee is shown in the order for execution as the person entitled to execute the decree (y).

(i) *Tincouri v. Debendro Nath* (1890) 17 Cal. 491.

(u) *Multh Abdul v. Sukkhnaboo* (1897) 21 Bom. 456; *Ram Lal v. Radhey Lal* (1885) 7 All. 330; *Beerchunder v. Maymana* (1880) 5 Cal. 736.

(v) *Hussain v. Sahu* (1891) 15 Bom. 28.

(w) *Chhotay Lal v. Purn Mull* (1896) 23 Cal. 39.

p. 41; *Leake v. Dantel* (1868) 10 W. R. F. B. 10; *cf. Ramu Rai v. Dayal Singh* (1894) 16 All. 390.

(x) *Srihary v. Murari* (1886) 13 Cal. 257

(y) *Ram Chander v. Mohendra Nath* (1874) 21 W. R. 141; *Dhuresh v. Oolfat* (1874) 21 W. R. 219.

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42, 43.

Subject to the limitations mentioned above, the Court executing a transferred decree has the same powers in executing such decree as if the decree had been passed by itself. From this it follows that a Court executing a transferred decree has no more powers in execution than a Court executing its own decree. Thus a Court executing its own decree has no power to entertain any objection regarding the legality or the correctness of its decree. Therefore, a Court executing a transferred decree has also no such power. It cannot therefore refuse to execute the decree sent to it on the ground that the decree is wrong in point of law (z), or that it is defective (a), or that it directs a sale of property which is not "saleable" within the meaning of s. 60 of the Code (b), or that it was obtained by fraud (c), or that it was passed without jurisdiction (d). It is clear that if a Court executing a transferred decree were allowed to enter into these questions, it would be virtually allowing it to sit in judgment upon the decree of the transferring Court. See notes to s. 38.

Continuance of jurisdiction of Court executing transferred decree.—

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree (1) until the execution has been withdrawn from it (e), or (2) until it has executed the decree and has certified that fact to the Court which sent the decree, or (3) until it has failed to execute the decree and has certified that fact to the Court which sent the decree (s. 41). Until some one of these events happen, the only Court which has seisin of the execution proceedings is the Court to which the decree is sent for execution, and the Court which passed the decree has no jurisdiction to entertain an application for execution unless concurrent execution was ordered, or proceedings in the Court to which the decree is sent are stayed for the purpose of executing the decree by the Court which passed it (f). It follows from this that if a decree is sent for execution by Court A to Court B, and an application for execution is made to Court B (O. 21, r. 10), but the application is rejected on the ground of some *informality*, and a fresh application for execution is subsequently made to Court B, it (Court B) cannot refuse to entertain it on the ground of want of jurisdiction, for its jurisdiction has not ceased as none of the three events mentioned above has happened (g). But if the application for execution is dismissed by the Court to which the decree is sent in consequence of the decree-holder's failure to prosecute, and a certificate is sent to the Court which passed the decree that execution has failed by reason of non-prosecution, the former Court has no power to receive a subsequent application for execution for its jurisdiction ceased when the certificate was sent; the proper Court then to deal with the decree is the Court that passed it (h).

43. [S. 229.] Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be

Execution of decrees passed by British Courts in places to which this part does not extend or in foreign territory.

(z) *Maharaja of Bhartpur v. Rani Kanno Dei* (1901) 23 All. 181; *Kashi v. Jamuna* (1904) 31 Cal. 922; *Subramanian v. Panjamma* (1882) 4 Mad. 824.
(a) *Bajirav v. Nanarav* (1887) 11 Bom. 528.
(b) *Sadashe v. Jayantibai* (1884) 8 Bom. 185; *Madho Lal v. Katwari* (1888) 10 All. 180.
(c) *Parvata v. Digambar* (1891) 15 Bom. 307.

(d) See *Ohogalal v. Trueman* (1883) 7 Bom. 481; *Kasturshet v. Rama* (1886) 10 Bom. 65.
(e) *Ashootosh Dutt v. Doorga* (1861) 6 Cal. 504.
(f) *Maharaja of Bobbili v. Narasuraju* (1912) 37 Mad. 231.
(g) *Abda Begam v. Muzaffar* (1898) 20 All. 129.
(h) *Mathura v. Kailas* (1896) 3 C. W. N. 6081.

executed in manner herein provided within the jurisdiction of any Court in British India.

44. [s. 229B] The Governor-General in Council may, by notification in the *Gazette of India*, declare that the decrees of any Civil or Revenue Courts situate in the territories of any native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees may be executed in British India as if they had been passed by the Courts of British India.

Execution of decrees
passed by Courts of Na-
tive States.

By notification.—For notifications issued under this section, see General Statutory Rules and Orders, Vol. I, pp. 622-625, and Vol. IV, pp. 682, 683 and 685.

Where foreign judgment passed without jurisdiction.—This section was merely intended to alter the procedure by which decrees passed by Courts of Native States can have effect given to them in British India (i). It does not preclude a Court of British India to which a decree of a Native State is sent for execution by virtue of a notification under this section from ascertaining whether the foreign Court had jurisdiction to pass the decree, and from refusing execution if it finds that the foreign Court had no jurisdiction to pass the decree (j). See notes to s. 10, "A British Indian Court will not give effect to a foreign judgment, etc."

Limitation for execution of a decree of a Court of a Native State.—The period of limitation for execution of a decree of a Court of a Native State transferred for execution to a Court of British India is not the period prescribed by the law of that State, but that prescribed by the law of British India, that is, within three years from the date of the decree [Limitation Act, 1908, Sch. I, art. 182] (k).

45. [s. 229A] So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the *Gazette of India*, declared this section to apply.

Execution of decrees
in foreign territory.

Court established or continued in Native States.—For a list of such Courts see General Statutory Rules and Orders, Vol. I, pp. 638-642, and Vol. IV p. 683.

Note that there is no provision for sending decrees of British Indian Courts for execution to Courts in Native States other than those mentioned in this section, though s. 44 provides for the issue of notifications declaring that the decrees of these very Courts may be executed in British India as if they had been passed by the Courts of British

(i) *Madras v. P. & M. Co.* (1892) 11 Bom. 213. (j) *Strappa v. Jangal* (1864) 40 Bom. 551.
(k) *Parasuram v. S. & S. Co.* (1912) 40 Bom. 244. (l) *Madras v. P. & M. Co.* (1912) 40 Bom. 244.

St.
45, 46.

India. Such a notification was issued with regard to the Travancore Courts and also the Cochin Courts in 1887 as part of a reciprocal arrangement by which those Courts were to execute the decrees of our Courts, and there are regulations made by the Travancore and other States providing for execution of decrees of our Courts upon receipt from our Courts of a copy of the decree, a certificate of non-satisfaction, and a copy of any order for execution, or a certificate that no such order has been made. Such being the case, there is no reason why our Courts should not act in aid of the Travancore Courts and furnish them *as matter of comity* the documents they require to enable them to execute the decrees of our Courts *under the powers conferred upon them by the legislative authority in Travancore*. The policy of the Indian legislature has been to leave the decrees of our Courts to be executed in the Courts of Native States pursuant to the legislative authority of such States, but not to provide, as they have in s. 45 as regards a limited number of such Courts, for the transfer to them of the decrees of our Courts for execution so as to make them the executing Courts as regards such decrees for all purposes with authority to decide all questions arising in the course of execution (1).

"By notification."—For notifications issued under this section, see General Statutory Rules and Orders, Vol. I, pp. 618-621.

46. [New.] (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept.

Precepts.

cept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Attachment under precept.—The object of a precept is to enable a decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. No such attachment, however, can continue for more than two months except in the two cases mentioned in the section.

The effect of the latter part of the section is to do away with a re-attachment of property attached under a precept where, before the determination of the interim attachment, the decree-holder applies for execution against the property.

(1) *Pierce Leslie v. Perinial* (1917) 40 Mad. 1069, 1076-1079.

QUESTIONS TO BE DETERMINED BY COURT
EXECUTING DECREE.

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47. [s. 244.] (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

Questions to be determined by the Court executing decree.

(2) The Court may, subject to any objection, as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall for the purposes of this section, be determined by the Court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

Changes introduced by the section.—This section corresponds with s. 244 of the Code of 1882 except in the following particulars :—

1. Sub-clauses (a) and (b) of s. 244, which provided for the determination of questions regarding the amount of mesne profits and interest in execution, proceedings have been omitted, as it was deemed expedient that such questions should be determined by the decree and not in execution. See O. 20, r. 12.

The words “or to the stay of execution thereof” which occurred in s. 244 after the words “execution, discharge or satisfaction of the decree” have been omitted in the present section. There are two possible views as regards the omission of these words. The one is that the words omitted may have been regarded as superfluous, for a plea that the execution of a decree may be stayed is equivalent to the plea that the decree should not be executed, and it is thus a question “relating to the execution” of the decree (m). The other view is that questions relating to the stay of execution are no longer within the provisions of this section and no appeal will lie from orders determining such questions (mm). The latter view seems to be the correct view.

3. Sub-section (2) of the present section is new. It gives legislative recognition to the practice followed by the Courts under the Code of 1882. See notes below under the head “Sub-section (2).”

(m) *Subramania v. Kumara Velu* (1916) 89 Mad. 541, 543; *Ohidambaram v. Krishna* (1917) 40 Mad. 233, 237-238. | (mm) *Janardan v. Martand* (1920) 22 Bom. L. R. 889.

by *B* to *A* on the mortgage, and a decree is passed for *A* for that amount. After the decree has been fully executed, *B* discovers an error in calculation, and the decree is amended by substituting Rs. 6,000 for Rs. 7,000. *B* may claim a refund of Rs. 1,000 by an application under this section, but not by a separate suit (g). Similarly if *A* discovers an error in calculation after the decree has been executed, and the decree is amended by substituting, say Rs. 7,500, for Rs. 7,000, *A* may claim the excess of Rs. 500 by an application under this section, but not by a separate suit (r).

3. *Restitution of property sold in execution, when the sale is set aside.*—*A* obtains a decree against *B* for Rs. 5,000. *B* fails to pay the amount of the decree and his property is thereupon sold in execution, and purchased by *A*, the decree-holder. The sale is set aside on *B*'s application on the ground that the property was purchased by *A* without the leave of the Court as required by O. 21, r. 72. *B* may claim restitution of the property by an application under this section, but not by a separate suit (s). See now s. 144, sub-s. (2).

4. *Claim by legal representative of a deceased judgment-debtor for restitution of property taken in execution, on the ground that the decree in execution of which the property was taken is a nullity.*—If the hearing of a suit is concluded and judgment reserved, and the defendant then dies, the decree is binding upon his estate, though the judgment is delivered after his death (t). The reason is that in such a case nothing is left to be done by the parties from the moment the judgment is reserved, and any delay that takes place is the delay of the Court (u). See O. 22, r. 6. But if the defendant dies before the hearing is concluded, and a decree is passed against him without his legal representative being brought on the record, the decree is a nullity, and it cannot be executed against his legal representative (v). Suppose now that a defendant dies before the hearing is concluded, that a decree is passed against him without his legal representative being brought on the record, that the decree-holder applies for execution of the decree against the legal representative under s. 50, that the latter does not object to execution on the ground that the decree is a nullity, and that the property of the deceased is sold in execution. Is the legal representative entitled to have the sale set aside, and to recover back the property on the ground that the decree being a nullity, the execution proceedings are void, or is he estopped from doing so on the ground that he ought to have objected to the execution proceedings before the sale of the property? It has been held that the decree being a nullity, he is entitled to recover back the property and that he is not estopped from claiming back the property, for it was no duty of his to inform the decree holder that the proceedings adopted by him were illegal (w). Taking it then that the property sold can be claimed back, the question to be considered is, by what procedure is the property to be recovered, whether it is to be recovered by an application under this section or by a separate suit? According to an earlier decision of the Allahabad High Court, the legal representative is entitled to an order for restitution by an application under this section (x). According to a later decision of the same Court, he may bring a

(g) *Harnam v. Muhammad* (1905) 27 All. 485; *Dhan Kunwar v. Mahtab Singh* (1900) 22 All. 79.

(r) *Niratan v. Ram Rutton* (1901) 5 C. W. N. 627.

(s) *Vinayagaya v. Venkata* (1898) 16 Mad. 287; *Daulat Singh v. Jugal Kishore* (1900) 22 All. 108.

(t) *Ramacharya v. Anantacharya* (1897) 21 Bom. 314; *Surendro v. Doorya Soondery* (1892) 19 Cal. 518, 538, 19 I. A. 108.

(u) *Chetan v. Balbhadra* (1899) 21 All. 314.

(v) *Radha Prasad v. Lal Sahab* (1891) 13 All. 53, 17 I. A. 150; *Janardhan v. Ramchandara* (1902) 26 Bom. 317; *Sripat v. Tirbani* (1918) 40 All. 423; *Jungli Lal v. Laddu Ram* (1919) 4 Pat. L. J. 240 [F.B.].

(w) *Bent Prasad v. Mukhtesar* (1899) 21 All. 316, p. 323.

(x) *Imdad Ali v. Jagan Lal* (1895) 17 All. 478.

- S. 47. regular suit for the purpose (y). The earlier decision was not referred to in the later decision. Having regard to the decisions that questions relating to the *validity* of a decree cannot be tried in execution proceedings, but must be decided in a regular suit, the procedure by suit would appear to be the proper one. See ill. (1) under the head "Separate suit will lie," p. 126 below.

Note.—In some of the cases cited above, it was contended that the provisions of this section did not apply to questions arising *subsequent* to the execution of a decree, and since a claim for *restitution* could only arise *after* a decree has been completely executed, such claim should be made by a regular suit, and not by an application under this section. But this contention was overruled and it was held that this section applies to questions arising between the parties *after* the decree has been executed as much as to questions arising between them previous to execution (2). All that is necessary is that the question must be one *relating* to execution.

5. *Proceedings for recovery of possession of property sold in execution.*—A obtains a decree against B. In execution of the decree certain immoveable property belonging to B is put up for sale. The property may be purchased by A, the decree-holder, with the leave of the Court obtained under O. 21, r. 72, or it may be purchased by a third person. If the property is sold, and the judgment-debtor or his tenants obstruct the purchaser in obtaining possession of the property, the question arises as to what procedure should be adopted by the purchaser to recover possession from the judgment-debtor. The answer depends upon who is the purchaser, for the property may be purchased by the decree-holder himself after obtaining the leave of the Court, or it may be purchased by a stranger.

(i) Where the property is purchased by a *stranger*, he may either *apply* for delivery of possession under O. 21, r. 95, or he may bring a regular *suit* for possession (see notes to O. 21, r. 95 below). To such a case the provisions of s. 47 do not apply. The purchaser being a stranger, that is, one who is not a party to the suit, is not precluded from bringing a regular suit for possession (a). The period of limitation for an *application* for delivery of possession is three years from the date when the sale becomes absolute [Limitation Act, 1908, Sch. I, Art. 181]. The period of limitation for a *suit* for possession is twelve years from the date when the sale becomes absolute [*ib.*, art. 138].

(ii) Where the *decree-holder himself is the purchaser*, there is a conflict of decisions as to what procedure should be adopted by him for obtaining possession. According to the view taken by the High Courts of Bombay (b) and Madras (c) and in some cases also by the High Court of Calcutta (d), the only course open to him is to *apply* for possession under O. 21, r. 95, coupled with s. 47. He cannot bring a separate suit for possession, for his case is governed by the provisions of s. 47. The case being governed by s. 47, an appeal also will lie from any order that may be made on his application. According to this view, the question as to delivery of possession is a question relating to the "execution, discharge or satisfaction" of the decree, and, further, the question is treated as one between the "parties to the suit" on the ground that the decree-holder does not lose his character of a party to the suit merely because he happens also to be the purchaser. It follows from this that where the decree-holder, after purchasing the property, sells it to a third person, and such

(y) *Bent Prasad v. Mukhtesar* (1899) 21 All. 316.
(z) See *Collector of Jaunpur v. Bithal Das* (1902) 24 All. 291.

(a) *Kishori Mohun Roy v. Chunder Nath* (1887) 14 Cal. 644; *Krishna v. Sarasvatula* (1908) 81 Mad. 177.

(b) *Sadasht v. Narayan* (1911) 35 Bom. 452.

(c) *Kasinatha v. Uthumana* (1902) 25 Mad. 529; *Kattayat v. Raman* (1908) 26 Mad. 740; *Sandhu v. Hussain* (1905) 28 Mad. 87.
(d) *Madhusudan v. Gobinda* (1900) 27 Cal. 34; *Rammarain v. Bandi Pershad* (1904) 31 Cal. 787; *Hari Charan v. Mon Mohan* (1914) 18 Cal. W. N. 27.

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person is resisted by the judgment-debtor in obtaining possession, he too should proceed by way of application under this section and not by a regular suit, the reason being that a purchaser from a decree-holder who has purchased at a Court sale is a "representative" of the decree-holder within the meaning of this section (e). In two of the cases cited above, however, the Madras Court observed that if this question had not already been settled by previous decisions of that Court, they would be disposed to hold that such proceedings could not be regarded as those "relating to the execution, discharge or satisfaction of the decree" within the meaning of this section (f). According to the other view, which is the view taken by a Full Bench of the Allahabad High Court (g) and a Full Bench also of the Patna High Court (h) and in a large majority of cases by the Calcutta High Court (i) and in recent cases by the Chief Court of the Punjab (j), a decree-holder purchaser stands on the same footing as a purchaser who is a stranger, so that he may proceed either by an application under O. 21, r. 95, or by a separate suit for possession. This view proceeds on the ground that the question as to delivery of possession is not one relating to the "execution, discharge or satisfaction" of the decree within the meaning of s. 47, and that even if it be so, a decree-holder after he becomes purchaser of the property can no longer be said to be a "party to the suit" within the meaning of s. 47. According to this view, the matter is not within s. 47 at all, and no appeal therefore lies from an order made on the application of the decree-holder purchaser for delivery of possession under O. 21, r. 95. We are inclined to think that s. 47 does not apply to the case at all, not because the decree-holder purchaser is not a "party to the suit" within the meaning of s. 47—for we think he is such a party (k), but because the question as to delivery of possession cannot be said to be a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of s. 47. The following are the main points of distinction between the two views:—

- (1) According to the former view, that is, the view taken by the High Courts of Bombay and Madras and in some cases by the High Court of Calcutta, a decree-holder purchaser, who is resisted by the judgment-debtor in taking possession of the property purchased by him at the auction-sale, can proceed only by an application under O. 21, r. 95, coupled with s. 47, and such application should be made within three years from the date on which the sale becomes absolute [Limitation Act, Sch. I, art. 181]. According to the latter view, that is the view taken by the High Courts of Allahabad, Patna and Lahore and in a large majority of cases by the High Court of Calcutta, he may proceed by an application under O. 21, r. 95, or if he may proceed by way of suit. The period of limitation for a suit is twelve years from the date when the sale becomes absolute, so that even if the time for an application has expired, he may prosecute his remedy by way of suit.

(e) *Sandhu v. Hussain* (1905) 28 Mad. 87.

(f) 20 Mad. 740 and 28 Mad. 87 *supra*.

(g) *Bhagwati v. Banwari Lal* (1909) 31 All. 82 F. B. (Stanley, C. J., and Knox, J., dissenting); *Sudhu Misir v. Bhagratih* (1918) 40 All. 216.

(h) *Haji Abdul Gani v. Raja Ram* (1916) 1 Pat. L. J. 232; *Dhaninder Das v. Bakhdit* (1918) 3 Pat. L. J. 571; *Sridhar v. Jageshwar* (1919) 4 Pat. L. J. 716.

Seru Mohan v. Bhagben (1884) 9 Cal. 602; *Iswar Perhad v. Jai Narain* (1886)

12 Cal. 169; *Kishori Mohun v. Chunder Nath* (1887) 14 Cal. 644; *Bhimlal Das v. Ganesha* (1897) 1 Cal. W. N. 658; *Mohomed v. Habib Mia* (1904) 8 Cal. L. J. 749; *Sast Bhawan v. Radha Nath* (1915) 19 Cal. W. N. 835.

(j) *Chhoti Ram v. Karmon Baj* (1918) P. R. No. 8, p. 34; *Nusrat Ali v. Sakina Begam* (1919) P. R. No. 121, p. 312.

(k) See *Ganapathy v. Krishnama Hariar* (1918) 45 I. A. 64, 60, 41 Mad. 403, 411.

- S. 47. (2) According to the former view, the application for delivery of possession is one under O. 21, r. 95, coupled with s. 47, and an appeal therefore lies from an order made on the application. According to the latter view, s. 47 has nothing to do with the case, and the application is purely one under O. 21, r. 95, and no appeal lies from an order made upon such an application.

6. *Dispute between decree-holder and judgment-debtor as to amount of property actually attached.*—Where it is alleged by the judgment-debtor that the decree-holder in collusion with the Court peon had made away with the bulk of the property which had been attached and that only a small portion of the whole had been put up for sale, the matter is one which should be enquired into by the Court executing the decrees under this section (l).

7. *Second suit for redemption.*—See notes to s. 11, "Finality of decrees in redemption suits," p. 61 above.

8. *Questions as to factum of adjustment of decree.*—A obtains a decree against B for Rs. 27,000. B applies to enter up satisfaction of the decree, alleging that the decree was adjusted by a writing in the nature of a compromise signed by A. A alleges that the writing was obtained by fraud. The question is one "relating to the discharge of the decree" within the meaning of this section, and it should be decided on B's application and not by a separate suit (m).

Separate suit will lie.—When it is said with reference to this section that a separate suit *will* lie, it is understood that either the question does not relate to the "execution, discharge or satisfaction" of the decree, or that it does not arise between the parties to the suit or their representatives.

First, where the question does not relate to the execution, discharge or satisfaction of the decree.—In such a case a separate suit will lie, for the question not being one relating to the execution, discharge or satisfaction of the decree it cannot be determined in execution proceedings by the Court executing the decree. The following are the leading cases on the subject:—

(1) *Questions as to the validity of a decree.*—If a judgment-debtor or his legal representative objects to the execution of a decree on the ground that the decree is not valid, the question as to the validity of the decree, not being one relating to the "execution, discharge or satisfaction" of the decree, cannot be tried in execution proceedings under this section. Such a question can only be tried in a regular suit brought for the purpose (n). Thus if a judgment-debtor objects to the execution of a decree on the ground that the decree was obtained by fraud, the question of the validity of the decree must be determined by a separate suit (o). The same rule applies where a reversioner objects to the attachment of his reversionary interest, on the ground that the decree obtained against the widow of the last male owner is *not binding* on him, there being no debt due by the last male owner (p). See notes to s. 38 under the head "The Court executing a decree cannot go behind the decree," p. 114 above.

(l) *Gajadhar v. Babu Arjun* (1916) 1 Pat. L. J. 558.

(m) *Muhammad Kasim v. Rukia Begam* (1919) 41 All. 443.

(n) *Chintaman v. Chintaman* (1898) 22 Bom. 475; *Gomathan v. Komandur* (1904) 27 Mad. 118; *Rangasamy v. Thirupati* (1905) 28 Mad. 26; *Kumaretta v. Subapathy* (1907) 30 Mad. 26; *Khetrapal v. Sayama* (1904)

32 Cal. 265; *Liladhar v. Chaturbhuj* (1899) 21 All. 277; *Hira Lal v. Parmeshwar* (1899) 21 All. 356.

(o) *Sudindra v. Budan* (1886) 9 Mad. 80; *Dhani Ram v. Lachmeswar* (1896) 23 Cal. 689.

(p) *Tallapragada v. Boorugapalk* (1907) 30 Mad. 402; *Ala Singh v. Wasawa* (1913) F.E. no. 14, p. 52.

(2) *Agreement not to execute decree.*—*A* applies for execution of a decree obtained by him against *B*. *B* objects to execution on the ground that *A* had agreed prior to the decree not to execute the decree against him. *A* denies the agreement. It has been held by the Calcutta High Court that the question whether or not there was any such agreement between *A* and *B* is not a question relating to the execution, discharge or satisfaction of a decree within the meaning of this section, and that *B*'s only remedy is to bring a regular suit against *A* to restrain him by an injunction from executing the decree. The term "decree," according to that Court, means a decree which is susceptible and capable of execution, and not a decree which is alleged by the judgment-debtor to be a mere paper decree not to be executed (q). On the other hand, it has been held by the High Courts of Bombay (r), Madras (s) and Allahabad (t), that the question as to the existence of such an agreement ought to be determined in execution under this section, and not by a separate suit. Such an agreement is not obnoxious to O. 21, r. 2, as that rule relates to agreements after the passing of the decree (u).

(3) *Uncertified payment or adjustment.*—*A* obtains a decree against *B* for Rs. 2,000. It is subsequently agreed between *A* and *B* that *A* should accept Rs. 1,000 in full satisfaction of the decree. *B* accordingly pays *A* Rs. 1,000, but the adjustment is not certified to the Court as required by O. 21, r. 2. *A* then applies for execution of the decree. *B* objects to execution on the ground that the decree has already been satisfied. This objection cannot be entertained by the Court executing the decree, though it is a question relating to the "satisfaction" of the decree, for an uncertified adjustment cannot be recognized by a Court in execution proceedings (see O. 21, r. 2). Nor can *B* institute a regular suit against *A* for a declaration that the decree has been satisfied and for an injunction restraining *A* from executing the decree (v). Such a suit is barred under the present section, for the principal question in the suit will be whether the decree has been satisfied, and such a question being one relating to the "satisfaction" of the decree falls within the scope of this section. For the same reason, if *B*'s property is sold in execution of the decree, he cannot bring a suit to set aside the sale on the ground that the decree has been adjusted and satisfied (w). But if the decree is executed, *B* may sue *A* for damages for breach of the contract. The question in such a suit is not a question relating to the "execution, satisfaction or discharge" of the decree, but whether *A* agreed to accept Rs. 1,000 in full satisfaction of the judgment-debt, and, if so, what are the damages sustained by *B* by reason of the breach of the agreement. These questions are not within the scope of the present section, and hence a suit involving these questions is not barred under this section (x). See notes to O. 21, r. 2, "Sub-rule (3)." See also notes, "No. 8. Questions as to factum of adjustment of decree" on p. 126 above.

(4) *Declaratory decree.*—A decree which merely declares the rights of parties and does not direct any act to be done is incapable of execution (y). Hence a separate suit will lie to enforce the rights declared by such a decree. In fact, the only mode of enforcing such rights is by a regular suit. Thus if it be declared by a decree that the plaintiff is entitled to a monthly allowance, the decree is merely declaratory. Hence if the defendant fails to pay the allowance for any one month, the plaintiff's remedy is by suit,

(q) *Hassan Ali v. Gausi Ali* (1904) 31 Cal. 179; *Benode v. Brajendra* (1902) 29 Cal. 810.

(r) *Laldas v. Kishordas* (1898) 22 Bom. 403 [F.B.]; See also *Ismail v. Daudbhai* (1900) 2 Bom. L. R. 118.

(s) *Rukmani v. Krishnamachary* (1911) 4 Mad. L. T. 464; *Subramania v. Kumaravelu* (1916) 39 Mad. 541; *Chidambaram v. Krishna* (1917) 40 Mad. 233 [F.B.].

(t) *Gauri Singh v. Gajadhar Das* (1909) 6 All. L. J. 403.

(u) *Ohidambaram v. Krishna* (1917) 40 Mad. 233.

(v) *Amzan v. Matuk Lal* (1894) 21 Cal. 437; *Bairagulu v. Bapanna* (1892) 15 Mad. 302; *Deno Bandhu v. Hari* (1904) 31 Cal. 480.

(w) *Jaikaran v. Raghunath* (1898) 20 All. 254.

(x) *Hannant v. Subbhat* (1899) 23 Bom. 394; *Iswar Chandra v. Haris Chandra* (1898) 25 Cal. 718; *Periatambi v. Vellaya* (1898) 21 Mad. 409.

(y) *Krishna v. Singara* (1882) 4 Mad. 219.

- S. 47. and not in execution under this section (z). But if the decree, besides declaring the plaintiff's right to a monthly allowance, *directs* the defendant to pay the same from month to month to the plaintiff, the payment can only be enforced by proceedings in execution as often as default is made by the defendant, and a separate suit will not lie (a).

(5) *Claim for contribution by one judgment-debtor against another.*—A obtains a decree against B and C for Rs. 1,000. A executes the decree against B alone, and B pays the whole amount. B then sues C for contribution. The suit is not barred under this section, for the claim for contribution cannot be said to relate to the “execution, discharge or satisfaction” of the decree within the meaning of this section (b). In fact the remedy by suit is the only remedy.

(6) *Mal-administration of debtor's estate.*—A obtains a decree against B for Rs. 25,000. B dies leaving a will of which C is the executor. Failing in his endeavour to execute the decree, A sues C for the administration of B's estate by the Court and for an account against C on the footing of mal-administration. The suit is not barred by this section nay the remedy by way of suit is the only remedy, for the Court cannot in execution proceedings go into the question of whether or not an executor has been guilty of mal-administration of the estate (c).

Secondly, where the question, though relating to the execution, discharge or satisfaction of the decree, does not arise between the parties to the suit or their representatives.—In such a case, the question cannot be determined in execution proceedings under this section, and a regular suit may be brought. A question is said to arise between “the parties to a suit or their representatives,” when it arises between the decree-holder or his representative on the one hand and the judgment-debtor or his representative on the other. Questions between decree-holders *inter se* (d), or between judgment-debtors *inter se* (e), or between a party and his own representative (f), are not questions arising between “the parties to the suit or their representatives” within the meaning of this section.

Sub-section (2).—Court may treat suit as an application.—This sub-section is new. It gives legislative recognition to the practice followed by the Courts under the repealed Code. It enables the Court to treat an application under this section as a suit or a suit as an application. Hence where a regular suit is instituted for the determination of a question which ought to be determined under this section by the Court executing the decree, the Court in which the suit is brought may either dismiss the suit as barred under this section, or it may in its discretion regard the *plaint* in the suit as an *application* under this section and dispose of it accordingly, provided the Court in which the suit is brought has jurisdiction to execute the decree (g) and the execution of the decree was not barred at the date of the suit (h). Suppose now that a suit barred under this section is heard and disposed of as a *suit*: is the decree liable to be set aside in appeal on the ground that the Court had no *jurisdiction* to entertain the suit? It has been held that it is not, for the case is not one of *absence of jurisdiction* but of *error of procedure*. Hence if the decree be otherwise good in law, the appellate Court may treat the *plaint* in the suit as an *application* in execution and the *decree* in the suit as an *order* under this section, and it may uphold the decree, provided the Court which passed the decree had jurisdiction to execute the original decree (i). But the suit in

(z) *Nawazish v. Vilayete Khanum* (1898) 2 Agra 23; *Madhavrao v. Ramrao* (1898) 22 Bom. 267.

(a) *Ashutosh v. Lukhimoni* (1892) 19 Cal. 139; *Distinguish Matangini v. Chooneymoney* (1895) 22 Cal. 903.

(b) *Ram Saram v. Janki* (1896) 18 All. 106.

(c) *Saratmani v. Bala* (1908) 35 Cal. 1100.

(d) *Sanjivi v. Ramasami* (1885) 8 Mad. 495; *Ram Chunder v. Hamiran* (1906) 11 O. W. N. 422.

(e) *Puri v. Mahadeo* (1884) 6 All. 12.

(f) *Maganlal v. Doshi* (1901) 25 Bom. 631.

(g) *Jhamman Lal v. Kewal Ram* (1900) 22 All. 121; *Sadho v. Abhenandan* (1904) 26 All. 101, 103; *Sheodihal v. Bhawani* (1907) 29 All. 348; *Venkata Krishnama v. Krishna Rao* (1909) 32 Mad. 425.

(h) *Sadasht v. Narayan* (1911) 35 Bom. 452, 461.

(i) *Azizuddin v. Ramarugra* (1887) 14 Cal. 605; *Biru Mohata v. Shyama Churn* (1805) 22 Cal. 483; *Pasupathy v. Kothanda* (1905) 28 Mad. 64; *Jotindra v. Mahomed* (1905) 32 Cal. 382.

such a case must have been brought within the period of limitation appropriate to applications under this section, namely, the period prescribed by art. 181 of the Limitation Act, 1908 (*j*). It has been recently held by the High Court of Madras in a case decided under the Code of 1882 that even a written statement may in a proper case be treated as an application under this section (*k*). See s. 6 and the notes to s. 38 under the head "Jurisdiction of Court executing decree."

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Parties to the suit—Explanation to the section.—Under the old section it was held by the High Courts of Allahabad (*l*) and Calcutta (*m*) that a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, could not be considered as "parties to the suit" within the meaning of that section. On the other hand, it was held by the High Court of Madras, that such plaintiff and such defendant must be regarded as "parties to the suit" (*n*). The Explanation to the section gives effect to the Madras decision.

It has been held by the High Court of Madras that a defendant against whom a suit is dismissed on the ground of misjoinder is not "a defendant against whom a suit has been dismissed" within the meaning of the Explanation, and that he is not a party to the suit (*o*). But where a party has been properly impleaded as a defendant in a case and the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed against such defendant, he is "a defendant against whom a suit has been dismissed" within the meaning of the Explanation and therefore a party to the suit (*p*).

Illustrations.

(1) *A* sues *B* and *C*. A decree is passed against *B*, but as against *C* the suit is dismissed. In execution of the decree against *B*, certain property is attached as belonging to *B*. *C* contends that the property belongs to him and claims to have it released from attachment. Here *C* is a "party to the suit," though the suit has been dismissed against him. He must therefore proceed by an application under this section, and not by a separate suit.

(2) *A* and *B* institute a suit against *C*, praying that the relief claimed in the suit may be granted to *A*, or in the alternative to *B*. A decree is passed in the suit awarding the relief claimed to *A*, and dismissing *B*'s claim. Here *B* is a "party to the suit," though his suit has been dismissed.

(3) *A* mortgages his property to *B*. He then sells his equity of redemption to *C*. *C* sues *B* for redemption of the mortgage, and joins *D* who claims to be the owner of the property as a defendant to the suit. At the hearing, the suit is dismissed as against *D* on the ground of misjoinder, that is, on the ground that he is not a proper party to the suit. *D* is not "a defendant against whom a suit has been dismissed" within the meaning of the Explanation, and he is not a party to the suit: *Krishnappa v. Periaswamy* (1917) 40 Mad. 964. See also *Sham Lal v. Amar Prasad* (1917) 2 Pat. L. J. 219.

A "surety" for the performance of a decree, etc., is a "party to the suit" within the meaning of this section (*q*). See s. 145.

(*j*) *Lalman Das v. Jagan Nath* (1900) 22 All. 376.

(*k*) *Thathu v. Kondu* (1909) 32 Mad. 242.

(*l*) *Kalka v. Basant* (1901) 23 All. 346; *Sheo*

Fargash v. Nawab Singh (1910) 32 All. 321.

(*m*) *Rahimuddin v. Loll Meah* (1902) 29 Cal. 696;

Ram Pershad v. Jagannath (1903) 30 Cal.

134.

(*n*) *Ramaswami v. Kameswaramma* (1900) 23

Mad. 361 [F.B.]. See also *Gowri v.*

Vigneshwar (1893) 17 Bom. 49.

(*o*) *Krishnappa v. Periaswamy* (1917) 40 Mad.

964. The proper course in such a case is to

order the name of such a party to be struck

out under O. 1, r. 10 (2): *Sanmammu v.*

Radhabhaya (1918) 41 Mad. 418, 424-425.

(*p*) *Sanmammu v. Radhabhaya* (1918) 41 Mad.

418 [F.B.]

(*q*) See *Linga v. Husain* (1905) 28 Mad. 117.

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As to whether a decree-holder ceases to be a "party to the suit" by becoming the purchaser of the property of the judgment-debtor at a sale held in execution of his decree, see notes "No. 5.—Proceedings for recovery of possession of property sold in execution," on p. 124 above. See also notes on p. 128 above, "Secondly, where the question, etc."

"Representative."—The term "representative" in this section includes not merely "legal representative" in the sense of heirs, executors or administrators, but "representative in interest," that is, any transferee of the decree-holder's interest, or any transferee of the judgment-debtor's interest, who, so far as such interest is concerned, is bound by the decree (*t*). We proceed to give illustrations:—

(1) A transferee of a decree, or of the interest of any decree-holder in a joint decree within the meaning of O. 21, r. 16, is a "representative" of the decree-holder (*u*). A transferee from such transferee is also a "representative" of the decree-holder (*v*).

A judgment-creditor who attaches a decree held by the judgment-debtor against another is a "representative" of the judgment-debtor. A holds a decree against B. C obtains a decree against A, and in execution attaches the decree held by A against B. C is a "representative" of A in proceedings in execution of A's decree against B (*w*). See O. 21, r. 53, sub-r. 3.

(2) A obtains a decree against B for Rs. 5,000. B then sells certain property belonging to him to C. C is not a "representative" of B, for the decree is a simple money decree, and does not relate to the *specific* property sold to C (*x*).

(3) A purchaser, lessee, or mortgagee, from a judgment-debtor, of property belonging to the judgment-debtor and *attached* in execution of a decree against him, is the "representative" of the judgment-debtor within the meaning of this section, for the property being *under attachment* at the date of the purchase, lease or mortgage, the purchaser, lessee or mortgagee is bound by the decree so far as the interest transferred to him is concerned (*y*). See section 64.

(4) *Purchaser of judgment-debtor's equity of redemption under a private sale.*—A obtains a decree against B for sale of certain property mortgaged to him by B. After the date of the decree, B sells his equity of redemption in the mortgaged property to C. C is a "representative" of B, the judgment-debtor, for the property having been purchased after it was affected by A's mortgage-decree, C is to that extent bound by A's decree. Hence any question relating to the execution of A's decree, and arising between A and C, must be determined by the Court executing A's decree, and not by a separate suit (*z*). The same procedure would apply even if B had transferred his interest in the property to C during the pendency of the suit though before the passing of the decree (*a*).

(5) *Purchaser of judgment-debtor's equity of redemption at a judicial sale.*—A obtains a decree against B for the sale of certain property mortgaged to him by B. Before the property could be sold in execution of A's decree, X, who holds a money-decree against B, brings B's equity of redemption in the mortgaged property to sale in execution of his

(*t*) *Ishan Chunder v. Beni Madhub* (1897) 24 Cal. 62; *Gulzari Lal v. Madho Ram* (1904) 26 All. 447; *Tara Prasanna v. Nilmoni* (1913) 41 Cal. 418.

(*u*) *Dwar Buksh v. Fatik* (1899) 26 Cal. 250; *Badri Narain v. Jai Kishen* (1894) 16 All. 433.

(*v*) *Ganga Das v. Yakub Ali* (1900) 27 Cal. 670.

(*w*) *Sah Man Mull v. Kunagasabapathi* (1893) 16 Mad. 20; *Krishnan v. Venkatapathi* (1906) 29 Ma. 1. 318.

(*x*) *Madho Das v. Ramji* (1894) 16 All. 286; *Shiv-*

ram v. Jiru (1899) 13 Bom. 34; *Rashbehary v. Surumoyee* (1881) 7 Cal. 403; *Bamphul v. Harbakhsh Singh* (1912) P. R. no. 64, p. 242 [gift by judgment-debtor of his entire property].

(*y*) *Gur Prasad v. Ram Lal* (1899) 21 All. 20 (sale); *Mathewson v. Gobardhan* (1901) 28 Cal. 492 (lease); *Paramananda v. Mahabeer* (1897) 20 Mad. 373 (mortgage); *Kuppana v. Kumara* (1909) 34 Mad. 450 (sale).

(*z*) *Madho Das v. Ramji* (1894) 16 All. 286, 291.

(*a*) *Shro Narain v. Chuni Lal* (1900) 22 All. 243.

decree, and the same is purchased by *C*. *C* is a "representative" of *B*, the judgment-debtor, for the property having been purchased after it was affected by *A*'s mortgage-decree, *C* is to that extent bound by *A*'s decree. Hence any question relating to the execution of *A*'s decree, and arising between *A* and *C*, must be determined by the Court executing *A*'s decree and not by a separate suit (*b*).

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Note.—The only point of difference between this and ill. (4) is that in ill. (4) we have the case of a purchaser of the judgment-debtor's interest in the mortgaged property under a *private sale* from the judgment-debtor, while in the present illustration we have the case of a purchaser of the judgment-debtor's interest in the mortgaged property at a sale held in execution of a money-decree against the judgment-debtor. It was at one time thought that a purchaser under a *private sale* from a judgment-debtor was a "representative" of the judgment-debtor, but that a purchaser at a *judicial sale* was not his "representative" within the meaning of this section (*c*). But this view is no longer tenable.

(6) *A purchaser of property from a party to a suit in which an injunction has been granted affecting such property is not a "representative" within the meaning of this section.*—*A* obtains an injunction restraining *B* from obstructing him in the exercise of his right of way to his land over *B*'s land. *A* then sells his land to *C*. If *B* obstructs *C* in the enjoyment of the right of way, *C*'s proper remedy is by way of *suit* against *B* and not in execution under this section. The reason is that an injunction does not run with the land, and *C* cannot therefore claim the benefit of the decree against *B* (*d*). Note that *C* is not a transferee of the decree, but of the property only. See notes to s. 50 under the head "Decree for injunction."

(7) It has been held by the High Courts of Allahabad and Bombay that the Official Assignee is not a "representative" of an insolvent judgment-debtor within the meaning of this section (*e*). On the other hand, it has been recently held by the High Court of Calcutta that the Official Assignee is a "representative" of an insolvent judgment-debtor (*f*).

(8) It has been held by the High Court of Allahabad that a purchaser from a judgment-debtor under O. 21, r. 83 [Code of 1882, s. 305] is a "representative" of the judgment-debtor within the meaning of this section (*g*). *A* obtains a decree against *B*. In execution of the decree certain property belonging to *B* is attached, and an order is made for the sale thereof. *B* then obtains a certificate from the Court under O. 21, r. 83, to sell the property by private sale, and the property is sold to *C* in pursuance of the certificate. *C* is a "representative" of *B* within the meaning of this section.

(9) A purchaser from the judgment-debtor of an occupancy holding not transferable by custom is a "representative" of the judgment-debtor. If the holding is sold in execution of the decree against the judgment-debtor, and such purchaser is dispossessed by the auction-purchaser, the application that he may be restored to possession is to be made under this section, and not under O. 21, r. 100 (*h*).

(10) A purchaser from a judgment-debtor of a portion of a holding is, so far as his interest is concerned, bound by the decree for rent obtained against the judgment-debtor under s. 148 A of the Bengal Tenancy Act 8 of

(b) *Gulzari Lal v. Madho Ram* (1904) 26 All. 447; *Ishan Chunder v. Beni Madhub* (1897) 24 Cal. 62; *Radha Kishen v. Hem Chandra* (1907) 11 C. W. N. 495.
(c) See *Gour Sundar v. Hem Chunder* (1889) 16 Cal. 355, and *Sabharwal v. Sri Gopal* (1895) 17 All. 222.
(d) *Jamsetji v. Hari Dayal* (1908) 32 Bom. 181.
(e) *Kashi Prasad v. Müller* (1885) 7 All. 752; *Grey*

v. Hazari Lal (1908) 30 All. 486; *Sardarmal v. Arandayal* (1896) 21 Bom. 205.
(f) *Müller v. Lukhmani* (1901) 28 Cal. 419. But see *Chandmull v. Rames Soondary* (1894) 22 Cal. 259.
(g) *Gobardhan v. Bisban* (1901) 23 All. 116.
(h) *Panchratan v. Ram Sahay* (1918) 3 Pat L. J. 579.

- S. 47. 1885 and by the sale in execution of that decree. He is, therefore, a "representative" of the judgment-debtor; and if he is dispossessed by the auction purchaser, he may apply for possession under this section, but not under O. 21, r. 100 (i).

(11) A surety for the performance of a decree is not a "representative" of a party within the meaning of this section (ii).

Execution-purchaser.—We now turn to cases where property belonging to a judgment-debtor is sold in execution of the decree against him, and questions relating to the execution, discharge or satisfaction of the decree arise *subsequent to the sale*. These questions may be divided into two classes according to the character of the parties between whom they arise:—

A. Questions between the decree-holder on the one hand and the judgment-debtor on the other, the execution-purchaser being only interested in the result.—These questions being essentially questions *between parties to the suit* fall within the scope of this section. The fact that the auction-purchaser (who was not a party to the suit) is interested in the result, does not prevent the questions being questions *between parties*. These questions therefore must be determined by the Court executing the decree, and not by a separate suit. It has been so held in *Prosunno Kumar v. Kali Das* (j), which is the leading case on the subject. In that case their Lordships of the Privy Council said: "When a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result, has never been held a bar to the application of the section."

Illustrations.

(a) *A* obtains a decree against *B*. In execution of the decree certain property belonging to *B* is sold and purchased by *C*. *B* seeks to set aside the sale. *B* must proceed by an *application* and *not by a regular suit*. The mere fact that *C*, the auction-purchaser, who was no party to *A*'s suit, is interested in the result of the application, is no bar to the application of this section. Now *B* may seek to set aside the sale—

- (1) on the ground of *material irregularity* in publishing or conducting the sale, resulting in substantial injury [O. 21, r. 90]; or
- (2) on the ground of *fraud* in publishing or conducting the sale resulting in substantial injury [O. 21, r. 90]; or
- (3) on making the deposit required by O. 21, r. 89; or
- (4) on other grounds.

(1). If the sale is sought to be set aside on the first ground, the application must be made under O. 21, r. 90.

(2). If the sale is sought to be set aside on the 2nd ground, and this is what was sought to be done in *Prosunno Kumar v. Kali Das* (k) and the undermentioned cases (l), the application, in cases governed by this Code, must also be made under O. 21, r. 90. Under the Code of 1882, the application would be exclusively one under s. 244 which corresponds to the present section. But the law has now been altered for reasons to be presently stated. The same procedure applies where the sale is sought to be set aside after the same has been *confirmed* by the Court under O. 21, r. 92; that is to say, *B* can only

(j) *Bhikha v. Brij Bihari* (1917) 2 Pat. L. J. 478.

(k) *Raghubar Singh v. Jai Indra Bahadur Singh* (1919) 46 I. A. 228, 236.

(l) (1892) 19 Cal. 683, 19 I. A. 166; *Ganapathy v. Krishnamachariar* (1918) 45 I. A. 54, 60, 41 Mad. 403, 411.

(k) (1892) 19 Cal. 683, 19 I. A. 166.

(l) *Sadho v. Abhenandan* (1904) 26 All. 101; *Gaya Prasad v. Randhir Singh* (1906) 28 All. 681; *Mathura Das v. Lachman* (1902) 24 All. 239; *Durga Kunwar v. Balwan* (1901) 23 All. 478; *Harthar Kanta v. Rama Pandu* (1909) 33 Bom. 698.

proceed by an *application*, and the application must be one under O. 21, r. 90, though under the Code of 1882, it would have to be made under s. 244 (*m*). S. 47.

(3) If the sale is sought to be set aside on making the deposit required by O. 21, r. 89, the application must be made under that rule.

(4) If the sale is sought to be set aside on any other ground [see *ills.* (b) and (c) below], the application must be made under this section.

There is this difference between an application under this section and one under O. 21, rr. 89 and 90, that while an order made on an application under this section has the force of a decree [s. 2, cl. (2)], and is therefore open to a second appeal, an order made under O. 21, r. 92 on an application under O. 21, r. 89 and O. 21, r. 90, is appealable only as on order [O. 49, r. 1, cl. (j)] and no second appeal lies from it [s. 104, sub-s. (2)]. The object of the Legislature in transferring applications to set aside a sale on the ground of *fraud* in publishing or conducting the sale from the present section to O. 21, r. 90, is to exclude a second appeal from orders made on such applications. See notes to O. 21, r. 89, "Appeal," and notes to O. 21, r. 90 "Fraud in publishing or conducting sale."

(b) *A* obtains a decree against *B*, and applies for execution of the decree by attachment and sale of certain property belonging to *B*. An order is made for sale and the property is sold and purchased by *C*. *B* sues *A* and *C* to set aside the sale on the ground that the property was not liable to attachment and sale (see s. 60). The suit is barred by the provisions of this section (*n*). The reason is that the question as to whether the property was saleable or not is really one between *A* and *B*, the *parties to the suit* in which the decree was passed. "It is well settled that as between the judgment-debtor and the decree-holder this is an objection which can only be taken in execution, and it is also well settled that the provisions of s. 244 [now s. 47] prohibit a suit by a party or his representatives against an auction-purchaser to raise a question which as between the judgment-debtor and the decree-holder must have been determined under that section" (*o*). See notes to s. 60, "Objection to attachment on the ground that the property is not saleable, when to be raised."

(c) *A* obtains a decree against *B*. In execution of the decree certain property belonging to *B* is attached and proclaimed for sale. The decree is subsequently adjusted, but the adjustment is not certified to the Court as required by O. 21, r. 2 [Code of 1882, s. 258]. The consequence is that the property is sold by the Court, and it is purchased by *C*. *A* and *B* sue *C* to set aside the sale, alleging that they had effected an adjustment of the decree, and that the sale was therefore illegal and unnecessary. The suit is barred under this section for the question whether the decree was adjusted as alleged is one between *A*, the decree-holder, and *B*, the judgment-debtor, that is, between the *parties to the suit*, though they are ranged on one side as plaintiffs (*p*).

B. Questions between the auction-purchaser on the one hand and a party to the suit or his representative on the other hand.—Cases under this head frequently arise between the auction-purchaser on the one hand and the judgment-debtor on the other when the former is obstructed by the latter in obtaining possession of the property purchased by him. In such cases it has been seen that if the property is purchased by a *stranger*, he may apply for possession under O. 21, r. 95, or he may at his option bring a regular *suit* for possession [see p. 124, case 5]. But if the property is purchased by the decree-holder himself, the question arises whether the provisions of the present section apply

(*m*) *Durga Charan v. Kali Prosanna* (1899) 26 Cal. 727; *Golam v. Judhister* (1903) 30 Cal. 142; *Wahid-un-nisa v. Giridhar* (1905) 27 All. 702.
(*n*) *Ram Gopal v. Khiali Ram* (1884) 6 All. 448;

Basti Ram v. Fattu (1886) 8 All. 146.
(*o*) *Nadamuni v. Veerabhadra* (1910) 84 Mad. 417; 418; *Gokulsing v. Kisansingh* (1910) 34 Bom. 546, 552.
(*p*) *Dharsi Ram v. Chaturbhuj* (1900) 22 All. 86.

- S. 47. so as to bar a regular suit for possession. This again depends on the questions, namely, (1) whether a decree-holder ceases to be a *party* to the suit within the meaning of this section by reason of his becoming the purchaser at the auction-sale, or whether he continues to be a party notwithstanding that he has become the auction-purchaser, and (2) whether the question as to delivery of possession is a question relating to "the execution, discharge or satisfaction" of the decree within the meaning of this section. If the decree-holder ceases to be a party to the suit by reason of his becoming the auction-purchaser or if the question as to delivery of possession is *not* a question relating to the execution, discharge or satisfaction of the decree, the present section does not apply, and the decree-holder-purchaser may apply for possession under O. 21, r. 95, or he may at his option bring a regular suit for possession: this is the view held by the High Courts of Allahabad and Patna and in a large majority of cases by the High Court of Calcutta, and in recent cases by the Chief Court of the Punjab. But if he is to be treated as a *party* to the suit notwithstanding that he has become the auction-purchaser and the question as to delivery of possession is a question relating to the execution, discharge or satisfaction of the decree, he can only proceed by way of *application* and a regular suit is barred under this section: this is the view held by the High Courts of Bombay and Madras and in some cases by the High Court of Calcutta. According to the latter view, a person purchasing property from a decree-holder who has himself bought it at the auction-sale is a "representative of a party to the suit" within the meaning of this section, and he too, therefore, if he is obstructed by the judgment-debtor in obtaining possession, can only proceed by way of application under O. 21, r. 95, coupled with this section, and not by a separate suit (q). See notes on p. 124 above under the head "Proceedings for recovery of possession of property sold in execution," where the subject is fully considered and the cases bearing on the subject have been cited.

Suppose now that the auction-purchaser is a stranger, that is to say, a person other than the decree-holder. Can he be said to be a "representative" of either party to the suit within the meaning of this section? That he is not the representative of the *decree-holder* seems now to be fairly well established (r). Is an auction-purchaser a representative of the *judgment-debtor*? In some cases it has been said that he is (s); in others that he is not (t).

Sub-sec. (3): Inquiry as to who is the representative of a party.

—A obtains a decree against B. B dies before the decree is fully executed, and C is brought on the record as B's legal representative under s. 50. D claims to be the legal representative of B. Under the Code of 1882 it was competent to the Court under these circumstances either to stay execution of the decree until the question as to who is the representative of B was determined by a separate suit, or itself to determine the question. The present section makes it obligatory upon the Court executing the decree itself to determine the question (u). The same procedure is to be followed when a question arises in execution proceedings as to whether a certain person is a transferee of a decree, for a transferee of a decree is, as stated above, a "representative" of a party within the meaning of this section. An order determining whether a certain person is or is not the representative of a party is a decree [see s. 2, cl. (2)] and is therefore appealable (v).

- (g) *Sandhu v. Hussain* (1905) 28 Mad. 87.
 (r) *Krishna v. Sarosvata* (1908) 31 Mad. 177;
Nadamsuni v. Veerabhadra (1910) 34 Mad.
 417; *Subbamma v. Chennayya* (1917) 41
 Mad. 467; *Anand Kunwari v. Ajudhia*
Nath (1908) 30 All. 376, 384; *Maganlal*
Nath (1908) 30 All. 376, 384; *Maganlal*
Nath (1908) 30 All. 376, 384; *Maganlal*
Nath (1908) 30 All. 376, 384; *Maganlal*
Nath (1908) 30 All. 376, 384.
 (s) *Ishan Chunder v. Beni Madhub* (1898) 24 Cal.
 62; *Kashinatha v. Uthamasani* (1902) 25
 Mad. 529, 532; *Gulzari Lal v. Madho Ram*
 (1904) 26 All. 447; *Anand Kunwari v.*

- Ajudhia Nath* (1908) 30 All. 379, 383.
 (t) *Nadamsuni v. Veerabhadra* (1910) 34 Mad.
 417, 421; *Narsinghbat v. Bando Krishna*
 (1918) 42 Bom. 411; *Hukam Chand v.*
Ganga Ram (1919) F. R. no. 12, p. 25.
 (u) *Muna Koor v. Durga Prasad* (1917) 2 Pat.
 L. J. 192.
 (v) *Badri Narayan v. Jai Kishen* (1894) 16 All.
 483; *Krishnama v. Appasami* (1902) 25
 Mad. 545; *Ganga Das v. Yakub Ali* (1900)
 27 Cal. 670.

Objection by party or his representative that property attached is not liable to attachment.—All objections to attachment raised by a *party to the suit* in which the decree was passed or his *representative* come under this section. But objections to attachment raised by a *third party* come under O. 21, r. 58 [Code of 1882, s. 278]. The distinction is important, for an order under this section, being a “decree” (s. 2) is appealable, while an order under O. 21, r. 58, is not appealable. Moreover, if the objection falls under this section, a separate suit is barred, but if it falls under O. 21, r. 58, a separate suit is not barred. If the property in the hands of a judgment-debtor is attached, and the judgment-debtor objects to the attachment on the ground that the property is not “saleable” within the meaning of s. 60, and should not therefore be attached, as where it is service vatan or an occupancy holding, the objection is one under this section, for it is made by a *party to the suit (w)*. But if the judgment-debtor objects to the attachment on the ground that he holds it *on behalf of a third party, e.g.,* as a trustee, the objection comes under O. 21, r. 58 (x). Similarly where property is attached in execution of a decree passed against a *shebait* personally, and the defendant objects that the property does not belong to him personally but that it is held by him *as shebait of an idol*, the objection falls under O. 21, r. 58, and not under this section (y).

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A mortgages two properties X and Y to B. He then executes a second mortgage of property X to C. B sues A and C on his mortgage, and both the properties are ordered to be sold. C objects to the sale of property Y alleging that after it was mortgaged to B he (C) purchased it at a revenue sale and that the effect of that sale was to annul the mortgage of that property to B. Here C was joined as a party to the suit in his character of puisne mortgagee, while the objection taken by him to the sale of property of Y is taken in quite a different character, namely, as one claiming by title paramount adversely both to the mortgagor (A) and the mortgagee (B). Such an objection is not one by a “party to the suit” within the meaning of this section and no appeal therefore lies from an order made on his objection (z). See notes to O. 34, r. 1, “Persons having an interest, etc.”

As regards objections to attachment by the *legal representative* of a deceased judgment-debtor, it has been held that if property in the hands of a legal representative is attached, and the legal representative objects to the attachment on the ground that the property attached is *his own* property, and does not form part of the estate of the deceased judgment-debtor, the objection is one under this section, for it is made by a *representative* of a party to the suit (a). But if the legal representative objects to the attachment on the ground that he holds the property *on behalf of a third party*, the objection is one under O. 21, r. 58 (b).

Where a decree is passed against the *karnavan* of a *tarwad* in his representative capacity, all the members of the *tarwad* must be held to be “parties” to the suit. Hence if a decree is passed against a *karnavan* in his representative capacity, and the *tarwad* property is attached in execution of the decree, and a member of the *tarwad*

- (w) *Trimbut v. Govinda* (1895) 19 Bom. 328;
Majed v. Raghubur (1900) 27 Cal. 187;
Gahar v. Kasi (1900) 27 Cal. 415.
- (x) *Ramnathan v. Levasi* (1900) 23 Mad. 195;
Murigeya v. Hayat Sahab (1899) 23 Bom.
237; *Budrudeen v. Abdul Rahim* (1908) 31
Mad. 125.
- (y) *Karick Chandra v. Ashutosh* (1911) 39 Cal.
289; *Upenaranath v. Kusum* (1914) 42
Cal. 440.
- (z) *Sham Lal v. Amar Prasad* (1917) 2 Pat. L. J.
219.
- (a) *Seth Chand v. Dwya* (1890) 12 All. 313;
Punchanun v. Rabia Bibi (1890) 17 Cal.
711; *Kali Charan v. Jewat* (1906) 28 All.

- 51; *Vengapayyan v. Karimpanakai* (1903
28 Mad. 501; *Madhusudan v. Gobind*
(1900) 27 Cal. 34; *per Ranade, J., in*
Murigeya v. Hayat Sahab (1899) 23 Bom
237; *Govulasing v. Kisansingh* (1910) 3
Bom. 546; *Ajo Koer v. Gorat Nath* (1914
19 C. W. N. 517; *Dulla v. Shio Lal* (1917
39 All. 47.
- (b) *Ramanathan v. Levasi* (1900) 23 Mad. 195
199 disapproving; *Upendra v. Ranganath*
(1894) 17 Mad. 399; *per Ranade, J., in*
Murigeya v. Hayat Sahab (1899) 23 Bom
237; *Budrudeen Sahib v. Abdul Rahim*.
(1908) 31 Mad. 125.

- S. 47. objects to the execution alleging that the property belongs not to the *tarwad* but to him individually, the question is one between the parties to the suit within the meaning of this section, and the objection therefore is one under this section, and not O. 21, r. 58 (c). See notes to s. 11 under the head "Representative suit," p. 50 *ante*.

In a recent case before the Judicial Committee, where the son of a deceased Hindu brought a suit for redemption against the auction-purchaser on the ground that the sale held in execution of a decree obtained by the auction-purchaser against him and his father did not pass his interest in the property, but the father's interest only, it was held that the son being a party to the suit in which the decree was passed could have raised the question *before* the sale was confirmed, and that the suit was barred by the provisions of this section (d).

Where a sale is sought to be set aside on the ground that the "decree" was obtained by fraud.—It has been stated above that where a sale is sought to be set aside on the ground of fraud in publishing or conducting it, the parties must proceed by an application under O. 21, r. 90, and not by a separate suit [see p. 132, ill. (a)]. A suit, however, will lie to set aside a sale if the *decree* which resulted in the sale was obtained by fraud. The following are the leading cases on the subject:—

1. A suit *will lie* to set aside a decree and a sale held in execution of the decree, where both the decree and sale are impeached on the ground of fraud (e). The reason is that the question of the validity of a decree can only be determined by a regular suit. See ill. (1) under the head "Separate suit will lie," p. 126 above.

2. A obtains an *ex parte* decree against B. In execution of the decree certain property belonging to B is sold and purchased by C. The decree is then set aside under O. 9, r. 13. B thereafter sues A and C to set aside the sale, challenging not only the sale, but also the decree, on the ground of fraud. Is the suit barred under this section? No, for B is entitled to show that the decree was obtained by fraud, and this can only be done in a regular suit (f).

Appeal.—On referring to the definition of "decree" given in s. 2 above, it will be seen that an order determining any question within this section is a "decree." Hence an appeal lies from all orders under this section and also a second appeal (s. 100). It is important to note that *all* orders in execution proceedings are *not* appealable. As regards appeal, orders in execution proceedings may be divided into two classes:—

- (1) Orders under this section. [An appeal lies from these orders and also a second appeal.]
- (2) Other orders in execution proceedings. These may again be sub-divided into two classes:
 - (a) those which are declared appealable under s. 104; and
 - (b) those which are non-appealable.

Where an order is made in execution proceedings, and the order is non-appealable, attempts are frequently made by the party against whom the order is made to show that the order comes under this section and is therefore appealable (g). Similarly where an order is made in execution proceedings, and the order is appealable under s. 104,

(c) *Marivittil v. Pathram* (1907) 30 Mad. 215; *Kamal Kutti v. Ibrahim* (1901) 24 Mad. 658.
 (d) *Ganapathy v. Krishnamachariar* (1918) 45 I. A. 54, 60, 41 Mad. 408, 411.
 (e) *Abdul v. Mahomed* (1894) 21 Cal. 605; *Pran Nath v. Mohesh Chandra* (1897) 24 Cal. 546; *Moti Lal v. Russick Chandra* (1899)

28 Cal. 326.
 (f) *Ram Narain v. Shev Bhunjan* (1900) 27 Cal. 197.
 (g) *Mammod v. Locke* (1897) 20 Mad. 487; *Bujiha Roy v. Ram Kumar* (1899) 26 Cal. 529; *Ram Adhar v. Narain Das* (1902) 24 All. 519.

attempts are frequently made by the party against whom the order in appeal is made **Ss. 47, 48.** to show that the order comes under this section to enable the party to prefer a second appeal (h). It will thus be seen that this section is important not only as regards the question whether a *separate suit* will lie, but also as regards the question of *appeal*.

It may here be observed that a party is not bound to prefer an appeal against every order in an execution proceeding, though the order may be appealable. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties the propriety of the interlocutory orders made in the course of the proceedings (i).

It is also to be observed that it is not every order made in execution of a decree that comes within this section; if that were so, every *interlocutory order* in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable. An order in execution proceedings can come under s. 47 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; not when it determines merely an *incidental question* as to whether the proceedings are to be conducted in a certain way (j).

Limitation.—An application under this section by a representative of a judgment debtor to set aside a sale on the ground that the property sold belonged to him and not to the deceased judgment-debtor should be made within 30 days from the date of sale (k).

LIMIT OF TIME FOR EXECUTION.

48. [S. 230, 3rd and 4th paras.] (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—

Execution barred in certain cases.

(a) the date of the decree sought to be executed,
or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application

(h) *Bhubon Mohun v. Nunda Lal* (1899) 20 Cal. 824; *Umatanta v. Dino Nath* (1905) 28 Cal. 4.

(i) *Chandrabala v. Prabodh* (1909) 36 Cal. 422.

(j) *Jogodishury v. Kailash* (1897) 24 Cal. 725, 739; *Muthtar v. Muqarrab* (1912) 34 All.

530; *Srinibash v. Kesho Prasad* (1911) 38 Cal. 754; *Saraswati v. Golap Das* (1913) 41 Cal. 160.

(k) Limitation Act, 1908, art. 166; *Sattish Chandra v. Nishi Chandra* (1919) 46 Cal. 975.

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presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application ; or

(b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877.

Changes made in the section.—This section corresponds with the third and fourth paras. of s. 230 of the Code of 1882 (of which the provisions have been set forth below) except in the following particulars :—

- (1) The provisions of s. 230 applied only to decrees “for the payment of money or delivery of other property.” The present section applies to all decrees other than decrees granting an injunction.
- (2) The provisions of s. 230 applied only where an application for execution had been made “under this section and granted.” The words “under this section” as also the words “and granted” have been omitted in the present section. The result is that the rule of limitation contained in this section applies whether the previous application for execution was made under this section or not, and whether the application was granted or not. See notes below, under the head “Orders on application for execution.”
- (3) The words “or the decree (if any) on appeal affirming the same,” which occurred in s. 230, cl. (a), after the words “the date of the decree sought to be enforced,” have been omitted in this section. On a proper construction of that section, those words were quite unnecessary. See notes below, under the head “Date of decree sought to be executed.”
- (4) The words “or at recurring periods” in sub-section (1), cl. (b), are new. They are intended to give effect to certain decisions under s. 230 of the Code of 1882. See notes below under the head “Where payment is directed to be made at recurring periods.”
- (5) Clause (b) of sub-section (2) is new. It gives effect to certain decisions under s. 230 of the Code of 1882. See notes below under the head “Successive applications for execution of decrees of Chartered High Courts.”

Civil Procedure Code, 1882, section 230, third and fourth paras — In view of the several alterations made in s. 230 of the Code of 1882, we give below the provisions of that section, indicating in italics those words that have been omitted in the present section :—

“Where an application to execute a decree for the payment of money or delivery of other property has been made *under this section and granted*, no subsequent application to execute the same decree shall be *granted* after the expiration of twelve years from any of the following dates (namely) :—

- (a) the date of the decree sought to be enforced, *or of the decree (if any) on appeal affirming the same*, or

- (b) where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.

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Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application."

Successive applications for execution of decrees of Courts other than Chartered High Courts.—What is stated in this paragraph is confined to applications for execution of decrees of *Courts other than Chartered High Courts*. A decree-holder is entitled to present in succession *any number* of applications for execution of the same decree (l), and the Court has no power to refuse execution, unless—

- (i) the application is barred by virtue of general principles of law analogous to those of *res judicata*; or
- (ii) the application is barred under art. 182 of the Limitation Act, 1908; or
- (iii) the *execution* of the decree is barred under sub-section (1) of the present section (m), though the *application* for execution may not be barred under cl. (i) or cl. (ii) above.

Clause (i).—Thus if the first application for execution is dismissed after a hearing on the merits, the Court will not, having regard to the general principles of law analogous to those of *res judicata*, entertain a subsequent application for execution of the same decree (n). See notes to s. 11, "Orders in execution proceedings, etc.," p. 64 above.

Clause (ii).—Though an application for execution may not be barred as *res judicata*, the Court will not entertain it if it is barred under art. 182 of the Limitation Act, 1908. Leaving out of consideration certain portions of that article, the rule of limitation set forth in that article may be stated thus: the first application for execution must be made within three years from the date of the decree sought to be executed, and every successive application for execution of the same decree must be made within three years from the date of the last application. By this process a decree may be kept alive for any number of years. To this a limit has been set by the rule contained in the present section which is considered in the next clause.

Clause (iii).—Though an application for execution of a decree may not be barred as *res judicata* or under art. 182 of the Limitation Act, 1908, no order should be made for execution of the decree, if the application is presented after the expiration of twelve years (1) from the date of the decree or (2) from the date fixed by the decree for the payment of money or for the delivery of any property under the decree (o). A obtains a decree against B for Rs. 1,000 on 1st January 1894 and applies for execution of the decree within three years from the date of the decree. Further applications are made for execution of the same decree each within a period of three years from the date of the next preceding application, and the last of these is made in December 1905. A then makes a fresh application for execution on 1st January 1908. No order should be made for execution of the decree, for though the application is not barred under the Limitation Act, it is barred under this section as it is made twelve years after the date of the decree.

(l) *Thakur Prasad v. Fakrullah* (1895) 17 All. 106, 111-112, 22 I. A. 44. See also O. 21, r. 11, and Limitation Act, art. 182, cl. (4). | (m) *Dhontal v. Phattar* (1893) 15 All. 84, 100. | (n) See *Dhontal v. Phakkar* (1893) 15 All. 84. | (o) *Balaram v. Maruti* (1914) 39 Bom. 256.

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[*Note*.—Under section 230 of the Code of 1882 the twelve years' limitation did not apply unless one at least of the applications prior to that made on 1st January 1908 had been *granted* by the Court. If none of the applications was granted, the rule did not apply. But the words "and granted," which occurred in that section, have now been omitted, and it is no longer material to inquire whether any one of the previous applications was *granted* by the Court.]

Where payment is directed to be made "at a certain date."—If in the case put above, the decree had directed payment of Rs. 1,000 to be made *at a certain date*, for instance, on 1st March 1894, the period of twelve years would run from that date. See sub-section (1), cl. (b).

Where payment is directed to be made at "recurring periods."—The words "at recurring periods" have been added into the section to give effect to decisions under s. 230 of the Code of 1882. In fact, these words were read into that section in the undermentioned cases (p). Thus if a decree, dated 1st January 1903, directs payments to be made annually, but no dates are specified, the first yearly payment will fall due on 1st January 1904, the second on 1st January 1905, and thenceforward on the corresponding date year after year. Hence the period of twelve years prescribed by this section will run as regards the application to enforce the first yearly payment, from 1st January 1904, as regards the application to enforce the second yearly payment, from 1st January 1905, and so forth.

Where payment is directed to be made on the happening of a contingency.—In such a case, the period of 12 years provided by this section is to be computed from the date when the contingency happens (for until then the decree is not capable of execution), and not from the date of the decree (q).

Successive applications for execution of decrees of Chartered High Courts.—The holder of a decree of a Chartered High Court passed in the exercise of its ordinary original civil jurisdiction is entitled to present in succession *any number* of applications for execution of the decree, and the Court is bound to entertain them, unless the application is barred—

- (i) by virtue of general principles of law analogous to those of *res judicata* ; or
- (ii) under art. 180 of the Limitation Act, 1877 [now art. 183 of the Limitation Act, 1908], that being the article which applies to decrees of Chartered High Courts.

It will be observed that cl. (iii) which occurs in the preceding paragraph does not occur here. The reason is that the twelve years' rule laid down in this section does not limit or otherwise affect the operation of art. 183 of the Limitation Act, 1908, as it does that of art. 182. In other words, the said rule does not apply to decrees passed by Chartered High Courts. It was so held under the Code of 1882 (r). The same is now expressly enacted by sub-section (2), clause (b). Hence a decree of a Chartered High Court may be kept alive for any number of years. The same rule applies to Orders in Council made on appeal to the Privy Council (s). [The period of limitation for an application for execution of a decree of a Chartered High Court in the exercise of its ordinary original civil jurisdiction as distinguished from appellate civil jurisdiction (t) is twelve years from the several dates specified in art. 183 of the Limitation Act, 1908.]

(p) *Lakshmitai v. Madhavrai* (1888) 12 Bom. 65;

Kaveri v. Venkamma (1891) 14 Mad. 396.

(q) *Narhar v. Krishnaji* (1912) 36 Bom. 368;

Aiyasami v. Venkatachela (1917) 40 Mad.

989 [F.B.].

(r) *Mayabhai v. Tribhuvandas* (1882) 6 Bom.

258; *Ganapathi v. Balasundara* (1884) 7 Mad. 541.

(s) *Futeh Narain v. Chundrabati* (1893) 20 Cal. 551.

(t) *Kristo Kintur v. Burrodacant* (1872) 14 M. I. A. 465.

Orders on application for execution.—An application for execution may either be— S. 48.

- (1) *granted*; or
- (2) *refused*—
 - (a) in circumstances operating as a bar to future execution, as where it is refused on the ground that it is barred on the principle of *res judicata* or barred by the law of limitation, or
 - (b) in circumstances not operating as a bar to future execution, as where it is refused on the ground that it is not in accordance with law [O. 21, r. 17] (u); or
- (3) *withdrawn* by the applicant—
 - (a) in circumstances operating as a bar to future execution, as where the withdrawal was with the object of abandoning execution, or
 - (b) in circumstances not operating as a bar to future execution (v).

Under s. 230 of the Code of 1882, the twelve years' limitation imposed by that section applied only if one at least of the previous applications was *granted* by the Court but not otherwise. Under the present section the twelve years' limitation applies though none of the previous applications may have been *granted*, in other words, though all the previous applications may have been refused or withdrawn. All that the section now provides is that where an application to execute a decree *has been made*, whether it be granted or not, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date specified in the section.

“Fresh application” to execute the same decree.—The expression “fresh application” has been substituted as being a better expression for the expression “subsequent application.” Hence the decisions bearing on the words “subsequent application” apply equally to the words “fresh application.” We proceed to state the effect of those decisions substituting the word “fresh” for the word “subsequent.” The “fresh application” referred to in this section means a *substantive* application for execution and not merely an *ancillary* application made with the object of moving the Court to *proceed* in the matter of a *substantive* application already on the file (w). Thus where property has been attached on an application for execution, an application for *sale* of the attached property is not a fresh application to execute the decree within the meaning of this section (x). Similarly where a warrant is issued for the arrest of a judgment-debtor on an application for execution, but the warrant is returned by the peon sent to arrest the judgment-debtor with the remark that the judgment-debtor could not be found, a subsequent application for the *arrest* of the judgment-debtor is not a fresh application to execute the decree within the meaning of this section but is merely an *incidental* application to carry on proceedings already commenced (y). On the same principle it has been held that an application to *revive* an application for execution is not a fresh application within the meaning of this section (z).

An application to transfer a decree to another Court for execution is not an application for execution within the meaning of this section. Such an application, though

(w) *Dhonkal v. Phatkar* (1893) 15 All. 84, 100.
 (v) *Thakur Prasad v. Fakirullah* (1895) 17 All. 106, 110, 111, 22 I. A. 44; *Chintaman v. Balshastri* (1892) 16 Bom. 294, 301; *Sarivaran v. Arulanandam* (1898) 21 Mad. 261; *Rahim Ali v. Phul Chand* (1896) 18 All. 482, 486.

(w) *Rahim Ali v. Phul Chand* (1896) 18 All. 482; *Ram Sarup v. Dwarath* (1911) 33 All. 617; *Pansaul v. Kishen Mun* (1881) 9 C. L. B. 297;
 (x) *Choudhry Paroosh Ram v. Kal* (1890) 17 Cal. 53.
 (y) *Jit Mal v. Jwala Prasad* (1899) 21 All. 155.
 (z) *Sakina v. Ganssh* (1918) 3 Pat. L. J. 103.

- S. 48. made *within* twelve years from the date of the decree, will not entitle the decree holder to execution if the application for execution to the Court to which the decree is transferred is made *after* the expiration of twelve years (a).

“**Date of decree sought to be executed.**”—The rule of law is that it is only the final decree that can be executed (b). Hence if the decree sought to be executed is a decree of a Court of first instance, the period of twelve years prescribed by this section runs from the date of that decree. And if the decree sought to be executed is an appellate decree, that period runs from the date of the *appellate decree*, whether the original decree is affirmed, or whether it is set aside or modified, on appeal (c). The words “or of the decree (if any) on appeal *affirming* the same” which occurred in cl. (a) of s. 230 of the Code of 1882 have been omitted as being unnecessary and calculated to give rise to the contention, by reason of the word “*affirmed*,” that where the original decree was *modified* or *set aside* on appeal, the period of twelve years was to run from date of the *original* decree. On the same principle, where a portion of a decree is appealed from and the rest is not, the period of 12 years prescribed by this section runs from the date of the *appellate decree* both as regards the application to execute the portion appealed from and the portion not appealed from. The reason is that there is only one decree that can be executed, and that is the decree of the Appellate Court (d). Similarly where a second appeal is preferred to the High Court from a decree passed in first appeal, and an order is made by the High Court declaring the appeal before it to have abated, the period of twelve years under this section runs from the date of that order, and not from the date on which the decree was passed in first appeal (e). See notes to s. 36, p. 109.

By a decree dated 17th November 1897 the defendant is directed *inter alia* to pay Rs. 6,000 *forthwith* to the plaintiff. On 28th January 1899 the decree is amended in some *other* respects. Several applications for execution are made and the decree is thus kept alive. On 2nd December 1909, that is, more than 12 years after the date of the original decree, but within 12 years from the date of the amended decree, the plaintiff applies for execution. The sum of Rs. 6,000 being directed by the original decree to be paid *forthwith*, the period of 12 years is to be computed from the date of the *original* decree, and the application is barred so far as it relates to the sum of Rs. 6,000 (f).

The expression “decree” in this section means a decree capable of execution. Thus where a decree entitles the plaintiff to recover the amount thereof from the defendant personally in the event of the happening of a certain contingency, the period of twelve years provided by this section is to be computed from the date when the contingency happens, and not the date of the decree (g).

As to the operation of this section on applications for an order absolute under s. 89 of the Transfer of Property Act, 1882 [now O. 34, r. 5], see the undermentioned case (h).

“**Fresh application presented after the expiration of twelve years.**”

—These words make it quite clear that all that the section requires is the *presenting* of the fresh application within twelve years from the date of the decree. The *order* on the fresh application may be made after the expiration of twelve years. The section

(a) *Sundar Singh v. Doru Shankar* (1898) 20 All. 78; *Nilmony v. Bressur* (1889) 16 Cal. 744; *Suja Hoessein v. Monohur Das* (1895) 22 Cal. 921; *Jeewandas v. Ranchodas* (1910) 35 Bom. 103; *Khetpal v. Tikam Singh* (1912) 34 All. 396.
(b) *Muhammad v. Muhammad* (1889) 11 All. 267; *Luchmun v. Kishun* (1882) 8 Cal. 218; *Kristo Kinkur Roy v. Rajah Burrodacant* (1872) 14 M. I. A. 465. See notes to s. 30, “What decrees may be executed.”

(c) *Mahomed Mehdi v. Mohini Kant* (1907) 34 Cal. 874.
(d) *Kristnuma v. Mangammal* (1903) 26 Mad. 91.
(e) *Muhammad Razi v. Karbalai* (1909) 32 All. 136.
(f) *Nursingrao v. Bando* (1918) 42 Bom. 309 with facts slightly modified.
(g) *Narhar v. Krishnaji* (1912) 36 Bom. 368; *Aiyasami v. Venkatachela* (1917) 40 Mad. 989 [F.B.].
(h) *Muhammad v. Abdul Karim* (1916) 39 Mad. 544.

does not preclude the Court from making an order for execution after the expiration of twelve years, if the application was presented within that period. In fact, it was so held by the High Court of Madras under the corresponding section of the Code of 1882 (i).

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“Decree not being a decree granting an injunction.”—The operation of the twelve years' rule laid down in this section is now extended to all decrees except decrees granting an injunction. Under s. 230 of the Code of 1882, the rule was confined to decrees “for the payment of money and decrees for the delivery of other property.” Under that section the question was raised whether a mortgage-decree was a decree for the payment of money, and the decisions were not uniform. The present section applies to money-decrees as well as mortgage-decrees, in fact to all decrees except decrees granting an injunction (j).

“Subsequent order.”—The expression “subsequent order” in sub-sec. (1), cl. (b), means a subsequent order made by the Court which passed the decree and acting as such Court, and not an order of a Court executing a decree. Thus an order under O. 20, r. 11 (2), is a “subsequent order” within the meaning of cl. (b), but not an order made by a Court executing a decree allowing time to the judgment-debtor for payment of the decretal amount (k).

“Payment to be made at a certain date or at recurring periods.”

—See notes above under the head “Successive applications for execution of decrees of Courts other than Chartered High Courts.”

Whether the section is retrospective.—A obtains a mortgage-decree against B in 1900, that is, before the present Code came into force. A applies for execution of the decree from time to time, and the last of such applications is made in 1914, that is, more than 12 years after the date of the decree. Is execution of the decree barred under this section, regard being had to the fact that the old section did not apply to mortgage decrees and that the present section does apply to such decrees? No; according to the Allahabad High Court, the reason given being that this section is not retrospective (l). Yes, according to the Calcutta High Court, the reason given being that the present section applies to mortgage-decrees, and an application made in 1914 must be deemed to have been made under the present Code (m). The High Court of Patna has followed the Calcutta decision (n).

Fraud —“Fraud” or “force” on the part of a judgment-debtor at any stage of the execution gives a new starting point for the period of limitation (o). The word “fraud” in this section is to be interpreted in a wider sense than that in which it is generally used in English law (p). Locking up the house so as to prevent attachment of moveable property (q), or evading arrest by any contrivance, or dishonestly evading payment by eluding service of warrant (r), is “fraud” within the meaning of this section. Similarly a fictitious transfer of his property made by a judgment-debtor to defeat or delay the execution of decrees that may be passed against him amounts to “fraud” within the meaning of this section (s). The presentation by a judgment-debtor of an application to set aside a decree passed *ex parte* against him, the sole object of the application being to delay the proceedings in execution of the decree, is “fraud”

(i) *Virarama v. Annasami* (1883) 6 Mad. 359.
See also *Sakina Bibi v. Ganesh* (1918) 3 Pat. L. J. 103.

(j) *Balaram v. Maruti* (1914) 39 Bom. 256.

(k) *Jurawan v. Mahabir* (1918) 40 All. 198.

(l) *Kaunsilla v. Ishri Singh* (1910) 32 All. 499.

(m) *Biseswar v. Jasoda Lal* (1913) 40 Cal. 704.

(n) *Mahantha v. Sakina* (1916) 1 Pat. L. J. 214.

(o) *Venkayya v. Raghava* (1890) 22 Mad. 320;

Mohsin Ali v. Masum Ali (1911) 34 All. 20.

(p) *Pattakara v. Rangasami* (1883) 6 Mad. 365, 367.

(q) *Bhagu v. Bawasaheb* (1885) 9 Bom. 318;

Venkayya v. Raghava (1890) 22 Mad. 320.

(r) *Pattakara v. Rangasami* (1883) 6 Mad. 365;

Abdul Khadir v. Ahammad (1911) 35 Mad. 670.

(s) *Visalatchi v. Sivankara* (1882) 4 Mad. 292.

Ss. 48, 49. within the meaning of this section (t). But though the Court has the power to grant execution after the expiration of twelve years from the date of the decree on the ground of fraud or force on the part of the judgment-debtor, the Court should not use that power unless it is satisfied that the decree-holder on his part had been diligent in proceeding with the execution from the date of the decree (u). It is doubtful whether the fraud of one of several judgment-debtors keeps the decree alive against all of them (v).

Minority.—A decree is passed in August 1897 on behalf of a minor in a suit brought by his guardian for partition and mesne profits. Various applications for execution are made by the minor through his guardian within 3 years of each other. The period of 12 years prescribed by this section expires in August 1909. The minor attains majority in November 1909, and in November 1910 he applies for execution of the decree, alleging that he is entitled to an extension of the period on the ground of minority. Is he entitled to any extension either under sec. 6 of the Limitation Act, 1908, or under any other law? It has been held by the High Court of Madras that he is not entitled to any extension under sec. 6, on the ground that that section is expressly limited to cases where the limitation is provided in the Limitation Act itself; and, further, that there is no law apart from the said sec. 6 under which minority is a ground of exemption from the operation of the law of limitation (w). The High Court of Bombay agrees with the Madras High Court in holding that sec. 6 of the Limitation Act applies only to cases dealt with by the Act itself, but differs from that Court in that it holds that the minor is entitled to an extension of the period under the general principle of law which is that time does not run against a minor (x). But it has been held by the same Court that where the decree has been obtained in the first instance by an adult, the fact that the decree on his death passes to an heir who is a minor does not extend the period of 12 years prescribed by the present section (y). In the last-mentioned case it was assumed that the provisions of the Limitation Act applied to the case, but it was held that time having once begun to run, the decree having been obtained by an adult, no subsequent disability, that is, minority, can arrest it, having regard to the provisions of sec. 9 of the Limitation Act. The High Court of Allahabad has followed the Madras decision (z).

Dekkhan Agriculturists' Relief Act 17 of 1879, ss. 47-48.—In computing the period of 12 years provided by this section, the time taken up in procuring a conciliator's certificate as required by the abovementioned Act, is to be excluded (a).

Application of Code to execution proceedings.—See notes to s. 141.

TRANSFEREES AND LEGAL REPRESENTATIVES.

49. [S. 233.] Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferee.

Equity of judgment-debtor.—If the judgment-debtor has the right or equity to set off his cross-decree against the transferor under O. 21, r. 18, the transferee will hold the decree subject to that right or equity.

(t) *Rat Sham Kissen v. Damar Kumari Debi* (1908) 11 C. W. N. 440.
(u) *Ibid.* But see *Abdul Khadir v. Ahammad* (1911) 35 Mad. 670.
(v) *Abdul Khadir v. Ahammad* (1911) 35 Mad. 670.
(w) *Ramana v. Babu* (1912) 37 Mad. 186.

(x) *Moro v. Visaji* (1892) 16 Bom. 536.
(y) *Bhagwan v. Kaji Mahammad* (1912) 36 Bcm. 498.
(z) *Prem Nath v. Chatarpal* (1915) 37 All. 638.
(a) *Shidaya v. Satappa* (1918) 42 Bom. 367.

Illustrations.

Ss. 49, 50.

1. *A* holds a decree against *B* for Rs. 5,000. *B* holds a decree against *A* for Rs. 3,000. *A* transfers his decree to *C*. *C* cannot execute the decree against *B* for more than Rs. 2,000: *Kaim Ali v. Lakhikant* (1868) 1 B. L. R., F. B. 23.

2. *A* obtains a decree against *B* for Rs. 5,000. *B* then sues *A* for Rs. 2,000. Pending *B*'s suit, *C* obtains a transfer of *A*'s decree with notice of the suit. A decree is then passed for *B* in his suit against *A*. *C* applies for execution against *B* of the whole decree for Rs. 5,000. He is not entitled to execute for more than Rs. 3,000, as the transfer was taken with notice of *B*'s suit: *Kristo Ramani v. Kedarnath* (1889) 16 Cal. 619. See also *Sinnu v. Santhoji* (1903) 26 Mad. 428.

As to application for execution by transferee of a decree, see O. 21, r. 16.

50. [s. 234.] (1) Where a judgment-debtor dies before the decree has been fully satisfied the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased.

Legal representative.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Changes introduced by the section.—The present section differs from the corresponding section 234, C. P. C., 1882, in one respect, viz., that the words “fully satisfied” have been substituted for the words “fully executed.” See notes below under the head “Before the decree has been fully satisfied.”

Extent of liability of legal representative.—This section enables a decree-holder to execute his decree against the legal representative of a deceased judgment-debtor. The liability of a legal representative in *execution proceedings* is confined to the property of the deceased which *has actually come to his hands*. If the decree-holder seeks to make the legal representative answerable also for the property of the deceased, which with due diligence on his part *would have come to his hands*, his proper remedy is by way of *suit* against the legal representative, and not by proceedings in execution under this section (b).

A decree-holder is entitled under this section to have the amount of the decree paid out of the assets of the deceased in the hands of the legal representative *which have not yet been duly disposed of*. Hence the legal representative is bound to pay to the decree-holder the *full* amount of the decree, though there may be other creditors of the deceased, and the assets may not be sufficient to pay them all in full (c).

Legal representative.—“Legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles

(b) *Khusroobhai v. Hormazsha* (1887) 11 Bom. 727; *Saratmani Debi v. Batta Krishna* (1908) 12 Cal. W. N. 614.

(c) *Venkataramayan v. Krishnasami* (1899) 22 Mad. 194.

S. 50.

with the estate of the deceased [see s. 2, cl. (11)]. Thus where a judgment-debtor dies and a stranger takes possession of his property, the decree may be executed against the stranger, for he is a "legal representative" within the meaning of this section (d). Similarly where upon the death of a judgment-debtor possession of his property is taken by a residuary legatee under his will, and such legatee applies for letters of administration with the will annexed, the decree may be executed against him, though letters of administration may not have been granted to him on the date of the order for execution. The reason is that a residuary legatee *in possession* of the estate of the deceased, who has applied for letters of administration with the will annexed, is a "legal representative" within the meaning of this section (e). The purchaser of the business of a firm against which a decree has been passed is not the "legal representative" of the firm within the meaning of this section. The decree against the firm cannot therefore be executed against the purchaser (f).

"Before the decree has been fully satisfied."—The corresponding section of the Code of 1882 (s. 234) provided in effect that if a judgment-debtor died before the decree had been "fully executed," his legal representative should be brought on the record before the proceedings in execution were carried any further. This gave rise to the question, when can a decree be said to be 'fully executed'? It was held by the High Court of Madras that a decree could not be said to be "fully executed" until the property attached was sold, and that if the judgment-debtor died *before sale* his legal representative ought to be brought on the record; and if the property was sold without the legal representative being brought on the record, the sale should be set aside (g). On the other hand, it was held by the High Court of Allahabad that once the property was attached the decree was said to be "fully executed" and the property could be sold without the legal representative being brought on the record. The latter decision was based on the ground that once a property was attached, it was in the hands of the law, and the attachment did not abate on the death of the judgment-debtor (h).

It was to remove this conflict of decisions that the word "satisfied" has been substituted in the present section for the word "executed." The section provides in effect that if a judgment-debtor dies before the decree has been "fully satisfied", his legal representative ought to be brought on the record before the proceedings in execution are carried further. It is clear that mere attachment of the property of a judgment-debtor does not amount to *satisfaction* of the decree. Therefore, if the judgment-debtor died during the pendency of the attachment, the property cannot be sold unless his legal representative is brought on the record. The Allahabad decisions, therefore, are no longer law. If the property is sold without bringing the legal representative of the judgment-debtor on the record, the sale is illegal, and it must be set aside conformably with the Madras decisions.

"May apply to execute the decree against the legal representative."—This does not mean that when a judgment-debtor dies after execution proceedings have been commenced against him the decree-holder must present a fresh application for execution against his legal representative under the provisions of O. 21, r. 11. All that is necessary is to apply to the Court which passed the decree for liberty to continue the execution proceedings against the legal representative by substituting the name of the

(d) It was otherwise under the Code of 1882; see *Chathakelan v. Govinda* (1894) 17 Mad. 186.

(e) *Chun Lal v. Osmond* (1903) 30 Cal. 1044.

(f) *Harish Chandra v. Chandpori Co., Ltd.* (1903) 30 Cal. 981; *Arbuthnot's Industrials, Ltd. v. Muthu Chettiar* (1908) 31 Mad. 464.

(g) *Ramasami v. Bayirathi* (1883) 6 Mad. 180;

Groves v. Administrator-General (1889) 22 Mad. 119, 125.

(h) *Sheo Prasad v. Hira Lal* (1890) 12 All. 440; *Abdur Rahman v. Shankar* (1895) 17 All. 162. See also *Aba v. Dhondu Bai* (1895) 19 Bom. 276, 280-281; *Net Lal v. Sheikh Karim* (1896) 23 Cal. 686.

legal representative for that of the judgment-debtor in the application for execution **Ss. 50, 51.** already on the files of the Court (i). See O. 21, r. 22.

The application for execution against a legal representative must be made to the Court which passed the decree.—If a judgment-debtor dies after the decree is sent for execution by the Court which passed it to another Court, should the application for execution against the legal representative be made to the Court which *passed the decree*, or can it be made to the Court to which the decree has been sent for execution? It has been held by the High Court of Bombay (j), Allahabad (k) and Madras (l), that the application for execution in such a case must be made to the Court which passed the decree, and that the Court to which the decree is sent for execution is not competent to entertain the application and make an order of execution against the legal representative. If such an order is made by that Court, the same will be set aside. On the other hand, it has been held by the High Court of Calcutta that an application for execution may be made in such a case to the Court to which the decree is sent for execution (m).

Successive deaths of judgment-debtor and his legal representative.—If the legal representative of a judgment-debtor against whom execution has been taken out under this section dies before the decree has been fully executed, the decree-holder may execute the decree against his legal representative to the extent of the assets of the original judgment-debtor that may have come into the hands of such legal representative (n).

Orders passed in the lifetime of the deceased.—A obtains a decree against B. A then transfers the decree to C. C applies for execution against B, and an order is made for execution after notice to A and B as provided by O. 21, r. 16 [Code of 1882, s. 232]. A then dies, and his legal representative D is brought on the record under this section. The order for execution having been passed in A's lifetime, D cannot object to execution on the ground that the transfer to C was fraudulent (o).

Decree for injunction.—An injunction obtained against a defendant restraining the latter from obstructing the access of light and air to certain windows may, on the death of the defendant, be enforced under this section against his son as his legal representative by procedure under O. 21, r. 32 [Code of 1882, s. 260] (p). But such an injunction cannot be enforced under this section against a purchaser of the property from the defendant, for an injunction does not run with the land. The remedy of the decree-holder is to bring a fresh suit for an injunction against the purchaser (q). See notes to s. 11, "Decree for injunction and *res judicata*," on p. 36 above, and notes to s. 47 "No. 6—Purchaser of property, etc.," on p. 131 above.

PROCEDURE IN EXECUTION.

51. [New.] Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder order execution of the decree—

Powers of Court to enforce execution.

(a) by delivery of any property specifically decreed ;

(i) *Purushottam v. Rajbai* (1909) 34 Bom. 142.
(j) *Hiraachand v. Kasturchand* (1894) 18 Bom. 224.
(k) *Seth Shapurji v. Shankur* (1895) 17 All. 431.
(l) *Srinath v. Vaidyanath* (1905) 28 Mad. 406.
(m) *Sham Lal v. Modhusuddan* (1895) 22 Cal. 558.
(n) *Jafri Begam v. Saira Bibi* (1900) 22 All. 367.
(o) *Mulchand v. Chhagan* (1886) 10 Bom. 74;
Liladhar v. Chaturbhuy (1899) 21 All. 277 ;

Jagan Nath v. Sheo Ghulam (1909) 36 I.A. 45.
(p) *Sakarilal v. Parvatibai* (1902) 26 Bom. 283.
(q) *Dayabhai v. Bapalal* (1902) 20 Bom. 140;
Vithal v. Sakharam (1899) 1 Bom. L. R. 854 ; see also *Jamsetji v. Hari Dayu* (1908) 32 Bom. 181.

Ss. 51, 52.

- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require.

Receiver in execution proceedings.—A receiver may be appointed to realize a decree attached in execution proceedings. *A* obtains a decree against *B*. In execution of the decree *A* attaches a decree held by *B* against *C* (O. 21, r. 53). The Court may appoint a receiver to realize the decree attached, if this course is likely to benefit the parties more than the sale of the attached decree (*r*). Similarly a receiver may be appointed to realize a debt attached in execution of a decree (*s*). See notes to O. 21, r. 46, "Procedure where garnishee denies debt." But the Court has no jurisdiction to appoint a receiver of the *future* earnings of a judgment-debtor (*t*) nor of *future* allowance of maintenance payable to a judgment-debtor (*u*).

A obtains a decree against *B*. By consent of parties *C* is appointed receiver to take charge of certain properties for the execution of the decree. *A* then applies to the Court for the discharge of *C* as receiver, but the application is refused. The order is relating to "execution" within the meaning of s. 47, and is therefore appealable (*v*).

52. [s. 252.] (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

Enforcement of decree against legal representative.

(2) Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

Scope of the section.—Section 50 provides for the case where a decree has been passed *against a party* and the party dies before the decree is fully satisfied, and the decree is sought to be executed against his legal representative. The present section provides for the case where a decree is passed *against the legal representative* of a deceased person. As to the latter case it is provided by this section that if the decree is for the payment of money out of the property of the deceased, the decree may be executed *against the property of the deceased* in the hands of the legal representative. But in so

(*r*) *Partap Singh v. Delhi and London Bank* (1908) 80 All. 393.

(*s*) *Tootsa v. Antone* (1887) 11 Bom. 448.

(*t*) *Holmes v. Millage* [1893] 1 Q. B. 551.

(*u*) *Palikanday v. Krishnan* (1917) 40 Mad. 302. See s. 60 (1) (n).

(*v*) *Rameshwar Singh v. Harendra Singh* (1918) 3 Pat. L. J. 513.

S. 52.

far as the property of the deceased come into the hands of the legal representative has not been *duly* applied by him, the decree may be executed *against the legal representative* as if the decree was to that extent passed against him *personally*. In other words, the legal representative can be proceeded against *personally* to the extent only to which he has failed to apply the assets *duly*. An executor or administrator under the Indian Succession Act (s. 282) and Probate and Administration Act (s. 104) is bound to pay the creditors of the deceased "equally and rateably." If an executor or administrator under those Acts fails to pay the debts *rateably*, a creditor of a deceased person, who has obtained a decree against his executor or administrator, is entitled to proceed against him *personally* on the ground that the property of the deceased has not been "duly" applied within the meaning of this section. But the case is different where a decree has been obtained against an *heir* of a deceased Hindu or Mahomedan as his legal representative. In such a case, every payment by the heir on account of debts due by the deceased would be a *due* application of the assets, whether the debts were paid rateably or not. There is no analogy between the case of an *executor* or *administrator* governed by the provisions of the above-mentioned Acts and of an *heir* as a legal representative under the Hindu or Mahomedan law (*w*).

Legal representative.—"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. See s. 2, c. (11).

As to how far a decree passed against one of several Mahomedan heirs binds the other heirs, see Sir Roland Wilson's digest of Anglo-Muhammadian Law, 4th ed., p. 226, and Mulla's Principles of Mahommadan Law, 6th ed., p. 20.

Where on the death of a Hindu father, his sons are brought on the record as *his legal representatives* in a suit pending against him at the time of his death, the decree should be against them in their representative capacity, and not against them personally. It is clear that where the decree is against the sons in their representative character, it can only be executed against the estate of the father in the hands of the sons as provided by this section (*x*).

Decree against a wrong person as heir and legal representative.—A decree obtained against an *executor* or *administrator* of the estate of a deceased person is a decree against the estate of the deceased. But a decree obtained against the *heir* of a deceased Hindu or Mahomedan as his legal representative is not a decree against the *estate* of the deceased even if the decree provides for the payment of the decretal amount out of the property of the deceased in the hands of such heir. Therefore, a decree obtained by a creditor of a deceased Hindu against a wrong person as his heir cannot be executed against the rightful heir who is in possession of the property. The creditor must obtain a fresh decree against the rightful heir (*y*).

Decree against executor who has not proved.—A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered, that is, intermeddled with the estate, or proved the will. Where a decree is obtained against such person, and property belonging to the deceased is sold under such a decree, the sale is ineffectual to bind the testator's estate (*z*).

(w) *Veerasokkaraju v. Pappiah* (1908) 20 Mad. 792 ;
Haji Saboo Sultick v. Ally Mahomed (1904)
 30 Bom. 270.
 (x) *Narayanaswami Natch v. Seshama Raju*

(1908) 18 Mad. L. J. 86.
 (y) *Kaliappau v. Varadarajulu* (1909) 33 Mad. 75
 (z) *Mohamidu v. Pitchay* [1894] A. C. 437.

- S. 33. **53.** [New.] For the purposes of section 50 and section 52 property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Liability of ancestral property.

Scope of the section.—This section has been enacted to enforce the recognized rule of the Hindu law namely, that members of a joint Hindu family may not escape the payment out of the joint family property of any *debt* incurred and decreed against their father before his death, provided that such *debt* is not tainted by immorality. A decree, therefore, for an injunction obtained against the father alone (restraining him from obstructing the plaintiff from using a water-tank), cannot, after the father's death, be enforced in execution against the sons. This section does not apply to such a decree (a).

Liability of ancestral property in execution proceedings.—This section is new. It settles a question of procedure on which there was a conflict of judicial decisions. To understand the precise scope of the section it is necessary to bear in mind the rule of Hindu law that where a son or grandson takes any ancestral property by survivorship, he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes including judgment-debts. The question we are now concerned with is—by what *procedure* is this liability to be enforced? We proceed to consider the subject under the following four heads:—

1. *Where a money-decree has been passed against the father, and the father dies before issue of execution.*—A and his sons B and C constitute a joint Hindu family owning ancestral property. D obtains a decree against A for Rs. 5,000. A dies, and on his death B and C take the ancestral property by survivorship. A does not leave any self-acquired property. D applies for execution of the decree against B and C to the extent of the ancestral property that has come into their hands. Is this the right procedure or should D institute a fresh suit against B and C to recover the debt? According to the procedure prescribed by this Code, D should first proceed to bring B and C on the record as the legal representatives of A under s. 50, and then apply under that section to the Court which passed the decree to execute the same against B and C to the extent of the ancestral property come to their hands. The words in s. 50 are, “to the extent of the property of the deceased which has come to his [legal representative's] hands.” According to the present section, the ancestral property in the hands of B and C being liable under Hindu law for the payment of A's debts, is to be deemed, for the purposes of s. 50, to be the property of the deceased which has come to the hands of B and C as the legal representatives of A. If B and C object that the debt in respect of which the decree was passed was tainted with immorality, the question is one “relating to the execution of the decree” within the meaning of s. 47, and it should be determined by the Court executing the decree. This coincides with the view taken by the High Courts of Bombay and Calcutta under the Code of 1882 (b). According to the Madras and Allahabad decisions under that Code, a decree against a Hindu father could not be executed against ancestral

(a) *Chundlal v. Bat Mani* (1918) 42 Bom. 504.

(b) *Umed v. Goman Bhatji* (1896) 20 Bom. 385; *Sktiram v. Sakharam* (1909) 33 Bom. 39;

Amar Chandra v. Sebak Chand (1907) 34 Cal. 642. See *Hanmant v. Ganesh* (1919) 43 Bom. 612, at p. 626.

property in the hands of the sons not even to the extent of the father's interest in the property, and the only remedy of the decree-holder was to institute a *regular suit* against the sons. This view proceeded on the ground that the question whether the debts were tainted with immorality was not one that could be gone into in execution proceedings (c). These decisions are no longer law. **Ss. 53, 54.**

2. *Where a money-decree has been passed against the father, and the father dies after attachment of the ancestral property.*—All the High Courts are agreed that where the father dies after attachment of the ancestral property, the proceedings in execution can be continued against the sons (d). In fact, having regard to the provisions of the present section, a separate suit against the sons would be barred by s. 47. As to whether the sons should in such a case be brought on the record, see notes to s. 50 under the head "Before the decree has been fully satisfied," on p. 146 above.

3. *Where a mortgage-decree has been passed against the father, and the father dies before sale of the mortgaged property.*—Where a decree is obtained against the father for sale of ancestral property mortgaged by him, and he dies before sale, the proceedings in execution may be continued against the sons. But the sons, not being parties to the suit, are entitled to raise in execution proceedings such questions as they could have raised if they had been made parties (e). They can dispute the *factum* of the debt, or they can show that the debt was incurred for immoral purposes and is not therefore binding on the property (f). See notes to O. 34, r. 1, "Mortgage of joint family property."

4. *Where a decree has been passed against the sons in respect of their father's debt for payment of the debt out of the ancestral property.*—In such a case, the decree-holder may proceed to execute the decree by attachment and sale of the ancestral property come to the hands of the sons. The proceedings would be under s. 52. The expression "property of the deceased" in that section would be construed in the light of the present section. In fact, s. 53 is an *Explanation* to ss. 50 and 52, explaining the meaning of the expression "property of the deceased."

It will be seen from what has been stated above that a creditor can now follow the property in the hands of the sons or grandsons in execution not only in cases (2), (3) and (4), but also in case (1).

"**Debt of a deceased ancestor.**"—As to debts for which a Hindu son or grandson is liable, see Mulla's Hindu Law, 3rd ed., sec. 243, p. 264.

54. [s. 265.] Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Partition of estate or separation of share.

(c) *Ravi Varma v. Narayana* (1882) 5 Mad. 223; *Venkatarama v. Senthivelu* (1890) 13 Mad. 265; *Lachmi Narain v. Kunji Lal* (1894) 16 All. 449; *Jaganath v. Sita Ram* (1889) 11 All. 302.
(d) *Stragiri Zamindar v. Teruvengada* (1884) 7 Mad. 339; *Lachmi Narain v. Kunji Lal* (1894) 16 All. 449; *Peary Lal v. Chandi*

Charan (1906) 11 O.W. N. 163.
(e) See *Chunder Pershad v. Sham Koer* (1906) 33 Cal. 676; *Umamaheswara v. Singaperumal* (1885) 8 Mad. 376. See also *Hira Lal v. Parneswar* (1899) 21 All. 356.
(f) See *Ramkrishna v. Vinayak* (1910) 34 Bom. 354; *Indar Pal v. Imperial Bank* (1915) 37 All. 214.

S. 54. Partition by Collector.—This section is a reproduction of s. 265 of the Code of 1882 with a few verbal alterations. Where a decree has been passed for partition or for separate possession of a share of an estate of the kind mentioned in this section, the proper authority to effect the partition or to deliver possession of the share is the Collector; the Court has no power to do so (g).

Application of the section.—This section does not apply to a suit for partition of a revenue-paying estate where *no separate allotment of revenue* is asked for. It has been so held by a Full Bench of the High Court of Calcutta in *Jogodishuri v. Kailash Chandra* (h), a case under s. 265 of the Code of 1882. Commenting on that section Maclean, C.J., said: “The suit is one for the partition, not of the whole estate, but of a part only of the estate, and it does not seek to affect any division or payment of the revenue. I do not think that the section intended to make it compulsory that the Collector should make the partition, save in cases where as the result of partition the revenue would or might be affected.”

Partition.—The term “partition” in this section is not confined to a mere division of the lands in question into the requisite parts, but includes the delivery of the shares to their respective allottees (i).

Court's jurisdiction to control Collector's action.—Where the decree relates to an estate of the kind mentioned in this section, it should declare the rights of the several parties interested in the property, but as regards partition or separation it should direct the same to be made by the Collector or any gazetted subordinate of the Collector deputed by him in that behalf (j) [see O. 20, r. 18]. This section places the execution of the decree entirely in the Collector's hands. But if the Collector contravenes the decretal command of the Court, or transgresses the law for the time being in force relating to partition, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution (k). In such a case, the aggrieved party should proceed by an application under s. 47, and not by a separate suit (l). Where a Collector has once made a partition there is nothing to prevent him from reversing the partition for mistake or other cause before he has passed final orders and returned the proceedings to the Court (m).

It has been held by the High Court of Bombay that an objection that the Collector has made an unequal partition is no ground for interference by the Court with the order passed by the Collector (n). But in a Madras case, where all the parties objected to a partition effected by the Collector on the ground that it was unequal, it was held that the Court had the power to entertain the objection (o).

Estate.—The word “estate” is here used in its ordinary signification (p), *Sheri* lands, that is lands held under a lease from Government for a fixed period, come within the terms of this section as revenue-paying lands (q). But isolated plots of land which fall short of being the share of a co-sharer of a *mahal* do not (r). A *raiyyatwari* holding has been held not to be an “estate” within the meaning of this section (s).

(g) *Dattatraya v. Mahadaji* (1892) 16 Bom. 528.
(h) (1897) 24 Cal. 725.

(i) *Parbhudas v. Shankarbai* (1887) 11 Bom. 662.

(j) The provisions of s. 42 of the Specific Relief Act, 1877, do not constitute a bar to such a decree: *Rupanrai v. Subh Karan* (1919) 41 All. 207; *Asman Singh v. Tulsi Singh* (1917) 2 Pat. L. J. 221.

(k) *Dev Gopal v. Vasudev* (1888) 12 Bom. 371, 376; *Ganoji v. Dhondu* (1890) 14 Bom. 450; *Purushottam v. Balkrishna* (1904) 28 Bom. 238; *Ramchandra v. Krishnaji* (1916) 40 Bom. 118, 124-125.

(l) *Krishnaji v. Damodar* (1903) 5 Bom. L. R. 648.

(m) *Krishnaji v. Damodar* (1903) 5 Bom. L. R. 648.

(n) *Dev Gopal v. Vasudev* (1888) 12 Bom. 371; *Shrinivasa v. Gurunath* (1891) 15 Bom. 527; *Bhimangada v. Hanmant* (1918) 42 Bom. 689.

(o) *Chinna v. Krishnavanamma* (1896) 19 Mad. 435.

(p) *Secretary of State v. Nundan Lall* (1884) 10 Cal. 435.

(q) *Dattatraya v. Mahadaji* (1892) 16 Bom. 528.

(r) *Ram Dayal v. Megu Lal* (1884) 6 All. 452.

(s) *Muttarayyanagar v. Kudalalagayyanagar* (1883) 6 Mad. 97; *Muluchidambara v. Karupa* (1884) 7 Mad. 882.

ARREST AND DETENTION.

S. 55.

55. [s. 336.] (1) A judgment-debtor may be arrested

Arrest and detention. in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officers authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf.

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(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court shall release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to civil prison in execution of the decree.

Changes introduced by the section.—This section corresponds with s. 336 of the Code of 1882, except in the following particulars:—

1. Any *outer door* of a dwelling-house may now be broken open to effect the arrest of a judgment-debtor in execution of a decree. But the dwelling house must be in the occupancy of the judgment-debtor. See sub-section (1), proviso (2).
2. A surety under this section is no longer entitled to be released from his liability by the mere filing by the judgment-debtor of a petition in insolvency. Note the words "*and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested,*" in sub-section (4).
3. A power has been conferred on the Local Government to exempt certain persons from arrest. See sub-section (2).

Breaking open of outer door.—Under the Code of 1882, the breaking open of any *outer door* of a dwelling-house was strictly prohibited. This prohibition has now been removed to this extent that where a dwelling-house is in the occupancy of the judgment-debtor, and he refuses or prevents access thereto, the officer authorized to make the arrest may break open any outer door of such dwelling-house. But this does not authorize him to break open the outer door of a dwelling-house merely because the judgment-debtor is to be found in that house. The prohibition above referred to as well as the prohibition against entering a dwelling-house after sunset for effecting an arrest are to be traced to the maxim of English law that "a man's house is his castle." Referring to this maxim, Bentham wrote more than a century ago: "This poetical expression is certainly no *reason*: for if a man's house be his castle by night, why not by day? The course of justice is sometimes interrupted in England by this puerile notion of liberty" (1).

(1) Bentham's Theory of Legislation, 2nd Edn., p. 70.

Sub-section (2).—This sub-section is new. It is intended to cover the cases **Ss. 55-57.** of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.

Discharge of surety.—A surety under sub-section (4) is discharged by the death of the judgment-debtor (*u*). Similarly he is discharged, if the execution proceedings are struck off (*v*).

Under the Code of 1882, the security required was "that the judgment-debtor will appear when called upon, and that he will, within one month, apply under section 336 to be declared an insolvent." It was held upon the construction of these words that where a security bond provided that the surety would produce the judgment-debtor when the Court should direct him to do so, the surety was released from his obligation under the bond by the mere filing by the judgment-debtor of a petition to be declared an insolvent. Neither the withdrawal of the petition, nor failure to proceed with the petition, nor even failure on the part of the judgment-debtor to appear in Court when the direction to appear was made *subsequent* to the filing of the petition, was held to affect the surety's discharge (*w*). And the same was held where a surety undertook that the judgment-debtor would appear before the Court when called upon, and would within one month file a petition to be declared an insolvent (*x*). These decisions are no longer law. Sub section (4) now makes it clear that where a security bond is passed in the terms of that sub-section, that is, where a surety undertakes that the judgment-debtor will undertake within one month to apply to be declared an insolvent *and* will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the surety will not be released by the mere filing by the judgment-debtor of the petition in insolvency.

Realization of security.—See s. 145.

56. [s. 245A.] Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

Prohibition of arrest or detention of women in execution of decree for money.

Security for costs.—This section provides that a woman shall not be arrested in execution of a decree for the payment of money. With this immunity from arrest, however, there is coupled a burden, namely, that she may be required to give security for the defendant's costs where her suit is for the payment of money. See O. 25, r. 1.

57. [s. 338.] The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

Subsistence-allowance.

(*u*) *Krishnan v. Itinan* (1901) 24 Mad. 637 ;
Nabin Chandra v. Mirtunjoy (1913) 41 Cal. 50.

(*v*) *Lalji v. Odoya* (1887) 14 Cal. 757.

(*w*) *Koylash Chandra v. Christophoridi* (1888) 15 Cal. 171; *Ramsan v. Gerard* (1891) 18 All.

100; *Dwarkanadas v. Isabhai* (1895) 19 Bom. 210; *Krishnaiyar v. Krishnasamy* (1908) 28 Mad. 386.

(*x*) *Banna Mai v. Jamma Das* (1893) 15 All. 183; *Imbichunni v. Lalji* (1901) 24 Mad. 560.

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58. [Ss. 341, 342.] (1) Every person detained in the civil prison in execution of a decree shall be so detained,—
 Detention and release.

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,

(b) in any other case, for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

- (i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or
- (ii) on the decree against him being otherwise fully satisfied, or
- (iii) on the request of the person on whose application he has been so detained, or
- (iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance :

Provided, also, that he shall not be released from such detention, under clause (ii) or clause (iii) without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

Period of detention in jail.—The first part of sub-section (1) up to the words “six weeks” corresponds with s. 342 of the Code of 1882. The phraseology of that section, however, has now been altered to make it quite clear that the period of detention shall be (1) six months where the amount of the decree exceeds Rs. 50, and (2) six weeks in any other case, and that the Court has no power to fix shorter periods than those prescribed in the section (y).

Re-arrest.—The immunity of a judgment-debtor from a second arrest depends not only upon his having been *arrested*, but upon his having been detained *in jail* under the arrest. Thus where a judgment-debtor, while acting as a pleader in Court, was arrested and discharged on the ground that he was exempt from arrest under s. 642 of the

Code of 1882 (now s. 135), it was held that he was liable to be re-arrested in execution of Ss. 58, 59. the same decree against him (z). Similarly where a judgment-debtor was arrested, but was liberated owing to non-payment of subsistence money, it was held that he was liable to be re-arrested in execution of the same decree (a). To use the language of sub-section (2), the judgment-debtor was not in either case *released from detention* so as to prevent his re-arrest.

Interim protection order.—A is arrested and committed to jail in execution of a decree against him. While in jail he files his petition in insolvency, and obtains an *interim* protection order for one week, and is thereupon released from jail. He then applies for a further protection order, but his application is refused. Is A liable to be re-arrested in execution of the same decree? The Calcutta High Court has held that he is not liable to be re-arrested, on the ground that a judgment-debtor once discharged from jail cannot be arrested a second time in execution of the same decree (b). On the other hand, it has been held by the High Court of Bombay that A is liable to be re-arrested, the decision proceeding on the ground that the only cases in which a judgment-debtor is exempt from re-arrest are those specified in this section, and that release under an *interim* protection order is not one of them (c). The Calcutta decision is obviously wrong.

Contempt of Court.—This section does not apply to cases of imprisonment for contempt of Court (d).

59. [s. 653.] (1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(a) by the Local Government, on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

(z) *Rajendra v. Chunder Mohun* (1896) 23 Cal. 128.

(a) *Habibul-Rahman v. Ram Sahai* (1904) 26 All. 817.

(b) *Boiy Chund in the matter of* (1893) 20 Cal.

874; *Secretary of State v. Judah* (1886) 12 Cal. 652.

(c) *Shamji v. Poonja* (1902) 26 Bom. 652; *Suraj Din v. Mahabir Prasad* (1910) 33 All. 279.

(d) *Martin v. Lawrence* (1879) 4 Cal. 655.

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ATTACHMENT.

60. [S. 266.] (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Property liable to attachment and sale in execution of decrees.

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ;
- (b) tools of artisans, and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ;
- (d) books of account ;
- (e) a mere right to sue for damages ;
- (f) any right of personal service ;

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- (g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf, and political pensions ;
- (h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty ;
- (i) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of—
 - (i) the whole of the salary, where the salary does not exceed twenty rupees monthly ;
 - (ii) twenty rupees monthly, where the salary exceeds twenty rupees and does not exceed forty rupees monthly ; and
 - (iii) one moiety of the salary in any other case ;
- (j) the pay and allowances of persons to whom the Indian Articles of War apply ;
- (k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment ;
- (l) the wages of labourers and domestic servants whether payable in money or in kind ;
- (m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;
- (n) a right to future maintenance ;
- (o) any allowance declared by any law passed under the Indian Councils Acts, 1861, and 1892, to be exempt from liability to attachment or sale in execution of a decree ; and
- (p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable

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property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation.—The particulars mentioned in clauses (g), (h), (i), (j), (l), and (o) are exempt from attachment or sale whether before or after they are actually payable.

(2) Nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

Changes introduced by the section.—This section corresponds with s. 266 of the Code of 1882 except in the following particulars :—

1. In cl. (a), the words “cooking vessels,” “beds,” and “and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman,” have been added. See notes below.
2. The latter portion of cl. (b) relating to agricultural produce is new.
3. Cl. (c) stood as follows in s. 266 of the Code of 1882 :—“The materials of houses and other buildings belonging to agriculturists.”
4. In cl. (g), the words “or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf” have been added.
5. Cl. (h) is new. See notes below.
6. In cl. (i), the words “or allowances equal to salary” and “while on duty” have been added. See notes below.
7. Cl. (k) is new. See notes below.
8. In cl. (l), the words “whether payable in money or in kind” are new.
9. The alterations in sub-section (2), cl. (a), correspond with the alterations in sub-section (1), cl. (c).

Amendment of the section.—The section as it originally stood contained a clause at its very end, being cl. (b) of sub-sec. (2), which ran as follows :—

“(b) to affect the provisions of the Army Act or of any similar law for the time being in force.”

The above clause has been repealed by the Repealing and Amending Act 10 of 1914, Sch. II. See notes below under the head “Salary of Army officers.”

Saleable property.—Subject to the proviso to sub-section (1), all saleable property which belongs to the judgment-debtor may be attached and sold in execution of a decree against him. The equity of redemption of a mortgagor in mortgaged property is “saleable property” within the meaning of this section, and is therefore liable to be attached and sold in execution of a decree against him (e). The share of a partner in a

partnership business is "saleable property," and can be attached and sold in execution of a decree obtained against him by his creditor (f). The right to claim specific performance of a contract to sell land is also attachable and saleable (g). A life-interest in trust funds is attachable and saleable in execution of a decree against the life-tenant (h). Similarly a vested remainder can be attached and sold in execution of a decree against the remainderman (i).

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The word "saleable" in this section means saleable by auction at a compulsory sale under the order of the Court and not transferable by act of parties. It has accordingly been held that a condition in a permanent lease that the landlord would re-enter if the tenant made any transfer of the land demised, does not make the land unsaleable in execution. The lease forbids a sale by the tenant, but does not prevent a sale by the Court (j). Country liquor is "saleable" property within the meaning of this section, though the permission of the Collector may be necessary to the sale thereof under the Abkari Act (k).

Money or other valuable security deposited as security for the due performance of duty by a servant with his master may be attached in execution of a decree against the servant, but the attachment will be subject to the lien which the master has upon the deposit, and the deposit cannot be sold until the same is at the disposal of the servant free from the lien of the master at the expiration of the period of employment (l).

Where land was assigned to a Hindu widow for her maintenance with a proviso against alienation, it was held that she had no saleable interest in the usufruct (m).

A religious office is not saleable property (n). Similarly the right of managing a temple, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, is not saleable (o). The right to officiate at funeral ceremonies is also not saleable (p). The property of a temple cannot be sold away from the temple. But there is no objection to the sale of the right, title and interest of the servant of a temple in land belonging to the temple which he holds as remuneration for his service, the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from office for failure to perform the service (q).

The income of property subject to a restraint upon anticipation accruing due after the date of the judgment cannot be attached in execution of a decree against the separate property of a married woman passed under s. 8 of the Married Women's Property Act, 1874 (r).

The right of a widow under the Hindu law to reside in her husband's family house is a purely personal right and cannot be transferred. Such right cannot be attached in execution as it is not "saleable" property (s). For other kinds of property which cannot be alienated, see Transfer of Property Act, 1882, s. 6.

(f) *Jaga Chunder v. Iswar Chunder* (1893) 20 Cal. 993. See O. 21, r. 49.

(g) *Rudra v. Krishna* (1887) 14 Cal. 241.

(h) *Abdul Lateef v. Doutra* (1889) 12 Mad. 250.

(i) *Annaji v. Chandrabat* (1893) 17 Bom. 503.

(j) *Keshab v. Ajahar* (1914) 10 C. W. N. 1182; *Golak Nath v. Mathuranath* (1893) 20 Cal. 273.

(k) *Purehottam v. Balvant* (1908) 10 Bom. L. R. 15.

(l) *Karukhan v. Subramanya* (1886) 9 Mad. 203.

(m) *Duwait v. Apaji* (1896) 10 Bom. 342. See also *Gulab Kuar v. Bansidhar* (1898) 15 All. 371, and *Bansidhar v. Gulab Kuar* (1894) 16 All. 443.

(n) *Kuppa v. Dorasami* (1888) 6 Mad. 76; *Narasimma v. Anantha* (1882) 4 Mad. 391;

Rangasami v. Ranga (1893) 16 Mad. 146; *Mancharam v. Pranshankar* (1882) 6 Bom. 298, 300.

(o) *Durga Bibi v. Chanchal* (1882) 4 All. 81; *Rama Varma v. Ramasunayar* (1882) 5 Mad. 89; *Rajah Vurmah v. Ravi Vuimah* (1876) 1 Mad. 235, 4 I. A. 76; *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (1900) 23 Mad. 271, 27 I. A. 69; *Malika v. Ratanmant* (1897) 1 C. W. N. 493; *Sholajanund v. Peary* (1902) 29 Cal. 470.

(p) *Jhummun v. Dinonath* (1871) 16 W. R. 171.

(q) *Lotikar v. Wagle* (1882) 6 Bom. 596. See also *Bishen Chand v. Nadir Hossein* (1888) 15 Cal. 329, 15 I. A. 1.

(r) *Gouddoin v. Venkatesa* (1907) 30 Mad. 378.

(s) *Salakshi v. Lakshmayee* (1908) 31 Mad. 500.

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"Property".—*A* sues *B* for partnership accounts. The accounts are then referred to arbitration with the consent of the parties. While the award is not yet made, *X*, a creditor of *A*, applies for attachment of the "rights and interest" of *A* in the award. The attachment cannot be allowed, for the expectant claim under an inchoate award is not "property" within the meaning of this section (*t*). Money paid into Court as a fine in a criminal case against a judgment-debtor is, after the order imposing the fine is set aside, attachable under this section as money belonging to the judgment-debtor even before the issue of a refund certificate (*u*).

The doors and windows of a building cannot be *separately* attached, for they have no separate existence as *property* (*v*). An uncertain right in unascertained property could not be the subject of attachment (*w*).

Disposing power—A property may not belong to a judgment-debtor, and yet he may have a *disposing power* over it exercisable for his own benefit. In such a case also the property is liable to attachment and sale subject to the proviso to this section.

A trustee of a religious endowment has no disposing power over the *corpus* of the trust estate exercisable for his own benefit; hence the *corpus* cannot be attached (*x*).

A bonus sanctioned by a Railway Company to its servant is virtually a gift which must be completed either by a registered document or by actual payment as required by s. 123 of the Transfer of Property Act. A Railway Company sanctioned a bonus to *A*, and the amount was forwarded to the District Paymaster of the Company for payment to *A*. Before the amount was paid to *A*, it was attached by a creditor of *A* in the hands of the Paymaster. Held that the amount could not be attached, for the gift was not complete, and *A* had therefore no *disposing power* over the money (*y*).

A sends a cover containing currency notes to the Post Office for delivery to *B*, the addressee. Can the cover be attached while it is yet in the Post Office by a creditor of *B*? It has been held that it can be attached, on the ground that the cover is in the *disposing power* of *B*. "When once the letter has been posted, the property in it becomes vested in the addressee" (*z*).

An auctioneer has no disposing power over the whole of the sale proceeds of goods sold by him, but only over that portion of it which represents his commission. Hence the whole of the sale proceeds in the hands of an auctioneer cannot be attached in execution of a decree against him, but only so much of it which represents his commission (*a*).

Where a married man effects a policy on his own life, and the policy is expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, then, in cases to which the Married Women's Property Act, 1874, applies, the simple declaration on the face of the policy that the policy is for the benefit of his wife or children amounts to a trust for them, and the policy cannot be attached by his creditors; but in cases to which the said Act does not apply, such a declaration is not sufficient to create a trust, and the insured has a disposing power over the policy for his own benefit, and the policy may be attached by his creditors, unless it has been assigned as provided by s. 130 of the Transfer of Property Act, 1882, or a trust has been declared in respect thereof as provided by s. 5 of the Indian Trusts Act, 1882. In this connection it may be

(*t*) *Syud Taffuzzool v. Rughoonath* (1871) 14 M. I. A. 40.

(*u*) *Harnam Singh v. Salig Ram* (1912) P. R. No. 90, p. 318.

(*v*) *Peru v. Renue* (1885) 11 Cal. 164.

(*w*) *Bebee Tokai v. Darod* (1856) 6 M. I. A. 510.

(*x*) *Bishen Chand v. Nadir Hossein* (1888) 15 Cal. 329, 15 I. A. 1.

(*y*) *Janki Das v. East Indian Ry.* (1884) 6 All. 634.

(*z*) *Narasimhulu v. Adiappa* (1890) 13 Mad. 242.

(*a*) *Smith v. Allahabad Bank* (1901) 23 All. 135.

observed that there is a conflict of decisions as to whether s. 6 of the Married Women's Property Act, which provides for insurance by a married man for the benefit of his wife and children, applies to Hindus. It has been held by the High Court of Madras that it does (b); by the High Court of Bombay, that it does not (c).

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"Debts."—Debts are expressly mentioned in the section, and they are liable to attachment and sale. A debt is an *obligation* to pay a *liquidated* (or specified) sum of money (d). Money that has not yet become due does not constitute a debt, for there is no *obligation* to pay that which has not yet become due. The word "debt" in this section means an actually existing debt, that is, a perfected and absolute debt. A sum of money which might or might not become due or the payment of which depends upon contingencies which may or may not happen is not a "debt" (e). A money-claim that *has already become due* is a debt, and it may be attached as such, though it may be *payable* at a future day; but a money-claim *accruing due* is not a debt and cannot be attached. *The attachment must operate at the time of the attachment and not be anticipatory so as to fasten on a claim that may ripen into a debt at some future time* (f).

A debt that is enforceable by a foreign Court only is not liable to attachment under this section (g).

Illustrations.

1. A delivers goods to his agent, B, for sale. B sells the goods, and receives the sale proceeds. The sale proceeds in the hands of B constitute a "debt" due to A, and they may therefore be attached while in B's hands in execution of a decree against A. *Madho Das v. Ramji* (1894) 16 All. 286.

2. A is bound under a deed to pay a monthly allowance to B for B's maintenance. C, who holds a decree against B, attaches in August the allowance for September. The attachment is not valid, for the allowance can only be attached as a "debt" and the allowance for September was not a debt due to B at the time of attachment in August: *Haridas v. Baroda Kishore* (1900) 27 Cal. 38; *Nilkunto v. Hurro* (1878) 3 Cal. 414.

3. A agrees to sell his property to B for Rs. 2,000 to be paid to A on the execution of the conveyance. The price payable to A is not a "debt" owing to him by B until the conveyance is executed. Hence it cannot be attached before the execution of the conveyance in execution of a decree against A: *Ahmaduddin v. Majlis Rai* (1881) 3 All. 12. But once the sale is completed, the amount representing the price may be attached in the hands of B, and it does not make any difference that the whole is payable in one sum or by instalments or in the shape of periodical payments: *Harshankar v. Baijnath* (1901) 23 All. 164.

4. Maintenance allowance that has already become due, *private* pensions that have already become due, and the wages of private servants that have already become due are "debts" within the meaning of this section: *Kasheeshuree v. Greesch Chunder* (1866) 6 W. R., Mis. 64 (maintenance); *Bhoyrub v. Madhub Chunder* (1880) 6 C. L. R. 19 (private pensions); *Ayyavayyar v. Virasami* (1898) 21 Mad. 393; *Devi Prasad v. Lewis* (1908) 31 All. 304 (wages of private servants).

5. A agrees to advance Rs. 5,000 to B on a mortgage of B's property. B advances Rs. 3,000 only. C, who holds a decree against B, seeks to attach the balance of Rs. 2,000,

(b) *Balamba v. Krishnappa* (1913) 37 Mad. 483

[F. B.]

(c) *Shankar v. Umabai* (1913) 37 Bom. 471.

(d) *Webster v. Webster* (1862) 31 Beav. 393.

(e) *Haridas v. Baroda Kishore* (1900) 27 Cal. 38.

(f) *Syud Tufsoozul v. Rughoonath* (1871) 14 M. I. A. 40, 50; *Sher Singh v. Sri Ram* (1908) 30 All. 246.

(g) *Ghamshamlal v. Bhansali* (1881) 5 Bom. 249.

- S. 60. payable by *A* to *B* as a debt due by *A* to *B*. *C* cannot attach the balance, for it is not a debt due by *A* to *B*. It is clear that if *A* fails to pay the balance, *B* cannot sue *A* to recover the balance and his only remedy against *A* is by way of damages for non-payment of the balance : *Phul Chund v. Chand Mal* (1908) 30 All. 252.

As to the mode in which a debt may be attached, see O. 21, r. 46. See also O. 21, r. 79.

Clause (a): Ornaments.—Ornaments on the person of a Hindu wife, forming part of her *stridhan*, cannot be attached in execution of a decree against the husband, even though the Hindu law concedes him a personal right of user (*h*). The *mangalsutra*, a neck ornament which is worn by a Hindu married woman during the lifetime of her husband without ever removing it, is also exempted from attachment (*i*).

Clause (c): houses occupied by agriculturists.—The term “agriculturist” includes persons engaged in cultivating the soil for remuneration although they may have no interest in the soil either as proprietor or tenant (*j*). The Code of 1882 (s. 266) exempted from attachment only the materials of houses occupied by agriculturists. But it was held that even a house occupied by an agriculturist could not be attached, provided it was occupied by an agriculturist as such (*k*), that is to say, it was occupied by him *bonâ fide* for the purposes of agriculture (*l*). The burden of proving this lies on the agriculturist debtor, and it must be proved by him in execution proceedings (*m*). The exemption extends, after the death of the agriculturist, to his representative occupying the house in good faith as an agriculturist (*n*).

If a house occupied by an agriculturist is specifically mortgaged, it is not protected from sale in execution of a decree upon the mortgage. Clause (c) does not prohibit the sale of property *specifically mortgaged*, though it may be occupied by an agriculturist as such, unless he is prohibited by law from mortgaging or selling it (*o*).

Clause (e): right to sue for damages.—“Mesne-profits” are in the nature of damages, and the right to sue for mesne-profits is a right to sue for “damages.” Such a right cannot therefore be attached and sold in execution of a decree against the person entitled to the right. Thus if *A* is entitled to claim mesne-profits from *B* for wrongful dispossession of his lands, *A*’s right to sue *B* for mesne-profits cannot be attached and sold in execution of a decree against *A*. If the right is attached and sold and purchased by *X*, *X* has no right to sue *B* for the mesne-profits, the sale to him being void (*p*).

Clause (f): right of personal service.—A *vritti* is a right to receive certain emoluments as a reward for personal service, and is therefore exempt from attachment and sale (*q*). The *birt* *Maha brahmuni* or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district is a right of personal service and cannot therefore be attached (*r*).

Clause (g): gratuities allowed by Government.—The gratuity referred to in this section is a bonus allowed by Government to its servants in consideration of past services. It may be allowed to one who is not a “pensioner,” or it may be

(h) *Tukaram v. Gunaji* (1871) 8 B. H. C. A. C. 129.

(i) *Aspina v. Tangamma* (1885) 9 Bom. 106.

(j) *Devare v. Vaikunt* (1917) 41 Bom. 475.

(k) *Radhakisan v. Balvant* (1883) 7 Bom. 530.

(l) *Jisan v. Hira* (1888) 12 Bom. 368.

(m) *Pandurang v. Krishnaji* (1904) 28 Bom. 125.

See also *Jamna Prasad v. Raghunath* (1913)

35 All. 307.

(n) *Radhakisan v. Balvant* (1883) 7 Bom. 530.

(o) *Bhagvandas v. Hathibai* (1880) 4 Bom. 25; *Bhola Nath v. Kishori* (1911) 34 All. 25.

(p) *Shyam Chand v. Land Mortgage Bank* (1883) 9 Cal. 695.

(q) *Ganesh v. Shankar* (1886) 10 Bom. 395; *Govind v. Ramkrishna* (1888) 12 Bom. 366; *Rajaram v. Ganesh* (1899) 23 Bom. 131.

(r) *Durga Prasad v. Shambhu* (1919) 41 All. 656.

allowed to a pensioner in addition to his pension. In either case it is exempt from attachment (s). S. 60.

Stipends payable out of service family pension fund notified in the Gazette of India.—For notifications issued under this clause [i. e., cl. (g)], see General Statutory Rules and Orders, vol. IV., p. 685.

Political pensions.—All pensions of a political nature payable directly by the Government of India are political pensions. A pension which the Government of India has given a guarantee that it will pay by a treaty obligation contracted with another sovereign power is a political pension (t). Arrears of political pension due to a pensioner and lying in the hands of the Government at the time of his death do not lose their character of political pension by reason merely of the pensioner's death. The character of the funds remains unchanged so long as it remains unpaid in the hands of the Government and it is not liable to attachment in the hands of the Government in execution of a decree against the deceased. But once the fund has passed out of the hands of the Government into the hands of the legal representative of the deceased, it may be attached like any other portion of the deceased's estate (u).

A grant of a Zamindari by Government to A. B., as a reward for past services rendered by him to Government is not a *pension*, but a *gift*, and may therefore be attached in execution of a decree against the grantee. The word "pension" in this section implies *periodical* payments of *money* by Government (v). Allowances granted to the "Candyan" "pensioners" of Ceylon (w), to the members of the family of the King of Oudh (x), to the members of the Mysore family (y), and to the descendants of the Nawab of Carnatic (z), are instances of political pensions.

Private pensions.—Private pensions, as distinguished from Government pensions, are not exempt from attachment, and they may be attached either as "debts" or as "property belonging to the judgment-debtor" within the meaning of this section. But they neither constitute "debts" nor "property belonging to the judgment-debtor" until they have become due and payable. Hence they cannot be attached *before* they have become due and payable. Pensions granted by Railway Companies to their servants are private pensions (a).

Clause (h): allowances, being less than salary, of a public officer while absent from duty.—This clause is new. The allowances (being less than salary) of a public officer [s. 2 (17)] *while absent from duty*, are now *wholly* exempt from attachment. Under the Code of 1882 it was held, in the absence of any specific provision as to these allowances, that they stood on the same footing as the salary of a public officer *while on duty* and were exempt from attachment only to the extent to which such salary was exempt, and no more (see cl. (i)]. Thus where an officer was on sick leave on *half pay* which was Rs. 150, it was held that the decree-holder could attach Rs. 75 (b). Under this clause the whole of Rs. 150 is exempt from attachment.

Clause (i): salary of public officer while on duty.—The salary of a public officer [s. 2 (17)] can be attached only *partially*, except where it does not exceed Rs. 20 monthly in which case the *whole* of it is exempt from attachment. The object

(s) *Bawan Das v. Mul Chand* (1884) 6 All. 173; *Muhammad v. Carlier* (1882) 5 Mad. 272 (decided under the Code of 1877 which did not include "gratuities").
(t) *Bishambar v. Imdad Ali* (1891) 18 Cal. 216, 17 I. A. 181; *Muthusami v. Prince Alagia* (1903) 26 Mad. 423.
(u) *Valia v. Anujani* (1903) 26 Mad. 69.
(v) *Lachmi Narain v. Makund* (1904) 26 All. 617

(w) *Muthusami v. Prince Alagia* (1903) 26 Mad. 423.
(x) *Bishambar Nath v. Imdad Ali* (1891) 18 Cal. 216, 17 I. A. 181.
(y) *Mahamed v. Mohamed* (1867) 7 W. R. 169.
(z) *Mahomed v. Comandur* (1869) 4 M. H. C. 277.
(a) *Bhojrab v. Madhub Chunder* (1890) 6 C.L. R. 19.
(b) *Beard v. Samuel* (1883) 6 Mad. 179.

S. 60. of the exemption appears to be to enable a public officer to maintain himself and his family in a position suitable to his rank. This exemption did not occur in the Code of 1859; hence the salary of a public officer and of the other persons mentioned in this clause was attachable to the extent of the whole as a "debt." And since it could only be attached as a "debt," it was not attachable until it had become due (c). Under the Codes of 1877 and 1882, and under the present Code, the salary, to the extent to which it is attachable, may be attached in advance (d). It is no valid reason for refusing the attachment that the attachment, if allowed, would not leave the officer enough to live on (e). As to the salary of Army officers, see notes below under the head "Salary of Army officers."

Salary of a private servant.—The salary of a private servant can be attached as a "debt;" hence it cannot be attached before it has become due (f).

Clause (j): Indian Articles of War.—The Indian Articles of War apply only to soldiers and followers of the Native Army: see Act V of 1869, amended by Act XII of 1894. Hence the pay and allowances of soldiers and followers of the Native Army are exempt from attachment.

Clause (k): compulsory deposits.—The expression "compulsory deposit" is defined in s. 2 of the Provident Funds Act IX of 1897 as a subscription or deposit which is not repayable on the demand or at the option of the subscriber or depositor, and includes any contribution which may have been credited in respect of any interest or increment which may have accrued on such subscription or deposit under the rule of the Funds.

Compulsory deposits made by railway servants towards the Provident Fund under the Provident Funds Act are not liable to attachment so long as they retain the character of compulsory deposit. A deposit which, when it was made, was a "compulsory deposit," continues to retain that character so long as it remains in the hands of the Railway Company. It does not lose that character, though the employee may have ceased to be in the service of the Company by retirement, resignation or dismissal, and may have become entitled in that event to be paid the amount due to his credit in the Provident Fund. But once it is paid out by the Company on the happening of any of the above events, it loses the character of "compulsory deposit," and it may be attached in the hands of the party to whom it has been paid (g).

Clause (l): wages of labourers.—A "labourer" is a person who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education. Thus persons who agree to spin cotton and to receive a certain amount of money for a certain quantity of cotton spun by them are labourers, and their wages cannot be attached (h).

Clause (m): expectancy of succession, etc.—The interest which a Hindu reversioner has in the immoveable property of a deceased Hindu on the death of the deceased's widow, is "an expectancy of succession by survivorship"; in other words it is an interest expectant on the widow's death to which the reversioner could only succeed if he survived the widow (i). The interest in the pre-empted property of a success-

(c) *Tejram v. Kusaji* (1870) 7 B. H. C. A. C. 110.
 (d) *Beard v. Samuel* (1883) 6 Mad. 179; *Bhojrab v. Madhub Chunder* (1890) 6 C. L. R. 19.
 (e) *Debi Prasad v. Lewis* (1918) 40 All. 213.
 (f) *Ayyavayyar v. Virasami* (1898) 21 Mad. 393;
Devi Prasad v. Lewis (1909) 31 All. 304.
 (g) *Veerchand v. B. B. & C. I. Railway* (1904) 6

Bom. L. R. 921; *Sett Munna Lal v. Gainsford* (1908) 35 Cal. 641.
 (h) *Jeehand v. Aba* (1881) 5 Bom. 132.
 (i) *Ram Chunder v. Dhurmo* (1871) 15 W. B. F. B. 17; *Anandibai v. Rajaram* (1898) 22 Bom. 984.

ful pre-emptor who *has not yet paid the pre-emptive price* fixed by his decree is a “merely contingent interest” which cannot be attached (j); see O. 20, r. 14.

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Clause (n): right to future maintenance.—If A is entitled to a monthly maintenance allowance under an agreement, the allowance could only be attached after it has become due (k). It cannot be attached prospectively, that is, before it has become due (l). In other words *arrears* of maintenance may be attached, but not the right to *future* maintenance. A hereditary grant of an allowance of paddy out of the melwaram of certain land is not a right to *future* maintenance so as to be exempt from attachment under this section (m). *Quære* whether villages assigned to a Hindu widow in lieu of her maintenance could be attached in execution of a decree against the widow (n). See notes to s. 51, “Receiver in execution proceedings.”

Salary of Army officers—Sub-sec. (2) of the present section as it stood originally ran as follows:—

(2) Nothing in this section shall be deemed—

- (a) to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for this enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land, or
- (b) to affect the provisions of the Army Act or of any similar law for the time being in force.

The italicized words and letters were repealed by the Repealing and Amending Act 10 of 1914, sch. II.

It is provided by s. 136 of the Army Act, 1881 [stat. 44 and 45 Vict.], amended by the Army (Annual) Act of 1895, that the pay of an officer or soldier of His Majesty's Regular Forces serving in India shall be paid to him *without deduction* unless the Legislature in India has directed to the contrary in that behalf. Under section 60 of the Code as it stood before the amendment above referred to, questions arose as regards the extent of application of the Army Act. As regards officers in the *British* Army, it was held that they were officers of His Majesty's Regular Forces within the meaning of s. 136 of the Army Act, and that their salary therefore could not be attached at all (o). As regards officers in the *Indian* Army, there was a conflict of decisions; the High Courts of Calcutta and Madras (p) held that an officer in the *Indian* Army was not an officer of His Majesty's Regular Forces within the meaning of s. 136 of the Army Act, and that his salary therefore was liable to be attached to the extent mentioned in s. 60 (1) (i). On the other hand, it was held by the High Court of Bombay (q), relying on s. 190, sub-s. (8), of the said Act, that an officer in the *Indian* Army was an officer of His Majesty's Regular Forces and that his salary therefore could not be attached at all.

Cl. (b) of sub-s. (2) having been repealed, the question arises whether the salary of an officer of His Majesty's Regular Forces can be attached under this section as salary of a public officer to the extent mentioned in cl. (i) of sub-sec. (1).

(j) *Gorak Singh v. Sidh Gopal* (1906) 28 All. 383.

(k) *Kasheeshuree v. Gresh Chunder* (1866) 6 W. R. M. 84.

(l) *Haridas v. Baroda Kishore* (1900) 27 Cal. 98; *Asad Ali v. Haidar Ali* (1910) 38 Cal. 13;

Patikandy v. Krishnan (1917) 40 Mad. 302.

(m) *Vaidyanatha v. Egga* (1907) 30 Mad. 279.

(n) *Bansidhar v. Gulab Kuar* (1904) 16 All. 443, in appeal from *Gulab Kuar v. Bansidhar* (1893) 15 All. 371.

(o) *Velchand v. Bouchier* (1912) 37 Bom. 28; *Lecky v. Bank of Upper India* (1911) 33 All.

529. See also *Oakes & Co. Ltd. v. Discarcie* (1910) F. R. no. 10, p. 80.

(p) *Calcutta Trades Association v. Ryland* (1896) 24 Cal. 102; *Watson v. Lloyd* (1901) 25

Mad. 402.

(q) *King King & Co. v. Davidson* (1914) 38 Bom. 687.

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It has been held by the High Courts of Allahabad (r) and Bombay (s), that it can be so attached. These cases must be distinguished from a Bombay case in which the question was whether the salary of a First Class Warrant Officer can be attached under the provisions of the Code of Civil Procedure in execution of a decree for maintenance obtained against him by his wife. It was held that it could not be attached under the Code. The ground of the decision was that a First Class Warrant Officer was a "soldier" as defined by s. 190 of the Army Act, that under s. 145 of the Act no execution can issue against his pay in respect of the maintenance of his wife but that a specified sum may be deducted for such maintenance from his pay, and that an order had already been made for such deduction by the Commander-in-Chief (t).

Objection to attachment on the ground that the property is not saleable when to be raised.—A obtains a decree against B, and applies for execution of the decree by attachment and sale of certain property belonging to B. The property is attached and sold, and purchased by C. B then applies to the Court to set aside the sale on the ground that the property was not liable to attachment and sale. Can the application be entertained? It has been held that if B was a party to the order for sale, or was aware of it and did not appeal against it, he would be precluded from questioning the propriety of the order after the sale, and he cannot therefore impeach the sale that has taken place under that order. "A judgment debtor who might have raised objections prior to the sale, but who has refrained from doing so, and who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable" (u). But if B was not aware of the proceedings in attachment of the property, or of the proceedings in connection with the sale thereof, the application to set aside the sale would be entertained (v). The same procedure and principles apply where a sale effected by the Collector is sought to be set aside on the ground that the property was not ancestral, and therefore could not legally be sold by the Collector (w). See notes to s. 47, "Execution purchaser," ill. (b) on p. 133 above, also notes to that section under the head "Objection by party or his representative that property attached is not liable to attachment," on p. 135 above.

61. [New.] The Local Government, with the previous sanction of the Governor-General in Council, may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family shall, in the case of all agriculturists or of any class of agriculturists,

Partial exemption of
agricultural produce.

- (r) *Hay v. Ram Chandar* (1917) 39 All. 308 [case of an officer of the Indian army].
(s) *Kering Rupchand & Co. v. Murray* (1918) 43 Bom. 716.
(t) *Duckworth v. Duckworth* (1919) 43 Bom. 368.
(u) *Umed v. Jas Ram* (1907) 29 All. 612; *Pandurang v. Krishnaji* (1904) 28 Bom. 125;

- Dwarkanath v. Tarini Sankar* (1907) 34 Cal. 196; *Lala Ram v. Thakur Prasad* (1918) 40 All. 680.
(v) *Durga Charan v. Kali Prosanna* (1899) 26 Cal. 727, 732.
(w) *Daulat Singh v. Jugal Kishore* (1900) 22 All. 108. See s. 69, and Sch. III to the Code.

be exempted from liability to attachment or sale in execution of a decree.

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"Be exempted from liability to attachment or sale."—These words are large enough to include agricultural produce which has been hypothecated. See s. 60, cl. (b).

As to attachment of agricultural produce, see O. 21, rr. 44-45. As to sale of such produce, see O. 21, rr. 74-75.

62. [s. 271.] (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

Seizure of property in dwelling-house.

(2) No outer door of a dwelling house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw ; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution consistent with these provisions to prevent its clandestine removal.

Changes introduced by the section.—This section corresponds with s. 271 of the Code of 1882, except that the prohibition against breaking open any outer door of a dwelling-house has been relaxed where the dwelling-house is in the occupancy of the judgment-debtor. See notes to s. 55 under the head "Breaking open of outer door" on p. 154 above.

"Dwelling-house."—A shop or a godown is not a "dwelling-house" within the meaning of this section (x).

63. [s. 285.] (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof,

Property attached in execution of decrees of several Courts.

- s. 63. shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

Changes introduced by the section.—This section corresponds with s. 285 of the Code of 1882 except in the following particulars :—

- (1) The words “is under attachment” have been substituted for the words “has been attached.” See notes below, under the head “Is under attachment.”

- (2) Sub-section (2) is new. See notes below.

Object of the section.—The object of this section is to prevent different claims arising out of the attachment and sale of the same property by different Courts, in other words, it is to prevent confusion in the execution of decrees (y).

Application of the section.—A attaches certain property in execution of a decree obtained by him against B in the Small Causes Court at Surat. The same property is subsequently attached by C in execution of a decree obtained against B in the Court of the Subordinate Judge at Surat. The Court of the Subordinate Judge is a Court of higher grade than the Small Causes Court, and it is therefore the proper Court under this section for deciding objections to the attachment, for determining claims made to the property, and for ordering the sale thereof and receiving the sale-proceeds (z).

Sub-section (2).—This sub-section is new. It declares in effect that a proceeding in execution shall not be deemed to be invalid, merely because it was taken by a Court which ought not to have taken it, having regard to the provisions of sub-section (1). Under the Code of 1882 there was a conflict of decisions on the question whether the rule contained in s. 285 of that Code [now sub-sec. (1)] was a rule of *procedure* only or whether it affected *jurisdiction*. It was held by the High Courts of Calcutta (a), Bombay (b), and Madras (c), that the rule was merely a rule of procedure, and that it did not oust the jurisdiction of the inferior Court in proceedings in execution of its own decree. On the other hand, it was held by the High Court of Allahabad, that the section affected jurisdiction, that is to say, it took away the jurisdiction of the inferior Court in the several matters specified in the section (d). The result was that where a sale was effected by a Court of lower grade in a case where it ought to have been effected by a Court of higher grade, the sale, according to the Calcutta, Bombay and Madras decisions, was not for that reason invalid; but, according to the Allahabad decisions, it was absolutely void as one made without jurisdiction. Sub-section (2) gives effect to the Calcutta, Bombay and Madras decisions.

There yet remains another point to consider, and it may thus be considered in the form of an illustration. A obtains a decree against B in the Court of a Subordinate

(y) *Ram Narain v. Mina* (1898) 25 Cal. 46, 48; *Bykant Nath v. Rajendro Narain* (1880) 12 Cal. 333, 338.
(z) *Turmuklal v. Kalyandas* (1895) 19 Bom. 127; *Balku Ram v. Raghubar* (1894) 16 All. 11.
(a) *Bykant Nath v. Rajendro Narain* (1880) 12 Cal. 333; *Ram Narain v. Mina* (1898) 25 Cal. 46; *Gopi Chand v. Karimunnessa* (1907) 34 Cal. 686.

(b) *Abdul Karim v. Thakordas* (1898) 22 Bom. 88; *Turmuklal v. Kalyandas* (1895) 19 Bom. 127; *Patel Naranji v. Haridas* (1894) 18 Bom. 458.
(c) *Kunhayan v. Ithukutti* (1899) 22 Mad. 295.
(d) *Chiranjī v. Jawahir* (1904) 26 All. 538; *Har Prasad v. Jagan Lal* (1905) 27 All. 56; *Durpatti Bibi v. Ramrack Pal* (1909) 31 All. 527.

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63, 64.

Judge. In execution of the decree certain property belonging to *B* is attached by the Subordinate Judge's Court. *C* obtains a decree against *B* in a District Court. The same property is then attached by the District Court in execution of *C*'s decree. [Here the proper Court to sell the property is the District Court.] The property is sold by the Subordinate Judge in execution of *A*'s decree, and it is purchased by *X*. Subsequently the same property is sold by the District Court in execution of *C*'s decree, and it is purchased by *Y*. Which of the two purchasers has the better title? According to the decision of the Calcutta High Court in *Bykant Nath v. Rajendro Narain* (e), *X*, the first purchaser, would take an indefeasible title (1) if the sale was held by the Subordinate Judge's Court and (2) the purchase was made by *X*, without notice of the attachment by the District Court; but if either the sale was held or the purchase was made with notice of the attachment, the purchase of *X* would be liable to be defeated by the purchase of *Y*. According to the decision of the Bombay High Court in *Abdul Karim v. Thakordas* (f), it is quite enough to give an indefeasible title to *X* if he purchased without notice of the attachment by the District Court. The Bombay Court does not regard any notice which the inferior Court may have of the attachment by the superior Court as of any consequence, for the simple reason that the jurisdiction of a Court cannot depend upon notice. Much the same view has been taken by the Madras High Court (g). Under the present section, it seems, *X* would take an indefeasible title to the property, whether or not he or the Subordinate Judge's Court had notice of the attachment by the District Court.

The result therefore is, that where property is under attachment by two Courts one of which is of a higher grade than the other, and the property is sold by the Court of lower grade in contravention of the provisions of sub-section (1), the sale is not thereby rendered invalid, though the Court selling the property and the purchaser at the Court sale may be aware of the irregularity. The course to be adopted by the Court of higher grade in such a case is to accept the sale made by the lower Court, and send for the sale-proceeds for distribution amongst the decree-holders (h).

"Is under attachment."—These words have been substituted for the words "has been attached" to make it clear that the provisions of this section do not apply unless there are two or more attachments existing at the same time (i).

Rateable distribution.—See notes to s. 73, "Court to which application for execution should be made."

64. [S. 276.] Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

(e) (1886) 12 Cal. 333.

(f) (1898) 22 Bom. 88.

(g) See *Kunhayyan v. Ithukutti* (1899) 22 Mad. 205.

(h) See *Bykant Nath v. Rajendro Narain* (1886) 12

Cal. 333, 338, and *Patel Naranji v. Haridas* (1894) 18 Bom. 458, 463; *Nulkanta v. Gosto* (1919) 46 Cal. 84.

(i) See *Stowell v. Ajudhia* (1884) 6 All. 255.

S. 64. S. 276 of the Code of 1882 ran as follows :—

“When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.”

Changes introduced by the present section—The present section differs from the corresponding s. 276, C. P. C., 1882, in the following respects :—

- (1) The words “by actual seizure or by written order duly intimated and made known in manner aforesaid” after the words “where an attachment has been made” in s. 276 have been omitted as being mere surplusage (j). See notes below “Where an attachment has been made.”
- (2) The words “during the continuance of the attachment,” which occurred in s. 276, have been omitted, and the words “contrary to such attachment” have been substituted for them. See notes below under the head “Contrary to such attachment.”
- (3) The Explanation to the section is new. See notes below under the head “Explanation to the section, etc.”

Object of the section.—*A* sues *B* for Rs. 5,000. *B* owns a house worth Rs. 5,000 ; he has no other property, *B* may sell or mortgage the house notwithstanding the institution of the suit against him, and he may sell or mortgage it even after a decree has been passed against him in the suit, and the sale or mortgage in either case will be perfectly valid and pass a good title to the transferee (*k*). But if the property is attached in execution of the decree, any private transfer of the property by *B* contrary to such attachment shall be void as against all claims enforceable under the attachment. The object of the section is to prevent fraud on decree-holders (*l*), and to secure intact the rights of the attaching creditor against the attached property by prohibiting private alienations pending attachment (*m*).

“Where an attachment has been made”—An attachment operates as a valid prohibition against alienation of the attached property not from the date of the order of attachment, but from the date on which the necessary proclamation is made and copy of the order affixed as provided by O. 21, r. 54. The omission in the present section of the words “by actual seizure or by written order duly intimated and made known in manner aforesaid” which occurred in s. 276 of the old Code has not the effect of making the attachment effective from the date of the order of attachment (*n*).

Attachment before judgment.—An alienation made after an order for attachment before judgment is void under this section even though the property is not actually attached until after the passing of the decree. There is nothing in O. 38 requiring that the actual attachment in pursuance of the order directing attachment should be made before the passing of the decree (*o*).

(j) *Stmrk Lal v. Radharaman* (1917) 39 I. C. 857; *Sinnappan v. Arunachalam* (1919) 42 Mad. 844, 851, 852.
 (k) *Pullen Chetty v. Ramalinga Chetty* (1870) 5 M. H. O. 368.
 (l) *Shivalingappa v. Chandasappa* (1906) 30 Bom. 387, 389.

(m) *Dinobundhu v. Jogmaya* (1902) 29 Cal. 154, 29 I. A. 9.
 (n) *Ramanayakuda v. Boya* (1919) 42 Mad. 585; *Sinnappan v. Arunachalam* (1919) 42 Mad. 844 [F. B.].
 (o) *Venkatarubiah v. Venkata Seshatya* (1919) 42 Mad. 1.

"Private transfer."—The words "private transfer" mean a voluntary sale, gift, or mortgage in contravention of the attachment order, and not the enforced execution of a conveyance or assignment in obedience to a decree of a Court qualified to pass it (p). See notes, "Transfer," on p. 176 below.

A private transfer under this section is not absolutely void, but void only as against claims enforceable under the attachment :—

(1) In execution of a decree obtained by *A* against *B*, certain property belonging to *B* is attached. During the pendency of the attachment, *B* mortgages the property to *C*. The property is then sold in execution of the decree and purchased by *D*. Here the mortgage having been made contrary to the attachment is void as against *A*'s claim, and *D* is entitled to take the property free from the mortgage created by *B*. This illustration shows the operation of the section.

(2) *B*'s property is attached in execution of a decree obtained by *A* against him. While the attachment is pending, *B* sells the property to *C*, and pays out of the sale-proceeds the amount of the decree into Court, and the attachment thereupon ceases [see O. 21, r. 55]. The sale to *C* is *valid*, the decree having been satisfied by payment into Court, and *there being no claim outstanding which is enforceable under the attachment* (q). Moreover, an alienation by means of which the decree in execution of which the attachment was made is satisfied can scarcely be regarded as an alienation *contrary* to the attachment (r).

(3) On the same principle, where *A* attaches *B*'s property in execution of a decree obtained by him against *B*, and applications are thereafter made by other decree-holders, *C*, *D* and *E* for rateable distribution without attaching the property in execution of their decrees, and subsequently *B* sells the property to *F* and pays off *A* (the attaching creditor), the other decree-holders, namely, *C*, *D* and *E* are not entitled to question the alienation to *F*. In the first place, the alienation can hardly be said to be an alienation *contrary to the attachment* within the meaning of this section, for the alienation was the means by which the decree in execution of which the attachment was made was satisfied. In the next place, it cannot be said that the claims of *C*, *D* and *E* are "claims for the rateable distribution of assets" within the meaning of the Explanation to the section, for to bring s. 73 [which provides for rateable distribution] into play certain conditions are necessary, and one of them is that there should be *assets held by the Court*. In the case now under consideration no assets came into the hands of the Court at all. Therefore, *C*, *D* and *E*, are not entitled to question the alienation by *B* to *F*, and the alienation is perfectly valid (s).

(4) A decree-holder, though entitled to rateable distribution as contemplated by the Explanation to the section is not entitled to question a private alienation under this section unless his claim be one "*enforceable under the attachment*" within the meaning of this section. The "*attachment*" referred to in this section is *the attachment under which the execution sale is made*. Therefore, a "claim enforceable under the attachment" means a claim enforceable under the attachment under which the execution sale is made (s). A claim under any other attachment is not a "claim enforceable under the attachment" within the meaning of this section. The result is that—

(p) *Qurban Ali v. Ashraf Ali* (1882) 4 All. 219, 225.

(q) *Umesh Chunder v. Bai Bullab* (1882) 8 Cal. 279; *Amund Lal v. Jalladher* (1879) 14 M. I. A. 543, 550; *Abdur Razzaq v. Ganga Lal* (1898) 20 All. 421; see also *Chand v. Nandram* (1911) 35 Bom. 516.

(r) *Annamalai v. Palamalai* (1918) 41 Mad. 265, 276; *Annamalai v. Palamalai* (1918) 41 Mad. 265, 276, 285 [F. B.].

- S. 64. if *A* obtains a decree against *B*, and *B*'s property is attached in execution of the decree, and
B subsequently alienates the property to *C*, and
the property is thereafter attached and sold in execution of a decree obtained by *D* against *B*, and it is purchased by *F*,
and *C* sues *F* for possession,

C's title is to be preferred to *F*'s title, and *C* is entitled to possession of the property. *D* cannot object to the alienation to *C*, for the alienation to *C* was prior to his attachment. Nor is *A* entitled to question the alienation, for the sale in execution was not made under his attachment, but under *D*'s attachment. The sale having been made under *D*'s attachment, *A*'s claim cannot be said to be a "claim enforceable under the attachment" within the meaning of this section. The result is the same even if *A* be substituted for *D*, that is, even if the same person is the decree-holder in both cases (*t*). It was so held by their Lordships of the Privy Council in *Mina Kumari v. Bijoy Singh* (*tt*). That was a case under old s. 276 which did not contain the Explanation which now occurs at the end of the present section, but the decision proceeded on the assumption that *Sorabji v. Govind* (*uu*) cited in the notes below was good law, an assumption which involved that what now stands as the Explanation to the present section formed part also of the old section. *Mina Kumari*'s case therefore would also govern cases under the present section.

If in the case put above the property was sold by the court under *A*'s attachment instead of *D*'s, and *D* had applied for execution before the Court received the proceeds of the sale, the alienation to *C* would be void, it being contrary to *A*'s attachment, and, further, *D* would be entitled to rateable distribution under s. 73.

"Contrary to such attachment."—These words have been substituted for the words "during the continuance of the attachment" which occurred in s. 276 of the Code of 1882. The words "during the continuance of the attachment" were too wide, in that they comprised alienations that could not possibly prejudice the rights of an attaching creditor, as where property is mortgaged by *A* to *B*, and the equity of redemption is subsequently attached at the instance of *C* in execution of a decree obtained by *C* against *A*, and pending the attachment the mortgage is transferred by *B* and *A* to *D*. In such case the transfer of mortgage, though made during the continuance of the attachment, cannot prejudice *C*, the attaching creditor, for the effect of the transfer is merely to substitute *D* for *B*. But the transfer having been made "during the continuance of the attachment," it came literally within the old section 276, though it was not contrary to the attachment, and it was accordingly contended in a case before the Judicial Committee under s. 276 that the transfer was void as against *C*. This contention, however, was not upheld, the Judicial Committee holding that the object of s. 276 was merely to prohibit alienations contrary to the attachment, and that an alienation such as the above by *B* and *A* to *D* cannot in any sense be said to be contrary to the attachment (*uu*). The words "contrary to the attachment" have now been substituted for the words "during the continuance of the attachment" to give effect to the Privy Council ruling noted above. See *ills*. (1) and (2) on p. 173 above.

Explanation to the section : Claims for rateable distribution of assets under s. 73 are claims enforceable under an attachment within the meaning of this section.—The Explanation to the section is new. *A* obtains a decree against *B*, and in execution of the decree attaches Rs. 7,000 belonging to *B* in the

(*t*) *Mina Kumari v. Bijoy Singh* (1917) 44 I. A. 72, 44 Cal. 662.
(*tt*) (1917) 44 I. A. 72, 44 Cal. 662.
(*u*) (1892) 16 Bom. 9.

(*uu*) *Dinobundhu v. Jogmaya* (1901) 29 Cal. 154, 29 I. A. 9. See also *Qurban Ali v. Ashraf Ali* (1882) 4 A.J. 219, 225.

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hands of a Railway Company. *B* then assigns the said sum in the hands of the Railway Company to his attorneys for costs due to them subject to *A*'s attachment. After the assignment, *C*, another creditor of *B*, obtains a decree against *B*, and in execution of his decree attaches the said sum in the hands of the Railway Company. Thereafter the Company pays the said sum to the Sheriff of Bombay. The assignment by *B* to his attorneys, though made prior to *C*'s attachment, is void as against *C*'s claim, for *C*'s claim is a claim for rateable distribution of assets [Rs. 7,000] within the meaning of s. 73, and therefore a claim enforceable under the attachment of *A* by virtue of the Explanation to this section. *C* is therefore entitled to be paid in priority to *B*'s attorneys. This is the law under the present Code, and it is in accordance with the view taken by the Bombay High Court in *Sorabji v. Govind* (*v*), decided under s. 276 of the Code of 1882. The view taken by the other High Courts was that *C*'s claim being a claim merely for rateable distribution could not be said to be a claim enforceable under the attachment, but this view is no longer law (*w*). The Explanation gives effect to the Bombay decision. But the Explanation does not apply unless the claim of the subsequent decree-holders can be said to be a claim for rateable distribution within the meaning of s. 73. Now the essential condition of enforcement of claims for rateable distribution is that there should be assets held by the Court [see s. 73 below], and that condition was satisfied in the case cited above. But if there be no assets received by the Court, as would be the case if no payment was made by the Railway Company to the Sheriff, and *A*'s attachment came to an end [O. 21, r. 55] by *B* satisfying *A*'s decree out of Court and then certifying it to the Court under O. 21, r. 2, *C*'s claim could not be enforced as a claim for rateable distribution, and the assignment to the attorneys would prevail over any claim that may be made by *C* under his subsequent attachment (*x*). The Explanation to the section protects only those decree-holders who are entitled to rateable distribution under s. 73, and no decree-holder can be entitled to rateable distribution under that section unless there are assets held by the Court (*y*). At the same time it must be noted that it is not enough that a decree-holder is entitled to rateable distribution under s. 73; to bring the Explanation into play it is further necessary that his claim must be one enforceable under the attachment within the meaning of the present section (*z*): see ill. (4) on p. 173 above. The result is that a decree-holder is not entitled to the benefit of the Explanation and is not entitled to question a private alienation unless—

- (1) he is entitled to rateable distribution under s. 73, for which it is absolutely necessary that there should be *assets held by the Court*, and
- (2) where there has been a sale in execution, his claim is one enforceable under the attachment under which the sale was made as explained in ill. (4) on p. 173 above.

As regards the first condition it is obvious that it cannot be present if the judgment-debtor satisfies the claim of the decree-holder out of Court, and that is what happened in the under-mentioned cases (*a*). In the Privy Council case of *Mina Kumari v. Bijoy Singh* (*b*), the first condition was present [rather it was assumed to be so], but the second condition was absent.

(*v*) (1892) 16 Bom. 91, referred to in *Mina Kumari v. Bijoy Singh* (1917) 44 I. A. 72, 79, 44 Cal. 662, 673.

(*w*) See *Manohar v. Ram Autar* (1903) 25 All. 431; *Kunhi v. Makki* (1900) 23 Mad. 478; *Durga Churn v. Monmohini* (1888) 15 Cal. 771.

(*x*) *Jetha Bhima & Co. v. Lady Janbai* (1912) 14 Bom. L. R. 904, 37 Bom. 138; *Mina Kumari v. Bijoy Singh* (1917) 44 I. A. 72, 78, 44 Cal. 662, 673; *Annamalai v. Palamalai* (1918) 41 Mad. 265, 275, 285.

(*y*) *Annamalai v. Palamalai* (1918) 41 Mad. 265, 275, 285.

(*z*) *Mina Kumari v. Bijoy Singh* (1917) 44 I. A. 72, 79, 44 Cal. 662, 673.

(*a*) 37 Bom. 138 *supra*; 41 Mad. 265 [F. B.], *supra*; *Rangi Ram v. Gangu* (1919) P. R. no. 5, p. 9. Another case in which there may be no assets is where the decree-holder is given leave to bid and to set off the amount of the decree against the purchase-money under O. 21, r. 72, and the former exceeds the latter: 4 I. A. 72, 78, 44 Cal. 662, 673.

(*b*) (1917) 44 I. A. 72, 44 Cal. 662.

S. 64. Private transfer under O. 21, r. 83.—A private transfer of his property by a judgment-debtor made pursuant to the provisions of O. 21, r. 83, is absolute, notwithstanding the provisions of this section, even against claims enforceable under the attachment (c).

"Transfer."—The renewal of an existing obligation is not a "transfer." Thus a mere renewal, though it be pending the attachment, of a mortgage already existing on the property prior to the attachment, is not a "transfer" within the meaning of this section (d). Similarly a mere assignment, pending the attachment, of a mortgage existing prior to the attachment, is not a "transfer." Such a transaction is perfectly valid; it does not in any way prejudice the rights of the attaching creditor. But if the amount secured by the renewed mortgage or by the assignment exceeds the amount due on the mortgage at the date of the attachment, the new security will to that extent be void (e).

The transfer of an easement is a transfer of an interest in immovable property within the meaning of this section. (f). See notes "Private transfer," on p. 173 above.

Effect of striking off execution proceedings or of removing them from the file.—An attachment is not necessarily *at an end* because the execution case is struck off or removed from the file. The effect of such a proceeding depends on the circumstances of each case. Where after an attachment has been made, the proceedings in execution are struck off or removed from the file *under circumstances which render a fresh attachment necessary* to bring the judgment-debtor's property to sale, a private transfer of the property by the judgment-debtor made after the proceedings are struck off is *valid*, though the same property may subsequently be re-attached in execution of the same decree on a fresh application for execution. But if the execution proceedings are struck off or removed from the file *under circumstances which do not render a fresh attachment necessary*, the transfer is *void* as against all claims enforceable under the attachment, and the mere fact that a fresh application for attachment is subsequently made in execution of the same decree will not render the transfer valid. The reason is that in the former case the proceedings in execution are deemed to have *terminated* on the same being struck off or removed from the file, and the attachment is deemed to be at an end, and the transfer having been made after the *termination* of the attachment, it cannot be affected by the subsequent attachment. In the latter case, however, the proceedings in execution are merely *suspended*, and the first attachment is therefore deemed to *subsist*, and the second application for attachment is a superfluity (g). Whether the execution proceedings have been struck off or removed from the file under these or those circumstances is a question of fact in each case (h). But where a fresh application for attachment is made, the presumption is that the first attachment has *ceased*, and the burden of proof is on the party alleging that the first attachment was still *subsisting* when the second application was made and that the second application was superfluous (i). B's property is attached in execution of a decree obtained against him by A. The execution proceedings are then "struck off." B then sells the property to C. The property is again attached on a fresh application by A. Is the sale valid? There being a fresh application for attachment, the presumption is that the first attachment

(c) *Shivlingappa v. Chanbasappa* (1906) 30 Bom. 387.

(d) *Manadevappa v. Srinivasa* (1882) 4 Mad. 417.

(e) *Dinobundhu v. Jogmaya* (1902) 29 Cal. 154, 29 I. A. 9.

(f) *Kristodhona v. Nandarani* (1908) 35 Cal. 889.

(g) *Kishen Lal v. Charat Singh* (1901) 23 All. 114;

Puddomones Dasse v. Muthooranath (1874)

12 B. L. R. 411; *Pearry Lal v. Chand*

Charan (1906) 11 C. W. N. 163; *Shaikh*

Kamar-ud-din v. Jawahir Lal 32 I. A. 102.

(h) *Bhagwan v. Khetter Moni* (1896) 1 C. W. N. 617; *Rangasami v. Periasami* (1894) 17 Mad. 58; *Mungul Pershad v. Grijia Kant* (1882) 8 Cal. 51, 8 I. A. 123; *Srinivasa v. Sami Rau* (1894) 17 Mad. 180; *Mahomed v. Kishori-Mohun* (1886) 22 Cal. 909, 22 I. A. 129; *David Ali v. Ram Prasad* (1915) 37 All. 542; *Yakub Ali v. Durga* (1915) 37 All. 518.

(i) *Hafiz v. Abdullah* (1894) 16 All. 138.

ceased from the moment the proceedings were struck off. The sale would therefore be valid, and the second attachment would be inoperative, unless *A* showed that the first attachment was still *subsisting* and that the second application was superfluous.

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The above cases would not have arisen if the Courts, instead of making an order for "striking off proceedings" or "removing proceedings from the file," had made an order either dismissing the application or adjourning the proceedings where the Court was, by reason of default on the part of the decree-holder, unable to proceed further with the proceedings in execution. The practice of "striking off proceedings" or "removing proceedings from the file" had no justification under any of the previous Codes. To put a stop to this practice it is now expressly provided by O. 21, r. 57, that where any property has been attached in execution of a decree, but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a further date; upon the dismissal of such application the attachment shall cease. Cases like the above are not likely to arise under this Code, if the procedure prescribed by O. 21, r. 57, is strictly followed by the Courts.

Private transfer pending attachment before judgment.—See notes to O. 38, r. 5.

Effect of attachment.—Attachment creates no charge or lien upon the attached property (*j*). It merely prevents and avoids any private alienation; it does not confer any title on the attaching creditors (*k*). There is nothing in any of the provisions of the Code which in terms makes the attaching creditor a secured creditor or creates any charge or lien in his favour over the property attached (*l*). But an attaching creditor acquires, by virtue of the attachment, a right to have the attached property kept in *custodia legis* for the satisfaction of his debt, and an unlawful interference with that right constitutes an actionable wrong. Thus it is an actionable wrong if *A* cuts and carries away crops attached by *B* in execution of a decree against *C*, and a suit will lie at *B*'s instance against *A* to recover from *A* damages which should not, however, exceed the value of the attached property (*m*).

Effect of vesting order on attachment.—A vesting order is an order made by the Insolvent Debtor's Court whereby the whole property of the insolvent vests in the Official Assignee. What is the effect of a vesting order on an attachment levied prior to the date of the vesting order? Has the attaching creditor, by reason of his prior attachment, priority over the Official Assignee in respect of property attached by him previous to the passing of the vesting order, or is the Official Assignee entitled to claim the attached property by virtue of the vesting order as part of the property of the insolvent? It has been held that whether the attachment is one before judgment (*n*) or in execution of a decree (*o*), the attaching creditor has no priority over the Official Assignee, and the latter is entitled to claim the attached property for the benefit of the attaching and other creditors of the insolvent. These decisions are based on the ground that an attaching creditor does not obtain a charge or lien on the attached property, and that it is not therefore open to him to contend that the property vests in the Official Assignee subject to his claim under the decree. Once the vesting order is made,

(j) *Sarkies v. Bundho Bae* (1889) 1 N. W. P. H. C. Rep. 172; *Soodul Chunder v. Russick Lal* (1888) 15 Cal. 202; *Zemindar of Kartannagar v. Trustees of Tirumalai* (1900) 32 Mad. 429; *Frederick Peacock v. Madon Gopal* (1902) 29 Cal. 428.
(k) *Mo'lat v. Karbuddin* (1898) 25 Cal. 179 24 I. A. 170; *Raghunath Das v. Sunder Das* (1914) 42 Cal. 72, 41 I. A. 251.
(l) *Krishnaswamy v. Official Assignee of Madras*

(1903) 28 Mad. 673, 678.
(m) *Sankaralinga v. Kandasami* (1907) 30 Mad. 413.
(n) *Krishnaswamy v. Official Assignee of Madras* (1903) 28 Mad. 673.
(o) *Frederick Peacock v. Madon Gopal* (1902) 29 Cal. 428; *Jitmand v. Ramcharan* (1905) 29 Bom. 405; *Sri Chund v. Murari Lal* (1912) 34 All. 628; *Raghunath Das v. Sunder Das* (1914) 41 I. A. 251; *Muhammad Sharif v. Radha Mohan* (1919) 41 All. 274.

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the attaching creditor and other creditors of the insolvent stand on the same footing, and they are entitled to a rateable distribution out of the property of the insolvent in the hands of the Official Assignee. In execution of a decree obtained by *A* against *B* certain property belonging to *B* is attached. *B* is subsequently declared an insolvent, and a vesting order is made. The attachment will be set aside, and the property will vest in the Official Assignee for the benefit of *B*'s creditors. This subject is now dealt with in s. 53 of the Presidency Towns Insolvency Act, 1909, the provisions whereof are in perfect accordance with the decisions cited above. See also Provincial Insolvency Act, 1907, s. 34.

Effect of winding up order on attachment.—The position of the liquidator of a registered company differs from that of the Official Assignee in this that the property of the company *does not vest* in him. An attachment, therefore, made on the property of the company at the instance of a decree-holder before the winding up of the company cannot be released at the instance of the liquidator (*p*).

SALE.

65. [s. 316.] Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

Purchaser's title.

Corresponding section of the Code of 1882.—Section 316 of the Code of 1882 ran as follows :—

“ When a sale of immoveable property has become absolute in manner aforesaid the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale ; and so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before :

Provided that the decree under which the sale took place was still subsisting at that date.”

The first part of section 316 now stands as O. 21, r. 94, with slight verbal alterations. The second part, with certain substantial alterations to be presently noted, stands as s. 65. The proviso to s. 316 has been omitted altogether.

Changes introduced by the section.—Under s. 316 of the Code of 1882 the title to immoveable property sold at an execution-sale vested in the purchaser from the *date of the certificate of sale*, that is, the date on which the sale became absolute. Under the present section, the title to such property, where the sale has become absolute, vests in the purchaser from the *time of sale* and not from the time when the sale becomes absolute.

The proviso to s. 316 has been omitted. It is therefore no longer necessary that the decree should be subsisting at the time of the confirmation of sale.

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Vesting of property in auction-purchaser.—In the case of a private sale of immoveable property, the property vests in the purchaser from the time when the deed of sale is executed. The reason is that a voluntary sale becomes absolute on execution and delivery of the deed by the vendor. In the case, however, of a Court sale, the property does not vest in the purchaser immediately on the sale thereof. The reason is that a compulsory sale does not become absolute until some time after the sale. A period at least of thirty days must expire from the date of sale before the sale can become absolute. During that period the sale is liable to be set aside at the instance of the judgment-debtor on the ground of irregularity in publishing or conducting the sale, or on deposit by him in Court of the amount specified in the sale proclamation together with a percentage on the purchase-money by way of compensation to the purchaser [O. 21, rr. 89-90]. The application by the judgment-debtor to set aside the sale in either of these two cases must be made within 30 days from the date of sale. Where no such application is made the Court must make an order confirming the sale, *and it is upon such confirmation that the sale becomes absolute* [O. 21, r. 92]. After the sale has become absolute, a certificate is granted by the Court to the purchaser which is called certificate of sale [O. 21, r. 94]. Such certificate bears date the day on which the sale became absolute. It is only when the sale becomes absolute, that the property sold vests in the purchaser. But though the property does not vest in the purchaser until the sale has become absolute, when it does vest, it will be deemed to have vested *from the time when it was sold*. The vesting of the property is thus made to relate back to the date of sale.

Successive purchasers at sales in execution of money decrees.—Under the Code of 1882, s. 316, the property sold vested in the purchaser from the date of the certificate of sale, and not before. This gave rise to some difficulty when the question to be decided was, which of two successive auction-purchasers should have priority, when the later purchaser had the certificate of sale issued to him first. Had the question been determined with exclusive reference to the terms of that section, the priority would have rested with the purchaser who first procured the certificate of sale. But this inequitable result was avoided, and the difficulty was got over by holding that the first purchaser had by his prior purchase obtained an *equitable* interest in the property, and that the subsequent purchaser must be deemed to have purchased *subject to* such interest (q). No such difficulty can arise under this Code, for it is provided by the present section that the property is to be deemed to have vested in the purchaser from the date of sale, and not from the date of the certificate of sale.

Illustration.

In execution of a money-decree obtained by *A* against *B*, certain immoveable property belonging to *B* is sold and purchased by *P1*. The same property is subsequently purchased by *P2* at a sale in execution of a money-decree obtained by *C* against *B*. *P2* obtains a certificate of sale first, and is placed in possession of the property. Subsequently *P1* obtains a certificate of sale, and sues *P2* for possession. Under the present section *P1* is entitled to possession, for the property is to be deemed to have vested in him from the date of sale, and the sale to him was *prior* to the sale to *P2*. The same result was arrived at under the Code of 1882 by holding that *P2* bought subject to *P1*'s equitable interest and he could not therefore retain possession against *P1* after *P1*'s title was perfected by the issue of a certificate to him.

But where property is sold in execution of a decree to *P1*, and the sale is *set aside* on the ground of irregularity, and the property is *then* re-sold and purchased by *P2*

(q) *Yeshwant v. Govind* (1886) 10 Bom 453; *Chintamanrav v. Vithabai* (1887) 11 Bom. 89.

- S. 65.** *P2* is entitled to priority as against *P1*, even though the sale to *P1* may subsequently be confirmed on appeal. The sale to *P1* not having been confirmed until after the sale to *P2*, *P1* is not entitled to priority over *P2*. Even under the Code of 1882, *P1* would not be entitled to priority over *P2*, for the sale to him (*P1*) having been set aside, it could not be said that *P2* purchased subject to *P1*'s interest in the property. *P1* had no interest in the property when it was sold to *P2* (*r*).

Successive purchasers at sales in execution of mortgage decrees.—Priority between successive purchasers of the same mortgaged property in execution of mortgage decrees against the same mortgagor is determined by the dates of the several purchases, and not by the dates of the several mortgages (*s*).

Suit for possession by auction-purchaser.—It was held under the Code of 1859 that a purchaser of immoveable property at a Court-sale could not maintain a suit for possession thereof *against a third person*, unless he had a certificate of sale issued to him before suit, although the sale had become absolute. The reason given was that the transfer of property to a purchaser at a Court-sale was not complete until a certificate of sale was issued to him. The decisions turned upon the language of s. 259 which provided that "the certificate shall be taken and deemed to be a valid transfer of such right, title and interest" as had passed from the judgment-debtor to the purchaser. The line of reasoning adopted was that if a certificate was to be taken as a transfer, the transaction must be necessarily incomplete until the certificate was issued. In short a certificate of sale was regarded as essential to the completeness of the sale. The said words were construed as controlling the operation of s. 256 which provided that a sale became absolute when it was confirmed by the Court (*t*). But as *against the judgment-debtor and his representatives*, it was held that the purchaser's title became complete on the confirmation of the sale (*u*). Under the present section, it seems, that an auction-purchaser can maintain a suit for possession even against a person not a party to the suit after the sale has been confirmed by the Court, though no certificate has been issued to him before the institution of the suit. The reason is that property under the present section vests in the purchaser immediately the sale is confirmed by the Court and the vesting does not remain in suspense until the grant of a certificate. For the same reason a purchaser at a Court-sale of an equity of redemption may sue the mortgagee for redemption, though no certificate has been issued to him before the institution of the suit (*v*). But the certificate must be produced at or before the passing of the decree.

Mesne-profits.—Under the Code of 1882, the property sold vested in the purchaser from the date of the sale certificate and not before. Hence it was held that the purchaser was entitled to mesne-profits from the date of the certificate, and not from the date of sale (*w*). Under the present section the property is to be deemed to vest in the purchaser from the date of sale. The purchaser, therefore, is entitled to mesne-profits from the date of sale.

Title of auction purchaser.—Under the Code of 1882, property sold in execution of a decree vested in the purchaser *so far as regards the parties to the suit and persons claiming through or under them*. That is to say, a purchaser at a Court-sale was entitled to hold the property only against the judgment-debtor and his representative but not against third parties. The words italicized above, which occurred in s. 316

(*r*) *Banko Lal v. Jagat Narain* (1900) 22 All. 168.

(*s*) *Kutti v. Subramanja* (1900) 32 Mad. 485; *Nanakchand v. Teluckdye* (1880) 5 Cal. 265.

(*t*) *Padu v. Rakhmat* (1873) 10 Bom. H. C. 435; *Hartigandae v. Bai Ichha* (1880) 4 Bom. 155.

(*u*) *Raj Kishen v. Radhu Madhub* (1874) 21 W. R. 349; *Khushal v. Bhimabai* (1888) 12 Bom. 589; *Shivram v. Ravji* (1888) 7 Bom. 254.

(*v*) See *Krishnaji v. Ganesh* (1882) 6 Bom. 139.

(*w*) *Amir Kazim v. Darbazi* (1902) 24 All. 475; *Shiam Lal v. Natha Lal* (1910) 33 All. 68.

of the Code of 1882, have been omitted in the present section. The omission, however, has not the effect of enlarging the purchaser's rights, and a purchaser at a judicial sale will now as before get a good title only against persons bound by the decree, but not against strangers (x).

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Sale when void, and when voidable.—A sale in execution of a decree is void, if the Court *had no jurisdiction* to sell the property. Thus a Court has no jurisdiction to sell property in execution of a decree, if the notice required by O. 21, r. 22, is not served (y). Similarly a Court has no jurisdiction to sell the property of a person who was not a party to the suit in which the property was sold or properly represented on the record (z). Nor has a Court jurisdiction to sell property without attachment (a). The lower Court has no jurisdiction to sell property after an order made by the appellate Court for stay of execution (b). In each of these cases the sale is a *nullity*, and might be disregarded without any proceeding to set it aside (c).

But where a Court *has jurisdiction* to sell the property, and the property is sold, the sale cannot in any case be treated as *void*. At the most it may be *voidable*, as where the notice required by O. 21, r. 22, is served upon a person who was not in fact the legal representative of the deceased judgment-debtor, but whom the Court wrongly held to be his legal representative (d). It would also be *voidable* on the ground of material irregularity or fraud in publishing or conducting the sale, provided substantial injury has resulted therefrom [O. 21, r. 90]. But what is most important to bear in mind is that sales in execution of decrees should not be avoided on the ground of mere irregularities of procedure in obtaining decrees or in the execution of them. This subject is dealt with in the next paragraph.

Irregularities of procedure in obtaining decrees or in execution proceedings.—Provided that the Court *has jurisdiction* to sell, a purchaser at a Court-sale is not bound to inquire into the correctness of the decree or of the order for sale. "To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. If the Court *has jurisdiction*, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues" (e). "Strangers to a suit are justified in believing that the Court has done that which, by the direction of the Code, it ought to do" (f). Therefore, where property sold in execution of a decree under the order of a competent Court is purchased by a stranger *bona fide* and for value, the sale cannot be set aside on the ground that the judgment-debtor had a cross-decree of a higher amount and the Court therefore ought not to have directed the sale (g), or that the decree had already been satisfied out of Court at the time the sale was held (h), or that the Court wrongly held that the defendant was served with the summons and on that passed an *ex parte* decree against him (i), or that though the attachment was subsisting at the date of the sale, the decree-holder's application for an order of sale

(x) See *Umes Chander v. Zahur Fatima* (1801) 18 Cal. 184, 178, 17 I. A. 201.

(y) *Raghunathdas v. Sundar Das* (1914) 41 I. A. 251, 42 Cal. 72.

(z) *Khatrajmal v. Diam* (1905) 32 Cal. 296, 313-315, 32 I. A. 23; *Radha Prasad v. Lal Sahab* (1891) 13 All. 53, 17 I. A. 150; *Beni Prasad v. Mukhtesar* (1899) 21 All. 316; *Rashid-un-Nissa v. Muhammad* (1909) 36 I. A. 168; *Pasumarti v. Ganti* (1915) 28 Mad. L. J. 525; *Payidanna v. Lakshminarasamma* (1915) 38 Mad. 1076.

(a) *Sorabji v. Kala* (1911) 36 Bom. 156.

(b) *Ramanathan v. Arunachellam* (1913) 38 Mad. 766.

(c) 32 Cal. 206, 312, *supra*.

(d) *Malkarjun v. Narhari* (1901) 25 Bom. 337, 348, 27 I. A. 216.

(e) *Rawa Mahton v. Ramkishan Singh* (1837) 14 Cal. 18, 25, 13 I. A. 106; *Mohura Mohan Ghose v. Akhoy Kumar Mitter* (1888) 15 Cal. 557; *Narayana v. Kallana* (1896) 19 Mad. 219, 223, 225.

(f) *Malkarjun v. Narhari* (1901) 25 Bom. 337, 347, 27 I. A. 216; *Pareesh Nath v. Hari Charan* (1911) 38 Cal. 622, 627.

(g) 14 Cal. 18, *supra*.

(h) 15 Cal. 557, *supra*; *Yellappa v. Ramchandra* (1897) 21 Bom. 463.

(i) 38 Cal. 622, *supra*.

- S. 65. had been dismissed for want of prosecution before sale (j), or that the property was not liable to attachment and sale within the meaning of s. 80 (k), or that the execution of the decree was barred by limitation (l), or that the decree proceeded upon an erroneous view of the law (m), or that the decree was one which the Court ought not to have passed (n). See notes to O. 21, r. 22, "Consequence of omission to give notice," and "Notice to wrong person," and notes to O. 21, r. 90, "Material irregularity in publishing or conducting the sale."

The above principles which apply in favour of a third party purchasing at a Court-sale do not apply where the decree-holder is himself the purchaser. The reason is that where the decree-holder himself is the purchaser, he "must be held to have had notice of all the facts" and proceedings relating to the suit and execution proceedings (o).

Effect of reversal of decree upon sale, where the decree is reversed after confirmation of sale.—There is a great distinction between decree-holders who come in and purchase under their own decree, which is afterwards reversed or modified, and *bona fide* purchasers who come in and buy at a sale in execution of the decree to which they are no parties, and at a time when that decree is a valid decree and when the order for sale is a valid order. The distinction above referred to is that a *bona fide* purchaser, who is a stranger to the decree, does not lose his title to the property by the subsequent reversal or modification of the decree, but where the decree-holder himself is the purchaser, the sale may be set aside if the decree is subsequently reversed or modified. Where the purchaser is a stranger, the judgment-debtor whose property is sold is entitled only to the sale-proceeds of the property if the decree is subsequently reversed. But where the purchaser is the decree-holder, he is bound to restore the property back to the judgment-debtor (p). "A sale in execution of a decree at which a third party becomes the purchaser is upheld, notwithstanding the subsequent reversal of the decree, because otherwise there will be less inducement to intending purchasers to buy at an execution-sale and consequently less chance of property fetching proper value at such sales (q)." But if the Court has no jurisdiction to sell, the sale is a nullity, and even a *bona fide* purchaser acquires no title under such a sale: see notes above, "Sale when void and when voidable."

Where property sold in execution of a decree is bought by the decree-holder, and re-sold by him to a *bona fide* purchaser for value, such purchaser will get a good title, though the decree may be subsequently reversed (r).

Effect of reversal of decree upon sale where the decree is reversed before confirmation of sale.—On referring to s. 316 of the Code of 1882, it will be observed that it contained a proviso of which the effect was stated to be that a sale could not be confirmed if, at the time of application for confirmation, the

- (j) *Rangasami v. Periasami* (1894) 17 Mad. 58.
 (k) *Dwarkanath v. Tarini* (1907) 34 Cal. 199;
Umed v. Jas Ram (1907) 29 All. 612;
Pandurang v. Krishnaji (1904) 28 Bom. 125.
 (l) *Saroda Churn v. Mahomed* (1885) 11 Cal. 376.
 (m) *Girādhars Lall v. Kantoo Lall* (1874) 14 Beng. L. R. 187, 1 I. A. 321.
 (n) *Kaunrilla v. Chandar Sen* (1900) 22 All. 377;
Kudrat-ullah v. Kubra Begam (1901) 28 All. 25.
 (o) *Kharajmal v. Daim* (1905) 32 Cal. 296, 315, 32 I. A. 23; *Mina Kumari v. Jagat Sattani* (1884) 10 Cal. 220; *Gungapershad v. Gopal Singh* (1887) 11 I. A. 234.

- (p) *Zain-ul-Abdin v. Muhammad Asghar Ali* (1888) 10 All. 166, 15 I. A. 12; *Mukhoda v. Gopal Chunder* (1899) 26 Cal. 734; *Set Umedmal v. Srinath* (1900) 27 Cal. 810; *Paresh Nath v. Hari Charan* (1911) 38 Cal. 622, 627; *Shivobai v. Yesoo* (1919) 43 Bom. 235, 238; *Ptari Lal v. Hanif-un-Nissa* (1916) 88 All. 240 [stranger purchaser]; *Chintaman v. Chunisahu* (1916) 1 Pat. L. J. 43, 46 [decree-holder purchaser].
 (q) *Mukhoda v. Gopal Chunder* (1899) 26 Cal. 734, 737.
 (r) *Sheik Ismail v. Rajab Rawther* (1907) 30 Mad. 295; *Marimuthu v. Subbaraya* (1903) 13 Mad. L. J. 231.

decree under which the sale was effected had ceased to be a subsisting decree (s). That proviso has not been reproduced in the present section. Under the present section, therefore a sale held in execution of a decree may be confirmed, at any rate where the purchaser is a third party, though the decree may be reversed before confirmation of the sale. See O. 21, r. 92 (1), and note the words "the Court shall make an order confirming the sale."

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What passes at a Court-sale.—See notes to O. 21, r. 94.

66. [S. 317.] (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

Changes introduced by the section :—

1. The words "on behalf of the *plaintiff* or on behalf of some one through whom *the plaintiff* claims" have been substituted for the words "on behalf of *any other person* or on behalf of some one through whom *such other person* claims." See notes below under the head "Scope of the section."
2. The latter part of sub-section (2) is new. See notes below under the head "Suit by a third person for a declaration that the certified purchaser is merely a benamidar."

Of these two changes the first is merely a verbal one, and the second is intended to supersede the Madras and Allahabad decisions on the point, and to give effect to the Calcutta decisions.

Benami purchases.—The object of the section is to put a stop to benami purchases at execution-sales (t). Where A under a secret understanding with B purchases property with his own moneys but in B's name the purchase is said to be benami. In such a case B is merely a benamidar or ostensible owner and holds the property in trust for A, so that A may compel B to transfer the property to him (A). If, however, A's object in purchasing the property in B's name was to defraud his creditors and the object of the fraud is carried out, the Court will not help A in recovering possession of the property from B. But if the object of the fraud is not carried out,

(s) *Doyamoyi Dasi v. Sarat Chunder* (1898) 25 Cal. 176; *Mul Chund v. Mukta* (1898) 10 All. 88; *Ram Sukh v. Ram Sahai* (1907)

29 All. 591.

(t) *Bodh Singh v. Gunesch Chunder* (1874) 12 B.L. R. 817.

- S. 66. the Court will help *A* in recovering possession of the property from *B* notwithstanding *A*'s primary intention to effect a fraud. This is the law as applicable to benami purchasers at a private sale (*u*). The law is more stringent in the case of benami purchases at a court-sale so that if *A* purchases property in *B*'s name at a court-sale, and a certificate of sale is issued to *B* (O. 21, r. 94), *B* will be conclusively deemed to be the real purchaser and no suit will lie under this section by *A* against *B* for possession of the property, unless *A* can prove that *B*'s name was inserted in the certificate fraudulently or without his consent [see sub-section (2)]. The same rule applies even if the claim made by the beneficial owner may not be for the whole of the property of which the defendant is the certified purchaser. Thus if *B* is the certified purchaser of certain property, part of which was purchased by him on his own account, and part benami for *A*, *A* is not entitled to maintain a suit under this section for recovery of the part purchased by *B* benami for him (*v*). At the same time it should be noted that the mere fact that the plaintiff has described the defendant as a benamidar does not make the transaction benami if it was not benami in fact; it is a mere misdescription and it is no ground for refusing the plaintiff a relief to which he is otherwise entitled (*w*).

This section must be construed strictly.—Where a transaction is once made out to be benami, the Courts of India, which are bound to decide according to equity and good conscience, will deal with it in the same manner as it would be treated by an English Court of equity (*x*). That is to say, effect will be given to the real and not to the nominal title, unless the result of doing so would be to work a fraud upon innocent persons (*y*). The present section provides that when property is sold at a court-sale, no suit shall be maintained against the certified purchaser on the ground that the purchase was made benami. It provides in effect that the certified purchaser shall be conclusively deemed to be the real purchaser, and shall not be liable to be ousted on the ground that his purchase was really made on behalf of another. In other words, the provisions of the present section bar the equitable jurisdiction of the Courts. The section, therefore, must be construed strictly and not extended beyond its express terms. But though the section prohibits suits against the certified purchaser to assert a benami title against him, it does not make benami purchases illegal. The object of the stringent provisions of this section is to discourage benami purchases at a court-sale, but not to render such purchases illegal (*z*).

Scope of the section.—This section provides that no suit shall lie against the certified purchaser on the ground that the purchase was made on behalf of the plaintiff (*a*). In other words, it is only in suits against the certified purchaser as defendant that such purchaser shall be conclusively deemed to be the real purchaser. Hence if the real owner is actually and honestly in possession, and a suit is brought by the certified purchaser as plaintiff against the real owner for possession or for rents and profits of the property of which he is the certified purchaser, the real owner may resist the suit on the ground that the certified purchaser was only a benamidar (*b*). And since the section bars suits brought against the certified purchaser as defendant, a suit by such purchaser

- (*u*) *Govinda v. Lala Kishun* (1901) 28 Cal. 370; *Jadunath v. Ruplal* (1906) 33 Cal. 987; *Cheneirappa v. Puttappa* (1887) 11 Bom. 708; *Siddlingappa v. Hirasa* (1907) 31 Bom. 406; *Yaramati v. Chundru* (1897) 20 Mad. 328; *Muthuramiah v. Krishna* (1908) 29 Mad. 72; *Munisami v. Subbaryar* (1908) 81 Mad. 97; *Kondeti v. Nukamma* (1908) 81 Mad. 435. See Indian Trusts Act, 1882, s. 84.
- (*v*) *Durga v. Bhagwandas* (1901) 28 All. 34. But see *Hari v. Ramchandra* (1907) 81 Bom. 61.
- (*w*) *Venkataappa v. Jalayya* (1918) 42 Mad. 615 [F. 33].

- (*x*) *Kahandas, ex parte* (1881) 5 Bom. 154.
- (*y*) Mayne's Hindu Law, sec. 442.
- (*z*) *Buhuns v. Lalla Buhoree* (1872) 14 M. I. A. 496; *Lokhee v. Kallypudoo* (1875) 23 W. R. 358, 2 I. A. 154.
- (*a*) *Suraj Narain v. Ratan Lal* (1917) 44 I. A. 201, 211, 40 All. 159, 170.
- (*b*) *Buhuns v. Lalla Buhoree* (1872) 14 M. I. A. 496; *Lokhee v. Kallypudoo* (1875) 23 W. R., 358 2 I. A. 154; *Jan Muhammad v. Ilaht Baksh* (1876) 1 All. 290; *Govinda v. Lala Kishun* (1901) 28 Cal. 370; *Vishnu v. Ragho* (1903) 5 Bom. L. R. 329; *Ghazi-ud-din v. Bishan Dial* (1906) 27 All. 443.

as plaintiff for a declaration that he purchased the property on his own behalf and not benami for another, is not barred under this section (c). In fact, the present section applies only when a suit is instituted by a person claiming to be the real purchaser as plaintiff against the certified purchaser as defendant, alleging that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. This point is now made quite clear by the substitution of the word "plaintiff" for the words "any other person" in sub-section (1).

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Suit by "a third person" for a declaration that the certified purchaser is merely a benamidar.—Under the corresponding s. 317 of the Code of 1882, it was held by the High Court of Calcutta that the only suits barred under that section were suits brought by the *beneficial owner as plaintiff* against the certified purchaser as defendant, and that suits brought by a *third party as plaintiff* against the certified purchaser as defendant for a declaration that the property, though ostensibly sold to the certified purchaser, is liable to satisfy a claim of such third party against the beneficial owner, were not barred under that section (d). On the other hand, it was held by the High Courts of Madras (e) and Allahabad (f) that suits even of the latter description, that is, suits brought by a *third person as plaintiff* were barred under that section. The present section gives effect to the Calcutta decisions by providing in sub-section (2) that "nothing in this section shall interfere with the right of a *third person* to proceed against that (*sic*) property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner."

Illustration.

A obtains a decree against B, and attaches certain property alleged to belong to B. C objects to the attachment, alleging that he is the certified purchaser of the property, having purchased the same at a court-sale held in execution of a decree obtained against B by D. A alleges that the property was purchased by C benami for B, and sues C for a declaration that C was merely the benamidar for B. The suit is not barred under this section, for it is a suit not by the *beneficial owner*, but by a *third person*.

Suit by beneficial owner in possession for a declaration of title.—It has been held by the High Court of Calcutta that a suit by a beneficial owner *in possession* for a declaration of his right to the property against the certified purchaser is not barred under this section (g). On the other hand, it has been held by the High Court of Allahabad that such a suit is barred under this section (h). A obtains a decree against B. In execution of the decree certain property belonging to B is sold. B himself purchases the property, but the purchase is made in C's name. The certificate of sale is granted to C, but B continues in possession of the property. After a few years C gives notice to the tenants not to pay rent to B. B thereupon sues C for a declaration that he is the real purchaser and for an injunction restraining C from interfering with his tenants. The suit is not barred according to the Calcutta decision. It is barred according to the Allahabad decision. In the Calcutta case, the Court said: "It is not a case in which the plaintiff seeks to obtain a decree for possession against the ostensible purchaser. Resting as it does on an existing possession, we do not think that it is a suit

(c) *Unconventured Service Bank v. Abdul Bari* (1896) 18 All. 481.

(d) *Kanizak v. Monohur* (1886) 12 Cal. 204;

Subha Bibi v. Hara Lal (1894) 21 Cal. 519.

(e) *Rama Kurup v. Sridevi* (1898) 16 Mad. 290.

But see *Kollanayida v. Tiruvail* (1897) 20 Mad. 862.

(f) *Delhi and London Bank v. Partab Bhaskar* (1899) 21 All. 29; *Kishan Lal v. Garurud-*

dhwaaj Prasad (1899) 21 All. 238; *Ram*

Narain v. Mohanjan (1904) 26 All. 82;

Khuda Baksh v. Aziz Alam (1906) 27

All. 194; *Sarju Prasad v. Bindeshri* (1911)

33 All. 382.

(g) *Sati Churn v. Aunopurna* (1896) 23 Cal. 699,

doubted in *Hanuman Pershad v. Jadu*

Nandan (1916) 43 Cal. 20, 26.

(h) *Bishan Dial v. Ghazi-ud-din* (1901) 23 All. 175.

- S. 66. of the nature prohibited by s. 317." As to this it was observed by Strachey, C.J., in the Allahabad case cited above: "If the learned Judges in that case meant to lay down that s. 317 applies only where the plaintiff, being out of possession, seeks to recover possession from a certified purchaser, and can never apply to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession was not the real purchaser, I cannot agree with them." Banerji, J., said: "The first paragraph [of the section] is not confined to a suit for recovery of possession only." The Allahabad decision is certainly more convincing. It is settled law, however, that where the beneficial owner has been in possession for *twelve years or more*, a suit will lie at his instance against the benamidar for a declaration of his title to the property. The basis of such a suit is the plaintiff's *title by possession*. The suit is based, not on the ground that the defendant is a benamidar, but on the title by possession only. Such a suit does not come within the purview of this section (i).

Person claiming through beneficial owner.—This section precludes a suit by the beneficial owner or one claiming through him. It does not preclude a suit by a person who does not claim through the beneficial owner, but claims through another person (j).

Joint purchase.—The provisions of this section are designed "to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase" (k). It has accordingly been held that where one of several holders of a joint mortgage decree applies for execution of the decree under O. 21, r. 15, subject to the rights of the other decree-holders, and purchases the mortgaged property at the execution sale, the other decree-holders are entitled to a declaration that the purchase was made on behalf of *all* the decree-holders (l). And this is *a fortiori* the case when the purchase money is set off against the entire amount of the debt, in other words, the purchase is made *with the use of joint funds* (m).

Where property is purchased at a court-sale by a member of a joint Hindu family in his name, but *with family funds*, the other members are entitled to sue him for a declaration that the purchase was made on behalf of the family, though the certificate of sale stands also in his name. The provisions of the section do not apply to such a case. It was so held by their Lordships of the Privy Council in *Bodh Singh v. Gunesh Chunder* (n), a case under the Code of 1859. Their Lordships said: "[The provisions of the section] cannot be taken to affect the rights of members of a joint Hindu family who, *by the operation of law* and not by virtue of any private agreement or undertaking [such as exists between a benamidar and the beneficial owner], are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, if made by the use of the family funds." Following this principle, it has been held that when a joint Hindu family consists of two members A and B, and A purchases property at an execution sale with joint funds in the name of C, B is entitled to his share of the property (o). The same principle applies where the parties stand in the relation of partners, and the purchase is made by one of the partners by the use of partnership funds (p).

(i) *Karamuddin v. Niamut* (1892) 19 Cal. 199.
See also *Bishan Dial v. Ghazi-ud-din* (1901) 23 All. 175, 178-179.
(j) *Narain v. Durga* (1913) 35 All. 138.
(k) *Ganga Sahai v. Keshri* (1915) 37 All. 545, 554-555, 42 I. A. 177, 182.
(l) (1915) 37 All. 545, *supra*.

(m) *Achhaibar v. Tapari* (1907) 29 All. 557.
(n) (1874) 12 B. L. R. 317.
(o) *Natesa v. Venkatramayyan* (1888) 6 Mad. 135; *Minakshi v. Kallanarama* (1897) 20 Mad. 349.
(p) *Achhaibar v. Tapari* (1907) 29 All. 557, at p. 561.

Waiver by certified purchaser of right of possession.—It has been held by the High Court of Madras, that if after obtaining a certificate of sale, the purchaser acknowledges that his purchase is benami, and allows the beneficial owner to continue in possession, such act may, by reason of the antecedent relation between the parties, operate as a valid transfer of the property. Thus if *A* is the *manager* of *B*'s estate [and this is the antecedent relation between the parties], and the estate is sold in execution of a decree against *B*, and is purchased by *B* in *A*'s name, a suit will lie at the instance of *B* against *A* for possession, if, after obtaining the certificate of sale, *A* allows *B* to continue in possession, and then disturbs *B* in his possession. The reason given is that the permission to hold possession amounts to a *transfer of title* from the benamidar to the beneficial owner and the suit is thus based not on the ground that the purchase was benami but on a fresh title created by the transfer (*q*). This view has been dissented from by the High Court of Allahabad, and it has been held by that Court, relying on the Privy Council case of *Lokhee v. Kallypuddo* (*r*), that the mere permission to hold possession cannot alone give or transfer a title from the benamidar to the real owner, and that a suit like the above would be barred under this section (*s*).

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Certified purchaser.—Where a purchaser, who had not obtained a certificate, was sued, and afterwards applied for and obtained a certificate, it was held that he was a certified purchaser within the meaning of this section (*t*).

Successor in title of certified purchaser.—This section bars a suit not only against a certified purchaser, but also against persons claiming title from him (*u*). Under the Code of 1882 there was a conflict of decisions as to whether s. 317 of that Code was a bar to suits against persons claiming title from the certified purchaser. On the one hand it was held by the High Courts of Madras, Allahabad and Calcutta, that the expression "certified purchaser" in s. 317 of that Code *did not include* a person claiming through or under the certified purchaser, such as an heir or an assignee (*v*), and that that section therefore was no bar to a suit against such person. On the other hand, it was held by the Bombay High Court that the expression "certified purchaser" *did include* his successor in title (*w*). The present section contains a legislative recognition of the correctness of the view taken by the High Court of Bombay (*x*).

67. [S. 327.] (1) The Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value.

Power for Local Government to make rules as to sales of land in execution of decrees for payment of money.

(*q*) *Monappa v. Surappa* (1888) 11 Mad. 234 followed in *Sankunni v. Narayannan* (1894) 17 Mad. 282 and *Kumbalinga v. Ariaputra* (1895) 18 Mad. 486. *Contra*; *Subramaniam v. Gopalarama* (1915) 29 I. C. 138.
(*r*) (1875) 23 W. R. 365, 2 I. A. 154.
(*s*) *Bishan Dial v. Ghazi-ud-Din* (1901) 23 All. 175, 179-180.

(*t*) *Aldwell v. Ilahi Bakh* (1883) 5 All. 478.
(*u*) *Kamurudeen v. Noor Mahamad* (1915) 28 Mad. L. J. 251.
(*v*) *Theyyavelan v. Roohan* (1898) 21 Mad. 7; *Sibta v. Bhagohi* (1899) 21 All. 195; *Dukhade v. Srimonto* (1899) 25 Cal. 950.
(*w*) *Hari v. Ramchandra* (1907) 31 Bom. 61.
(*x*) *Manji v. Hoorbat* (1910) 35 Bom. 342, 347.

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67, 69.

(2) *When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Local Government may, by notification in the local official Gazette, declare such rules to be in force, or may, with the previous sanction of the Governor-General in Council, by a like notification, modify the same.*

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.

Sub-sec. (2) was inserted in the section by the Code of Civil Procedure Amendment Act I of 1914. See the undermentioned case (y).

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY.

68. [S. 320, 1st para.] The Local Government may, with the previous sanction of the Governor-General in Council, declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Power to prescribe rules
for transferring to Collector
execution of certain
decrees.

Object of the section.—"The object of these provisions [i.e., provisions relating to the execution of decrees by Collectors] is well-known. In different parts of India, the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators. A strong opinion was entertained by certain members of the Government of India, that these results of the administration of civil justice were impolitic and inexpedient; and it was suggested that some procedure might be devised by which the Chief Executive Officer of the district would be enabled to liquidate the debts of encumbered land-holders without the immediate sale of their estates, and so to preserve the old landed gentry of the country. The provisions of ss. 320 to 325C [now ss. 68, 70, 71, and 72 and schedule III] were inserted in the Code of Civil Procedure, in order to give effect to these suggestions" (z).

69. [New.] The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

Provisions of Third
Schedule to apply.

(y) *Kishore Chand v. Ishar Singh* (1918) P. R. no. 89, p. 318.

(z) *Huro Prosad Roy v. Kali Prosad Roy* (1883) 9 Cal. 290, at p. 294.

70. [S. 320, 2nd, 3rd and 4th paras.] (1) The Local S. 70.

Rules of procedure.

Government may make rules consistent with the aforesaid provisions—

- (a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court ;
- (b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector ;
- (c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders, made on appeal with respect to such orders, would be subject to appeal to and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

(2) A power conferred by rules made under sub-section

Jurisdiction of Civil
Courts barred.

(1) upon the Collector or any gazetted subordinate of the Collector or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Civil Courts are precluded from interfering in any matter declared by notification to be within the Collector's jurisdiction.—Thus if it is declared by notification that a decree for the sale of a particular kind of property, *e.g.*, “ancestral” property, should be transferred to the Collector for execution, a sale of the property by a Civil Court would be void. Such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree (a). For the same reason, if the execution of a decree is transferred to the Collector, the Court transferring the decree has no power to postpone the sale (b), or to give leave to the decree-holder to bid under

(a) *Sukhdeo v. Sheo Ghulam* (1882) 4 All. 382.

(b) *Daulat Singh v. Jugal Kishore* (1900) 22 All. 108.
111.

- S. 70.** O. 21, r. 72 (c): the Collector alone has that power. Similarly where a decree is transferred for execution to the Collector, and the decree is subsequently adjusted, the application under O. 21, r. 2 [Code of 1882, s. 258] for recording the adjustment should be made to the Collector (d). But where a decree has been sent to the Collector for execution under this section, he holds the money which may be realized in execution of such decree at the disposal of the Court by which the decree has been sent to him for execution, and he is not competent to distribute such money in contravention of an order of the Court indicating the mode of distribution (e).

It is to be noted that sub-section (2) does not take away the jurisdiction of any Court other than the Court referred to in it. The Court there referred to is the Court alluded to in the previous portion of the section, namely, the Court to which application was made for the execution of decree and which as such Court transmitted the decree for execution (f).

Where a suit would lie to set aside an order made by a Court executing a decree, the fact that such order has been made by the Collector could not deprive the Civil Courts of the jurisdiction to entertain a suit from such order (g).

Civil suit to set aside order of Collector.—A suit will lie to set aside an order made by the Collector, if the order is *ultrâ vires*. Thus there is no rule made by the Government of Bombay under this section empowering the Collector to set aside a sale under O. 21, r. 89 [Code of 1882, s. 310A] on a deposit by the judgment-debtor of the amount specified in that rule, nor is there any rule empowering him to set aside a sale under O. 21, r. 90 [Code of 1882, s. 311] on the ground of material irregularity in publishing or conducting the sale (h). Nor is there any rule made by the Local Government of the N. W. P., under this section empowering the Collector to set aside a sale under O. 21, r. 89 [Code of 1882, s. 310A] (i), though there is a rule empowering him to set aside a sale under O. 21, r. 90 [Code of 1882, s. 311]. Again, there is no rule made by any of the local Governments empowering the Collector to set aside a sale on the ground of fraud (j). If in any of these cases the Collector arrogates to himself the power which he has not, and sets aside the sale, the order will be *ultrâ vires*, and it will be open to the auction-purchaser to bring a regular suit in a Civil Court for a declaration that the sale was a valid one, and that the order of the Collector setting aside the sale was invalid (k).

Appeal.—No appeal lies to the High Court from an order passed by the Collector in an execution proceeding transferred to him under this section. The reason is that this section specially provides that an appeal shall lie from the order of the Collector to such authorities as the local Government may by rules prescribe (l).

Revision.—An order made by the Collector in the course of execution proceedings under this section sanctioning the prosecution of a party to the suit under s. 476 of the Code of Criminal Procedure is an order made by him as a Revenue Court, and is not therefore subject to revision by the High Court (m).

(c) *Shrinivas v. Jagadevappa* (1918) 42 Bom. 621.

(d) *Muhammad v. Payag Sahu* (1894) 16 All. 228; *Khusalchand v. Nandram* (1911) 35 Bom. 516.

(e) *Tapari v. Deokinandan* (1894) 16 All. 1.

(f) *Shyam Behari Lal v. Rup Kishore* (1898) 20 All. 379, 382-83.

(g) *Shyam Behari Lal v. Rup Kishore* (1898) 20 All. 379.

(h) *Pita v. Chunilal* (1907) 31 Bom. 207; *Narayan v. Rasulkhan* (1899) 23 Bom. 531;

Ganpatram v. Isaac (1891) 15 Bom. 322; *Bai Amthi v. Madhav* (1891) 15 Bom. 694.

(i) *Sheo Prasad v. Muhammad* (1898) 25 All. 167.

(j) *Sadho Chaudhari v. Abhonandan Prasad* (1904) 26 All. 101, at p. 104.

(k) *Mahuradas v. Panhalal* (1895) 19 Bom. 216; *Muthura Das v. Jamna* (1908) 25 All. 355.

(l) *Mancherji v. Thakurdas* (1905) 7 Bom. L. R. 682.

(m) *Emperor v. Asharfi Lal* (1917) 39 All. 91. See also *Emperor v. Bhajan* (1915) 37 All. 334.

71. [S. 320, 5th paras.] In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

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71, 72.

Collector deemed to be acting judicially.

“Shall be deemed to be acting judicially.”—The result is that the Collector and his subordinates will be entitled to the benefit of the provisions of the Judicial Officers Protection Act XVIII of 1850, which are as follows :—

“No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction; provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute if within the jurisdiction of the person issuing the same”

72. [S. 326.] (1) Where in any local area in which no declaration under section 68 is in force

Where Court may authorize Collector to stay public sale of land.

the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

“The Court may authorize the Collector.”—These words are not imperative, but leave a discretion to the Civil Court. That discretion can only be exercised upon materials placed before the Court. It is therefore open to the decree-holder to place those materials in the shape of evidence before the Civil Court, and to satisfy the Court as well by evidence as by argument that the proposal of the Collector is not feasible or practicable. The Court should not decline to receive the evidence offered by the decree-holder (n).

Temporary alienation.—This section admits only of a temporary alienation of land, and not of an arrangement by which possession is left with the judgment-debtor subject to a payment of the judgment-debt by instalments (o).

(n) *Huro Prasad Roy v. Kali Prasad Roy* (1883) 9 Cal. 290.

(o) *Kashee Lal v. Ameer Jan* (1870) 2 All. H. C. 347; *Multra Pershad v. Ram Pershad* (1873) 6 All. H. C. 39.

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72, 73.

Provisions of sections 69 to 71 to apply.—Reading this section with para. 2 of schedule III [Code of 1882 s. 322] referred to in s. 69, it is clear that the provisions of this section cannot be applied to a decree which directs the sale of land in pursuance of a contract specifically affecting the same (*p*). Similarly reading this section with para. 11, sub-para. (1) of schedule III [Code of 1882, s. 352 A], it follows that where a judgment-debtor executes a mortgage of his property, while the property is in the management of a Collector under this section, with an undertaking to put the mortgagee in possession, the mortgagee is not entitled to claim possession (*q*). Likewise, reading this section with the same paragraph, no Court could issue any process of execution against any immoveable property in the management of a Collector under this section. Therefore, the period during which the property is in the management of the Collector under this section should be excluded from the period of limitation applicable to the decree of which execution is refused by the Court by reason of the property having been in the Collector's management (*r*): see sch. III, para. 11, sub-para. (3).

DISTRIBUTION OF ASSETS.

73. [S. 295.] (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons :

Proceeds of execution-
sale to be rateably distri-
buted among decree-
holders.

Provided as follows :—

- (a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;
- (b) where any property liable to be sold in execution of a decree is subject to mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;
- (c) where any immoveable property is sold in execution of a decree ordering its sale for the

(p) *Bhagwan Prasad v. Shoo Sahai* (1880) 2 All. 856.

(q) *Seth Jaidayal v. Ram Sahae* (1890) 17 Cal. 432 [P. C.].

(r) *Girdhar Das v. Har Shankar* (1898), 20 All. 383.

discharge of an incumbrance thereon, the proceeds of sale shall be applied— S. 73.

first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interest and principal moneys due on subsequent incumbrances (if any) ; and,

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

Changes introduced by the section.—The present section differs from the corresponding s. 295, C. P. C., 1882, in the following respects :—

1. The words “ where assets are held by a Court ” have been substituted for the words “ whenever assets are realized *by sale or otherwise in execution of a decree.* ” This, it is submitted, introduces an important alteration, though the High Court of Bombay has held otherwise. See notes below under the head “ Assets held by a Court.”
2. The words “ before the receipt of such assets ” have been substituted for the words “ prior to the realization.” See notes below, under the head “ Before the receipt of the assets.”
3. The word “ passed ” has been added after the word “ money.” See notes below under the head “ same judgment-debtor.”
4. The words “ interest in ” in cl. (b) have been substituted for the words “ right against,” to bring the wording of that clause into line with the Transfer of Property Act, 1882, s. 96. This is a mere verbal alteration.

Rateable distribution.—The object of this section is to provide a cheap and expeditious remedy for the execution of money-decrees held against the same judgment-debtor by adjusting the claims of rival decree-holders without the

S. 73. necessity for separate proceedings (s). Under the Code of 1859 (s. 270), the creditor who first attached property had a prior claim to have his decree satisfied out of the sale-proceeds to the exclusion of other creditors, but now all judgment-creditors who apply to the Court, prior to the receipt of the sale-proceeds by the Court, are entitled to share rateably (t). In *Bithal Das v. Nand Kishore* (u), Strachey, C.J., said: "The object of the section is two-fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders in the position I have described upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property." A obtains a decree against B in Court X for Rs. 4,000, and applies to that Court for execution of his decree by attachment and sale of certain property belonging to B, and the property is thereupon attached. C then obtains a decree also against B in Court X for Rs. 2,000, and applies to that Court for execution of his decree by attachment and sale of the same property attached in execution of A's decree. The property is then sold by the Court for Rs. 3,000. C is entitled to share rateably in the net sale-proceeds, that is to say, if the net sale-proceeds amount to Rs. 3,000, A will be paid Rs. 2,000 and C will be paid Rs. 1,000. It is not necessary to entitle C to participate in the assets that he should have given notice to A of the application made by him for execution of his decree (v).

To entitle a decree-holder to participate in the assets of a judgment-debtor, the following conditions must be present:—

1. The decree-holder claiming to share in the rateable distribution should have applied for execution of his decree to the Court by which the assets are held.
2. Such application should have been made prior to the receipt of the assets by the Court.
3. The assets of which a rateable distribution is claimed must be assets held by the Court.
4. The attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for the payment of money.
5. Such decrees should have been obtained against the same judgment-debtor.

No rateable distribution can be claimed under the section unless all the conditions enumerated above are present. We proceed to examine these conditions.

1. Court to which application for execution should be made.—

Those decree-holders only could share in the rateable distribution who have actually applied for execution of their decree in the form prescribed by O. 21, r. 11 [Code of 1882, s. 235] to the Court by which the assets are held (w). In execution of a decree obtained by A against B in the Court of a Subordinate Judge of the First Class, certain property belonging to B is attached by that Court. C then obtains a decree against B in the Court

(s) See *Hasoon Arra v. Jawadoonnissa* (1879) 4 Cal. 29.

(t) *Kommachi v. Pakker* (1897) 20 Mad. 107. 111.
(u) (1901) 28 All 106.

(v) *Chunni Lal v. Jugal Kishore* (1905) 27 All. 132
(w) *Krishnashankar v. Chandrashankar* (1881) 5 Bom. 198, 201.

of a Subordinate Judge of the Second Class and applies to that Court for execution of his decree by attachment and sale of the same property attached by the First Class subordinate Judge in execution of A's decree. The property is then sold by the First Class Subordinate Judge in execution of A's decree, and the sale-proceeds are received by that Court. Here the Court of the Subordinate Judge of the First Class is the Court by which the assets are held; and, further, it is the Court competent under s. 63 to determine claims to the attached property. The application for execution should therefore have been made by C to that Court. The application not having been made to that Court, C is not entitled to share the sale-proceeds rateably with A (x). The result is that the sale-proceeds will be applied towards the satisfaction of A's decree to the exclusion of C.

Suppose now that in the case put above C had applied to the Subordinate Judge of the First Class for execution of his decree. Would he have been then entitled to share in the rateable distribution? According to the Bombay decisions he would not have been so entitled unless he had previously caused the decree to be *transferred* for execution to the Court of the Subordinate Judge of the First Class (y). According to the Calcutta and Madras decisions it is not necessary to have the decree transferred for execution to entitle C to share in the rateable distribution (z).

2. Before the receipt of the assets.—The application for execution must be made *before the receipt* of the assets by the Court. The corresponding s. 295 of the Code of 1882 commenced as follows:—

“Whenever assets are *realised by sale or otherwise in execution of a decree*, and more persons than one have, *prior to the realization*, applied to the Court by which such assets are held.”

The present section begins as follows:—

“Where assets are *held by a Court*, and more persons than one have, *before the receipt of such assets*, made application to the Court.”

The word “realization” was rather obscure. Indeed it called for several decisions in which the Courts had to define its precise meaning. The word “receipt” which is now substituted for “realization” is not likely to require any judicial interpretation. Cases of the character noted below which turned upon the word “realization” are not likely to arise under the present section, so clear is the meaning of the word “receipt.”

A, B and C held money-decrees against the same judgment-debtor. In December 1892, A attached by a prohibitory order funds of the judgment-debtor in the hands of D [O. 21, r. 46, Code of 1882, s. 268]. In January 1893, B attached the same funds in execution of his decree. In February 1893, D paid the funds into Court. On the same day, but *after* payment was made into Court, C applied to attach the funds as property in the custody of the Court [O. 21, r. 52, Code of 1882, s. 272]. It was held under s. 295 of the Code of 1882 that the funds should be rateably distributed between A and B, and that C was not entitled to participate therein, as his application was made *subsequent to the realization* of the assets by the Court (a). The decision

(x) *Dattatraya v. Rahimtulla* (1894) 18 Bom. 456.

(y) *Nimbaji v. Vadga* (1892) 16 Bom. 683.

(z) *Clark v. Alexander* (1894) 21 Cal. 200; *Hart Bhagat v. Anundaram* (1897) 2 C. W. N. 126; *Arimuthu v. Vyapurtpandaram* (1910)

35 Mad. 568, 589, 590; *Narasimhachariar v. Krishnamachariar* (1914) 26 Mad. L. J. 406.

(a) *Srinivasa v. Seetharamayyar* (1896) 19 Mad. 72.

- S. 73. would be the same under the present section, for it is quite clear that *C's* application was made *after the receipt* of the assets by the Court.

It was held under s. 295 of the Code of 1882 that where property is sold in execution of a decree, the sale-proceeds are deemed to be *realized* not when the 25 per cent. is deposited by the purchaser into Court under s. 306 [now O. 21, r. 84], but when the balance of the purchase-money is paid (*b*). Hence a decree-holder who applied for execution *before* the entire amount due from the purchaser had been paid into Court was held entitled to share in the rateable distribution, though the application was made after deposit of the 25 per cent. But it was held that a decree-holder who applied for execution *after* the entire amount of the purchase-money had been paid into Court was not entitled to share in the rateable distribution though his application was made before the sale was *confirmed* by the Court under s. 312 [now O. 21, r. 92]; and the decision was put on the ground that the point of time when assets are *realized* is when the sale-proceeds are paid into Court, and not when the sale becomes absolute (*c*). The decisions would be the same under the present section, and how very obviously so would be seen by substituting the word "received" for the word "realized" (*d*).

It was held under the Code of 1882, that where immoveable property is sold in execution of a decree in separate parcels, the sale-proceeds are not deemed to be *realized* until the entire amount of the purchase-money in respect of all the parcels is paid into Court (*e*). The decision would obviously be the same under the present section. As regards moveables it has been held that if the property consists exclusively of moveables and they are sold in separate lots on different dates, the sale-proceeds are deemed to be realized *on the several dates* on which they are received by the Officer of the Court and not on the date on which the last payment is received. Thus if part of the moveables attached is sold and the price thereof is received on January 5 and the rest is sold and the price thereof is received on January 10, a decree-holder who applies for rateable distribution on January 7 is entitled to rateable distribution of the sale-proceeds realized on January 10 only and not those realized on January 15 (*f*).

Where property is sold in execution by a person appointed by the Court under O. 21, r. 65, the receipt of purchase-money by such person is for the purposes of this section equivalent to receipt of assets by the Court. The material date, therefore, is not the date on which the Court receives the amount of the purchase-money from such person, but the date on which such person receives the purchase-money from the purchaser (*g*).

3. Assets held by a Court.—Far more important than the change effected by the word "receipt" is the change introduced by the omission of the words "whenever assets are realized by sale or otherwise in execution of a decree," and the substitution therefor of the words "where assets are held by a Court." The latter words, coupled with the word "realization" which occurs later on in the section, include, it is submitted, several kinds of assets which were held not liable to rateable distribution under s. 295 of the Code of 1882.

(b) *Hafez v. Damodar* (1891) 18 Cal. 242.
 (c) *Vishwanath v. Virchand* (1882) 6 Bom. 16.
 (d) *Maharaja of Burdwan v. Apurba* (1911) 14 Cal. L. J. 50.

(e) *Ramanathan v. Subramanian* (1903) 26 Mad. 179.
 (f) *Surjan Singh v. Prag Das* (1918) P. R. no. 33, p. 128.
 (g) *Galstaun v. Bonnerjee* (1917) 44 Cal. 789.

Assets available for rateable distribution.—The only kinds of assets that were held to be available for rateable distribution under s. 295 were:— S. 73.

- (a) assets realized by “sale in execution of a decree,” that is, sale-proceeds of property sold in execution of a decree (*h*); and
- (b) assets realized “otherwise in execution of a decree.” These words were held to mean assets realized from the property of the judgment-debtor by such modes as those prescribed by s. 291 [O. 21, r. 69], s. 305 [O. 21, r. 83], and s. 322 [Sch. III, paras. 2 and 7] (*i*). This was explained in later decisions as meaning assets realized in one of the modes *expressly* prescribed by the sections of the Code (*j*). The following were held to be assets of this class:—
 - (i) debts attached under s. 268 [now O. 21, r. 46] and paid into Court by the garnishee (*k*);
 - (ii) rents of property under attachment realized by a receiver appointed under s. 503 [now s. 51. cl. (d) and O. 40, r. 1] at the instance of the decree-holder (*l*). [The appointment of receiver by the Court in such a case is a “process of execution”];
 - (iii) money in the custody of a public officer attached under s. 272 [now O. 21, r. 52] and paid into Court by that officer (*m*);
 - (iv) money realized in execution of a decree held by the judgment-debtor against another, where such decree is attached and realized under O. 21, r. 53 [Code of 1882, s. 273] (*n*);
 - (v) money paid under O. 21, r. 69, to the officer conducting the sale to stop the sale (*o*);
 - (vi) money raised by the judgment-debtor by private alienation under O. 21, r. 83, and paid into Court (*p*).

Assets not available for rateable distribution.—Assets not realized “by sale or otherwise in execution of a decree” were not liable to rateable distribution under s. 295. The following are instances of assets held not to be “realized by sale or otherwise in execution of a decree” within the meaning of s. 295, and therefore not subject to rateable distribution under that section:—

Cases under s. 295 of the Code of 1882.

A.—*Purshotamdass v. Surajbharthi* (1882) 6 Bom. 588—Money paid by a judgment-debtor under arrest under s. 236 of the old Code [now s. 55, proviso 4] to the officer arresting him in order to secure his release was held to be assets not subject to rateable distribution. Sir Charles Sargent, C.J., said “Section 295. . . must be read as if the words ‘from the property of the judgment-debtor’ were inserted after the word ‘realized.’ The provisions

(*h*) *Prosonnomoyi v. Sreenauth* (1894) 21 Cal. 809.

(*i*) *Purshotamdass v. Surajbharthi* (1882) 6 Bom. 588; *Gopal Dai v. Chunnai* (1886) 8 All. 87; *Vibudhapriya v. Yusuf* (1906) 28 Mad. 380.

(*j*) *Sew Bux v. Shib Onunder* (1886) 13 Cal. 225, 229; *Prosonnomoyi v. Sreenauth* (1894) 21 Cal. 809, 817; *Vibudhapriya v. Yusuf* (1906) 28 Mad. 380, 384.

(*k*) *Sorabji v. Govind* (1892) 16 Bom. 91.

(*l*) *Pink v. Bahadoor Singh* (1899) 26 Cal. 772.

(*m*) *Manilal v. Nanabhai* (1904) 28 Bom. 264.

(*n*) *Amara v. Annamala* (1908) 31 Mad. 502.

(*o*) *Purshotamdass v. Surajbharthi* (1882) 6 Bom. 588, 589.

(*p*) 6 Bom. 588, 589, *supra*; *Thiraviyam v. Lakshmana* (1918) 41 Mad. 616.

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contained in sections 291 [O. XXI, r. 83], 305 [O. XXI, r. 69] and 322 [now Sch. III, paras. 2 and 7; the latter para. corresponding with s. 323 of the old Code] are all modes of realizing assets from such property 'otherwise' than by sale, and are sufficient to account for the introduction of that expression into section 295." The effect of the above decision is that to constitute a realization within the meaning of s. 295, it must be either a realization by a sale in execution under the process of the Court, or it must be a realization in one of the other modes expressly prescribed by the sections of the Code.

This was the leading case under the old section, and it was followed in cases B, C, D and E below.

The correctness of the reasoning in *Purshotamdass'* case seems to have been doubted in *Manilal v. Nanabhai* (q) where Sir Lawrence Jenkins, C.J., said: "*Primâ facie* the word 'realized' implies that property has been converted into or obtained in cash or some other form available for immediate distribution, and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution."

B.—*Gopal Dei v. Chunni* (1886) 8 All. 67, following case A—Money paid into Court by the judgment-debtor under s. 275 of the old Code [now O. XXI, r. 55 (a)] for payment of the amount due to the decree-holder at whose instance the property was attached was held to be an asset not available for rateable distribution, the reason given being that the money was not realized "from the property of the judgment-debtor."

C.—*Sew Bux v. Shib Chunder* (1886) 13 Cal. 225, following case A—A obtained a decree for money against B. B's property was attached in execution of the decree. C then obtained a decree for money against B, and applied for attachment of B's said property; a warrant of attachment was issued, but the property was not actually attached. B then filed his petition in insolvency, and a vesting order was made. The Official Assignee then paid into Court the amount of A's decree, and the property was released from attachment. C then applied for rateable distribution under s. 295 of the amount paid into court. Held that C was not entitled to rateable distribution. Trevelyan, J., said "I do not think that in this case the money was realized out of the property of the judgment-debtor. . . I think that, by 'sale or otherwise' means by 'sale or other process of execution provided for in the Civil Procedure Code.'"

D.—*Prosonnomoji v. Sreenauth* (1894) 21 Cal. 809.—In this case, Sale, J., said that the rule deducible from cases A and C was that "to constitute a realization within the meaning of section 295, it must be either a realization by a sale in execution under the process of the Court, or it must be a realization in one of the other modes expressly prescribed by the sections of the Code."

E.—*Vibudhapriya v. Yusuf* (1905) 28 Mad. 380, following cases A, B, C and D—Money realized by a judgment-debtor by a private sale of his property attached in execution of the decree against him and paid by him into Court under s. 275 of the old Code [now O. XXI, r. 55 (a)] for payment of the amount due to the decree-holder at whose instance the property

was attached was held to be an asset not available for rateable distribution, the reason given being that though there was a realization of assets, the realization was not in one of the modes *expressly* prescribed by the sections of the Code.

Note.—The only distinction between cases B and E is that in case E the judgment-debtor obtained the money by sale of the attached property, while in case B he obtained it without any sale.

It is submitted that the assets in cases A, B, C and E should under the present section be treated as assets available for rateable distribution. The test under the present section is—

- (1) whether the money of which rateable distribution is claimed is an asset held by the Court; and
- (2) whether it has been realized or obtained in execution. The scope of the new section is wider than that of the old one (r). See below notes under case F.

Cases under the present section.

In the following cases which were all decided under the present section it was held that the moneys held by the Court were not assets available for rateable distribution within the meaning of the section:—

F.—*Sorabji v. Kala* (1911) 36 Bom. 156—Money paid into Court by a judgment-debtor under O. XXI, r. 55 (a) [Code of 1882, s. 275] for payment of the amount due to the decree-holder at whose instance the property was attached has been held not subject to rateable distribution under this section (This is the same as case B above.) Sir Basil Scott, C. J., said: “In the reference to the costs of realization we have an indication that the legislature contemplated that the assets referred to should be assets held in the process of execution. If we were to hold that money paid into Court under Order XXI, Rule 55, was assets held by the Court within the meaning of section 73, we should be only nullifying the provisions of Rule 55; for there will be no inducement to any judgment-debtor to procure a payment into Court of the amount claimed by his attaching creditor, if his money could at once be absorbed by rateable distribution amongst a number of other creditors.” This assumes that the word ‘realized’ means realized by sale or other process of execution expressly prescribed by the sections of the Code as was held in cases A, C, D and E. It is submitted, with respect, that the words “sale or otherwise” which occurred in s. 295 of the Code of 1882 having been omitted in the present section, the interpretation put upon those words in cases A, C, D and E can no longer govern cases arising under the present Code. All that is necessary under the present Code is that (1) there should be assets held by the Court and (2) that such assets should have been realized or obtained in execution proceedings [see the observations of Sir Lawrence Jenkins cited in case A above]. It cannot but be said that money paid into Court by a judgment-debtor under O. 21, r. 55 (a), is money or asset obtained in execution proceedings, and is therefore subject to rateable distribution. It is indeed difficult to see how this view of the section nullifies the provisions of O. 21, r. 55; for money paid into Court under r. 55 may be held to be assets subject to

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rateable distribution, and yet full effect may be given to r. 55. There is no reason why because a particular payment may operate to release the person [see case G] or property of a judgment-debtor from attachment, that payment should be applied for the benefit exclusively of the decree-holder at whose instance the person or property of the judgment-debtor was attached. Moreover, the object of O. 21, r. 55, is not to afford any inducement to a judgment-debtor as supposed by the Court in *Sorabji v. Kala*. All that O. 21, r. 55, says is that the circumstances mentioned in cls. (a), (b) and (c) of that rule shall have the effect indicated in the rule. The decision in *Sorabji v. Kala* has been disapproved by the High Court of Madras (s). It has also been disapproved by Pratt, J., in a later Bombay case—*Nathmal v. Maniram* (t). As to the first of the two grounds on which the decision in *Sorabji v. Kala* was based, namely that the money was not realized in process of execution, Pratt, J., said that it followed the cases decided on the words “sale or otherwise,” which were held to mean sale or other process of execution expressly provided for in the Code, but that it was too restrictive a construction under the amended section (u). As to the second ground, namely, that to allow rateable distribution of money paid into Court under O. 21, r. 55, would be to nullify the provisions of r. 55, the learned Judge said: “I also venture to doubt the correctness of the second reason. Order XXI, rule 55, operates effectively where there is one decree-holder. If there are a number of decree-holders there is no scope for the rule, for the judgment-debtor has no motive for paying off one judgment-creditor when the same property is liable to be re-attached by the others. To allow one decree-holder to be paid off in full when the property is insufficient to discharge other judgment-debts might possibly be a undue preference and defeat the object of the section which is equal distribution of all the monies received in execution. Again why should a judgment-creditor, whose attachment has been removed under Order XXI, r. 55, be in a better position than a judgment-creditor who has taken the trouble of bringing the property to sale. Lastly, if the money paid under Order XXI, rule 55, to remove an attachment is not available for rateable distribution, then a fortiori money paid to stop a sale under Order XXI, rule 69, would also not be so available. But even under the old section it was assumed by Sir Charles Sargent in *Purshottamdas' case* [case A, p. 197.] that money paid to stop a sale is available for rateable distribution. So that the interpretation put upon the section in *Sorabji Coovarji v. Kala Raghunath* (v) makes the new section more restrictive than the old one, and this is not what the Legislature intended.”

In the Madras case above referred to (w), the Court expressed the opinion that the assets referred to in the present section need not be assets obtained in execution proceedings. This indeed is an extreme view and it was dissented from by Pratt, J., the learned Judge holding that the reference to the costs of realization and the position of the section in the Code at the end of Part II on Execution led irresistibly to the conclusion that the assets to be available for rateable distribution must have been obtained

(s) *Thiravayam v. Lakshmana* (1918) 41 Mad. 616, 618.

(t) (1919) 21 Bom. L. R. 975, 978-79.

(u) See *Haral Saha v. Faidur Rahman* (1918) 40

Cal. 619, 622.

(v) (1911) I. L. R. 36 Bom. 156, 13 Bom. L. R. 1193.

(w) 41 Mad. 616, 618. *Supra*.

in execution (x). The view taken by Pratt, J., is, it is submitted, the correct view (y).

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G.—*Ebji Umersy v. W. & A. Graham & Co.* (1917) 19 Bom. L. R. 274.—Money paid by a judgment-debtor under arrest under section 55, proviso 4, to the officer arresting him in order to secure his release is not an asset subject to rateable distribution. [This case is the same as case A]. Macleod, J., said: "It appears that the section was only intended to apply to assets realized by the sale of property attached." This view of the section, it is submitted, is not correct. If this view were correct, money paid to stop a sale under O. 21, r. 69, and money raised by private alienation under O. 21, r. 83, would not be assets subject to rateable distribution. But even under the old section it was assumed by Sir Charles Sargent in case A that such monies were available for rateable distribution. It could not possibly be said that the present section is more restricted in its scope than the old section.

H.—*Nathmal v. Maniram* (1919) 21 Bom. L. R. 975.—A obtained a decree for money against B and in execution of the decree took out a warrant for attachment of the moveable property of B under O. 21, r. 43. The bailiff entered B's shop and showed the warrant to B and pointed out that if the money were not paid he would seize and keep in his custody the moveable property in his shop. B then paid the decretal amount and costs of execution and sheriff's poundage. Upon these facts Pratt, J., expressed the opinion that the money having been paid under stress of the warrant (z), and the warrant being a process of execution, the money was an asset available for rateable distribution within the meaning of the present section. The learned Judge, however, felt bound by the decision of the Appellate Court in *Sorabji v. Kala* [case F], and held that the money was not subject to rateable distribution.

For other cases see—

O. 21, r. 72, notes "Amount due on the decree."

O. 21, r. 83, notes "Rateable distribution."

O. 21, r. 89, notes "For payment to the decree-holder—rateable distribution."

4. **Decrees for the payment of money.**—It is only holders of decrees for the payment of money that are entitled to a rateable distribution under this section. What is a decree for the payment of money within the meaning of this section? We proceed to note the decisions:—

- (i) A decree for the payment of mesne-profits is a "decree for the payment of money" within the meaning of this section, notwithstanding that the amount of mesne-profits has not yet been ascertained. The holder of such a decree, who has applied for attachment under O. 21, r. 42 [Code of 1882, s. 255], is entitled to a rateable distribution with other decree-holders under this section (a).
- (ii) A decree upon a mortgage, which enables the mortgagee to realize the amount of the mortgage-debt "from the mortgaged properties and from the defendants personally" was held to be a "decree for the payment of

(x) 21 Bom. L. R. 975, 977, 979. *Supra*
 (y) See also *Sutkeena v. Hajee Mahomed* (1918)
 88 Mad. 221, 224.
 (z) See *Biswick v. Bath Colliery Co.* (1878) 3

Ex. D. 174; *Bidhoo v. Keshub* (1868) 9
 W. R. 462.
 (a) *Viraragava v. Varada* (1882) 5 Mad. 123.

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money" within the meaning of the old section by the High Court of Calcutta in *Hart v. Tara Prasanna Mukherji* (b). In that case the Court said: "every decree, by virtue of which money is payable is to that extent a 'decree for money' within the meaning of the section, even though other relief may be granted by the decree [e. g., sale of mortgaged property]; and the holder of such a decree is entitled to claim rateable distribution with holders of decrees for money *simpliciter*" (c). Following these observations, the High Court of Madras held that "where a decree upon a mortgage directs the mortgagor to pay the mortgage-debt to the mortgagee within a period fixed by the Court, and provides that in default the mortgaged property should be sold, and the balance, if any, should be recovered from the mortgagor," the decree was one "for the payment of money" within the meaning of the old section (d). In subsequent cases, however, which turned upon the meaning of the expression "decree for the payment of money" which occurred in s. 230 of the Code of 1882 [now s. 48], the High Court of Calcutta dissented from the Madras decision, on the ground that the decree in that case was not similar to the decree in *Hart v. Tara Prasanna Mukherji*, the decree in the latter case containing a distinct order upon the mortgagor personally to pay the amount of the mortgage-debt (e). The decree in those cases was similar to the decree in the Madras case, and it was held that the decree was not a "decree for the payment of money" within the meaning of s. 230 of the Code of 1882. The decision, it seems, would have been the same if the Court had been called upon to interpret the same expression in s. 295 of the Code of 1882, and the observations in *Hart's* case set out above would have been regarded as more *obiter dicta*. The Allahabad decisions, bearing on the expression "decree for the payment of money" in s. 230 of the Code of 1882 are also to the same effect (f). There is little doubt that if these High Courts were called upon to decide whether a decree of the character in the Madras case was a "decree for the payment of money" within the meaning of this section, they would hold that it was not. In any event the Madras decision cannot be sustained under this Code: see O. 21, r. 20.

- (iii) A decree directing the payment under s. 90 of the Transfer of Property Act [now O. 34, r. 6] of the balance of the mortgage-debt remaining due after payment to the mortgagee of the nett proceeds of the sale of the mortgaged property is a "decree for the payment of money" within the meaning of this section (g).
- (iv) A decree directing the payment of money by a person does not cease to be a decree for the payment of money, in so far as that person is concerned merely because it directs, as against another person, the realization of the money claim from mortgaged property. Thus a decree against A, B and C, which, so far A and B are concerned, is a decree for the enforcement of a mortgage by sale of their property, but which does not direct

(b) (1885) 11 Cal. 718.

(c) *Ib.*, pp. 729-730.

(d) *Kommaoti Kather v. Pakker* (1897) 20 Mad. 107, followed in *Abdulla Sahib v. Oosman Sahib* (1905) 28 Mad. 224 [a case under s. 230 of the Code of 1882, which contained the expression "decree for the payment of money," now s. 48], and approved in *Vaidhinadasamy Ayyar v. Somasundram*

Pillai (1905) 28 Mad. 473 [a case under s. 258 of the Code of 1882, now O. 21, r. 2].

(e) *Fazil v. Krishna* (1898) 25 Cal. 180; *Kartick v. Juggernath* (1900) 27 Cal. 285.

(f) *Ram Charan v. Sheobarat* (1894) 16 All. 418; *Pahalwan v. Narain* (1900) 22 All. 401.

(g) *Mallikarjunadu v. Lingamurti* (1902) 25 Mad. 244, 286-87.

the sale of any specific property belonging to *C*, is as regards *C*, a decree for the payment of money (*h*).

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- (v) A judgment entered up under s. 86 of the Insolvent Debtors Act is a money decree (*i*).

5. Same judgment-debtor.—The provisions of this section do not apply unless the judgment-debtor is the same. Where the holder of a decree against two or more persons applies for a rateable distribution of the assets realized from property belonging to one of such persons, the application is one for the execution of the decree against the same judgment-debtor.

Illustration.

X obtains a decree against *A*, and attaches *A*'s property in execution of the decree. *Y*, who holds a decree against *A* and *B*, applies for execution of his decree by attachment and sale of *A*'s property attached in execution of *X*'s decree. *Y* is entitled under this section to share in the proceeds of the sale of *A*'s property; it is immaterial that *Y*'s decree is against *B* also and that the decree might have been separately executed against *B*; *Shumbhoo Nath v. Luckynath* (1883) 9 Cal. 920; *Grant v. Subramanian* (1899) 22 Mad. 241; *Delhi Bank v. Uncovenanted Service Bank* (1888) 10 All. 35.

Similarly, where the holder of a decree against one person applies for a rateable distribution of the assets of that person realised from property belonging to that person and another, such application is an application for the execution of a decree against the same judgment-debtor.

Illustrations.

X obtains a decree against *A*, *B* and *C*, and attaches in execution of the decree certain property belonging to *A*, *B* and *C* jointly. *Y* holds a decree against *A* alone. *Y* is entitled under the provisions of this section to a proportionate distribution of the assets realized by the sale of the joint property, so far as they represent the share of *A* in that property. Similarly, if *Y* held a decree against *A* and *B*, he would be entitled to a rateable distribution of the assets so far as they represented the share of *A* and *B* in the property: *Gonesh v. Shiva* (1913) 30 Cal. 583; *Gatti Lal v. Bir Bahadur* (1905) 27 All. 158; *Ramanathan v. Subramania* (1903) 26 Mad. 179; *Chhotatal v. Nabibhai* (1905) 7 Bom. L. R. 567. These were decisions under s. 295 of the Code of 1852. *Quære* whether these decisions have been affected by the introduction in the present section of the word "passed" which did not find a place in the Code of 1882: *Balmer Lawrie & Co. v. Jadunath* (1914) 42 Cal. 1.

Decree against legal representative of judgment-debtor.—It has been held by the High Courts of Bombay and Madras that if a decree is obtained by *X* against *B*, and by *Y* after *B*'s death against *B*'s legal representative, the judgment-debtor is not the same and the present section does not apply (*j*). A different opinion has been expressed by the High Court of Calcutta (*k*).

Clauses (a), (b) and (c).—The first paragraph of this section and clauses (a) and (b) have reference to sales in execution of simple money-decrees. The provisos contained in clauses (a) and (b) declare the incompetence of a mortgagee or incumbrancer as such to share in any surplus proceeds, when property is sold subject to his

(h) *Delhi Bank v. Uncovenanted Service Bank* (1888) 10 All. 85.
(i) *In re Bhagwandas* (1884) 8 Bom. 511.
(j) *Govind v. Mohoniraj* (1901) 25 Bom. 494:

Srinivasa v. Kanthimathi (1910) 33 Mad. 465.
(k) *Hart v. Tara Prasanna Mukheri* (1885) 11 Cal. 718, 723.

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mortgage or charge. But the alternative is afforded to him of consenting to the property being sold free of his mortgage or charge, in which case the Court may give him the same right against the sale-proceeds as he had against the property. Clause (c) has reference to a sale in execution enforcing an incumbrance; but in distributing the sale proceeds, the discharge of subsequent (and not prior) incumbrances is alone taken into account (l). Compare O. 34, r. 13.

Claims for the rateable distribution of assets.—These claims are claims enforceable under an attachment within the meaning of s. 64. See notes to s. 64 under the head "Explanation to the section," p. 174.

Attachment before judgment.—A decree-holder who has caused property to be attached before judgment, is not entitled to share in a rateable distribution of the sale-proceeds of that property, unless he makes, after judgment, a fresh application for execution under O. 21, r. 11 [Code of 1882, s. 235]. O. 38, r. 11 [Code of 1882, s. 490] does not touch the point (m).

Sub-sec. (2): Suit for refund.—The scheme of this section is to enable the Court as matter of administration to distribute the assets according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication as to those rights, which may be subsequently re-adjusted in a suit brought under the penultimate paragraph of the section (n). Such a suit is virtually a suit for money had and received, and the period of limitation is three years from the date of the receipt of the assets by the defendant (o). The suit being one for money *had and received* it is clear that it should be dismissed as premature, if it is brought before the moneys have been *actually paid* to the defendant. A mere order for the payment of money under this section is not sufficient to found the action (p).

Suit by subsequent mortgagee to recover balance of money realised by sale under a prior mortgage.—X mortgages his property to A. He then mortgages the same property to B. Subsequently he further mortgages the property to A. A sues X on the first mortgage, joining B as a defendant, and obtains a decree on the mortgage. The property is sold in execution of the decree, and a balance of Rs. 12,000 which remains after satisfying A's decree is deposited in Court. A then obtains a decree for sale on the further charge, and in execution of the decree draws out the balance deposited in Court. B is not joined as a party to this suit, nor is any notice given to him that A was drawing out of Court the balance of Rs. 12,000. B then sues A to recover the amount drawn out by A, that is Rs. 12,000. Such a suit is not one under sub-sec. (2), and the period of limitation applicable to the suit is 12 years under art. 132 of the Limitation Act. The suit is really one to enforce payment of money charged upon immoveable property within the meaning of that article (q).

Inquiry as to validity of decree.—There is a conflict of decisions as to whether, where it is alleged by a claimant that a decree obtained by another claimant is collusive, that is, obtained by the latter in collusion with the judgment-debtor, the Court has power to enquire into the *bona fides* of the

(l) *Jagat v. Dhundhey* (1888) 5 All. 566. See

also *Mitu v. Kishan* (1890) 12 All. 546.

(m) *Pallonji v. Jordan* (1888) 12 Bom. 400; *Arunachellam v. Haji Sheik Meera* (1910) 34 Mad. 25.

(n) *Shankarsarup v. Mejo Mal* (1901) 23 All. 318, 322, 28 I. A. 203.

(o) 23 All. 318, *supra* *Ram Narain v. Brij Banks*

Lal (1917) 39 All. 322, 333; *Bainath v. Ramadoss* (1914) 39 Mad. 62. See Limitation Act, art. 62.

(p) *Hart v. Tara Prasanna Mukherji* (1885) 11 Cal. 718.

(q) *Barhamdeo v. Tara Chand* (1913) 41 Cal. 654, 41 I. A. 45.

decree. The High Court of Calcutta (r), and, following it, the High Court of Bombay (s), have held that it has. On the other hand, it has been held by the High Court of Madras that it has not (t). The latter view, it is submitted, is correct. If a Court executing a decree has no power to go behind the decree [see notes to s. 38], much less has a Court acting under the provisions of this section (u).

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Rights of Government not affected.—A judgment-debt due to the Crown is entitled to precedence in execution (v).

Rights created by this section not affected by insolvency.—An order made under this section for rateable distribution is not affected by the insolvency of the judgment-debtor subsequent to the making of the order. But the order will be confined in its operation to the assets of the judgment-debtor realized up to the date of the vesting order; assets realized after the date of the vesting order will vest in the Official Assignee (w).

Appeal.—An order made under this section is no doubt an order in execution, but it is not a decree, and is not therefore appealable, unless all the conditions enumerated in s. 47 are present. One of those conditions is that the question decided by the Court should be one which arose between the parties to the suit, that is, between the judgment-debtor on the one hand and the decree-holder on the other (x). It is clear from what has been stated above that an order made under this section cannot be one under s. 47, and no appeal will lie from it, if the question determined by the order arose between two rival decree-holders in which the judgment-debtor had no interest (y). But if the question determined by the order arose not only between rival decree-holders, but also between the judgment-debtor on the one hand and the decree-holders on the other, the order would be within s. 47, and would therefore be appealable (z).

RESISTANCE TO EXECUTION.

74. [s. 330.] Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

Resistance to execution.

(r) *In re Sunder Dass* (1885) 11 Cal. 42; *Puran-chand v. Surendra* (1912) 16 Cal. L. J. 582; *Peary Lal v. Peary Lal* (1913) 19 C. W. N. 903. In *Mathura Nath v. Umesh Chandra* (1897) 1 Cal. W. N. 633, Maclean, C.J., doubted the correctness of *In re Sunder Dass*.

(s) *Chhagan Lal v. Fazarali* (1889) 13 Bom. 154.

(t) *Saravana v. Arunachalam* (1917) 40 Mad. 841.

(u) See *Shankar Sarup v. Mejo Lal* (1901) 28

I. A. 203, 23 All. 813.

(v) *Secretary of State v. Bombay Landing Coy.* (1868) 5 B. H. C. 23.

(w) *Howatson v. Durrant* (1900) 27 Cal. 351.

(x) *Jagadish v. Kripa Nath* (1909) 36 Cal. 130.

(y) *Balmer Lawrie & Co. v. Jadunath* (1914) 42 Cal. 1.

(z) *Sorabji v. Kala* (1911) 36 Bom. 156; *Rajah of Karvetnagar v. Venkata Reddi* (1918) 39 Mad. 570.

PART III.

Incidental Proceedings.

COMMISSIONS.

Power of Court to issue commissions.

75. [New.] Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person ;
- (b) to make a local investigation ;
- (c) to examine or adjust accounts ; or
- (d) to make a partition.

The general powers of Courts in regard to commissions have been summarised in this section. The detailed provisions are set forth in O. 26.

76. [s. 385.] (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

Commission to another Court.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

See. O. 26, r. 4.

77. [New.] In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

Letter of request.

- 78.** [s. 391.] The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by— S. 78.
- Commission issued by
foreign Courts.
- (a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor-General in Council, or
 - (b) Courts situate in any part of the British Empire other than British India, or
 - (c) Courts of any foreign country for the time being in alliance with His Majesty.

PART IV.

Suits in Particular Cases.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

79. [S. 416.] (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council.

Suits by or against Government.

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by Section 111 of the East India Company Act, 1813.

Sub-section (2) is new.

As to procedure in suits by or against Government, see O. 27.

Scope of the section.—This section does not enlarge or in any way affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council which must always depend on the provisions of the Government of India Act, 1858, s. 65 [now Government of India Act, 1915, s. 32]. It gives no cause of action, but only declares the mode of procedure when a cause of action has arisen (*a*). The material words of the said s. 65 enact that “the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company,” that is, the East India Company (*b*).

The Secretary of State is not a proper party to a suit by an owner of land under s. 42 of the Specific Relief Act 1 of 1877 against a member of the public who claims to use such land as a public road and thereby endangers the title of the owner (*c*).

Act of State.—The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued, *viz.*, matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there is express statutory provision. No suit would lie against the East India Company in respect of acts of State or acts of Sovereignty, and therefore no suit in respect of such acts lies against the Secretary of State in Council (*d*). See notes above.

(a) *Jehangir v. Secretary of State* (1903) 27 Bom. 189.

(b) See *Doya Narain v. Secretary of State* (1886) 14 Cal. 256, 271-272; *Secretary of State v. Moment* (1912) 40 I. A. 48, 51-52.

(c) *Chunil Lal v. Ram Kishan* (1888) 15 Cal. 460.

(d) *P. & O. S. N. Co. v. Secretary of State* (1861) 5 Bom. H. C., App. 1, approved in 40 I. A. 48, 51, *supra*; *Jehangir v. Secretary of State* (1903) 27 Bom. 189 [damages for defamation]; *Shivabhanjan v. Secretary of*

State (1904) 28 Bom. 314; *Ross v. Secretary of State* (1915) 39 Mad. 781; *McInerney v. Secretary of State* (1911) 38 Cal. 797; *Secretary of State v. Cockcroft* (1914) 39 Mad. 351 [damages for injury to person]. See also *Dhakjee v. The East India Co.* (1843) 2 Morley's Digest, 307; *Secretary of State v. Hari* (1882) 5 Mad. 273; *Vijaya v. Secretary of State* (1884) 7 Mad. 466; *Shivabhanjan v. Secretary of State* (1904) 28 Bom. 314.

Jurisdiction.—A suit against the Secretary of State for India can only be brought in the Court within the local limits of whose jurisdiction the cause of action has arisen. The words “dwell” or “reside” or “carry on business” or “personally work for gain” which occur in ss. 16, 19 and 20 of the Code and cl. 12 of the Letters Patent do not apply to the Secretary of State in Council (e).

Ss.
79, 80.

Information exhibited by Advocate General.—The power of the Advocate General to exhibit informations in the nature of actions at law or bills in equity was expressly declared by s. 111 of the East India Company Act, 1813 [53 Geo. 3, c. 155], and kept alive by s. 2 of the Government of India Act, 1833 [3 & 4 Will. 4, c. 85], and again by s. 1 of the Government of India Act, 1853 [16 & 17 Vict., c. 95], and by s. 29 of the Government of India Act, 1858 [21 & 22 Vict., c. 106], and now merged in s. 114 of the Government of India Act, 1915 [5 and 6 Geo. 5, c. 61]. As the Governor General in Council was precluded by s. 22 of the Indian Councils Act, 1861 [24 & 25 Vict., c. 67] from legislative interference with the provisions of any of the enactments above quoted, it was thought that s. 416 of the Code of 1882 [now sub-section (1) of the present section] in so far as it excluded informations exhibited by the Advocate General, did not comprehend a full and accurate statement of the law on the subject. Accordingly sub-section (2) was added into the present section, so that the existence of the Statute therein referred to may not be overlooked. As to the definition of “information,” see Wharton’s Law Lexicon, p. 437.

80. [S. 424.] No suit shall be instituted against the Secretary of State for India in Council,
Notice.
or against a public officer in respect of

any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

Changes in the section.—This section corresponds with s. 424 of the Code of 1882. The words “any act” have been substituted for the words “an act,” and the words “by such public officer” for the words “by him.” Both these alterations are verbal.

Provisions of this section imperative.—The language of this section is imperative and absolutely debars a Court from entertaining a suit instituted without compliance with its provisions. If the provisions of the section are not complied with, the only course open to the Court is to reject the plaint under O. 7, r. 11, cl. (d) [Code of 1882, s. 54, (c)] (f).

(e) *Doya Narain v. Secretary of State* (1886) 14 Cal. 256; (1912) 40 Cal. 308. *Rodricks v. Secretary of State* (f) *Bachchu v. Secretary of State* (1902) 25 All. 187.

S. 30.

Object of notice.—The object of the notice required by this section is to give the Secretary of State or the public officer an opportunity to reconsider his legal position and to make amends or settle the claim, if so advised, without litigation (*g*).

Sufficiency of notice.—A notice under this section is sufficient, if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed (*h*). Hence a notice is not invalid merely because it is given by only two out of three plaintiffs (*i*). It is essential, however, that the notice should state the names, descriptions, and places of residence of all the plaintiffs. Therefore, when a suit was brought by sixty-three plaintiffs, but the notice contained the names, descriptions and places of residence of only two of them, it was held that the notice was insufficient (*j*).

Waiver of notice.—It is competent to the Secretary of State to waive notice and he may be estopped by his conduct from pleading the want of notice at a late stage of the trial. Thus where objection was taken by the Secretary of State to the sufficiency of notice in his written statement, but there was no issue raised upon the point, nor was any objection taken by him at any stage of the trial in the Court of first instance, and it was another defendant who applied just before the trial began that an additional issue might be raised on that point, it was held that so far as the Secretary of State was concerned the notice was waived, and that it was not competent to the other defendant to raise the question (*k*).

Notice to Secretary of State.—Where a suit is proposed to be instituted against the Secretary of State for India in Council, notice to him under this section should be given in all cases, whether the act in respect of which the suit is to be brought purports to be done by him in his official capacity or not. The substitution of the words "by such public officer" for the words "by him" which occurred in the corresponding s. 424 of the Code of 1882 makes the point quite clear. The words of this section countenance no distinction based only on the class or character of the suit filed when it is filed against the Secretary of State (*l*). See notes below under the head "Notice in suit for injunction."

"Any act purporting to be done by such public officer in his official capacity."—These words were introduced into s. 424 of the Code of 1877 by Act 12 of 1879. The same words also occurred in s. 424 of the Code of 1882. The present section corresponds with s. 424 of the Code of 1882 except that "any" has been substituted for "an" and the words "such public officer" have been substituted for the word "him." According to the concise Oxford Dictionary, to "purport" in this context means to "be intended to seem". Applying this meaning, the words "any act purporting to be done by such public officer in his official capacity" mean any act "intended to seem" to be done by him in his official capacity (*m*). See notes below under the heads "Notice to public officer" and "Notice in suits for injunction".

Notice to public officer.—There is no doubt that notice must be given to the Secretary of State in all cases *whatever be the character of the suit* (*n*), but as

(*g*) *Secretary of State v. Perumal* (1901) 24 Mad. 279; *Shahbazade v. Ferguson* (1881) 7 Cal. 499; *Manindra v. Secretary of State* (1907) 5 Cal. L. J. 148; *Secretary of State v. Gulam Rasul* (1916) 40 Bom. 392, 396.
 (*h*) *Jehangir v. Secretary of State* (1908) 27 Bom. 189.
 (*i*) *Secretary of State v. Perumal* (1901) 24 Mad. 279.
 (*j*) *Bhola Nath v. Secretary of State* (1912) 40 Cal. 503.
 (*k*) *Manindra v. Secretary of State* (1907) 5 Cal.

C. J. 148; *Bhola Nath v. Secretary of State* (1912) 40 Cal. 503.
 (*l*) *Secretary of State v. Kalekhan* (1912) 37 Mad. 113; *Secretary of State v. Gulam Rasul* (1916) 40 Bom. 392, 396; *Secretary of State v. Rajlurki* (1898) 25 Cal. 239, 242.
 (*m*) *Koti Reddi v. Subbiah* (1918) 41 Mad. 792, 807, per Wells, C.J.
 (*n*) *Secretary of State v. Kalekhan* (1912) 37 Mad. 113.

regards notice to a public officer it is to be given to him in those cases only where the suit is "in respect of any act purporting to be done by such public officer in his official capacity". The decisions bearing on the words "in respect of any act purporting to be done by such public officer in his official capacity" may be divided into the following four groups:—

I. Since notice to a public officer is required to be given only in respect of any act purporting to be done by him *in his official capacity*, no notice is necessary where the act done by him is *not within his sphere of duties*. Thus where a public officer took possession of property which he had no authority to seize and was sued for trespass, it was held that the suit was not against him in his official capacity, but as a private individual, and therefore no notice was necessary (o). Similarly where the suit was one for damages for assault, the allegation being that the plaintiff, a sub-overseer, was assaulted by the defendant who was his superior officer in a fit of anger, it was held that the act complained of was not an act purporting to be done by the defendant in his official capacity, and therefore no notice was necessary (p). On the same principle where a suit was brought to recover money due on a promissory note from a minor under the Court of Wards, and the Collector was appointed guardian ad litem of the minor, it was held that no notice was necessary as the Collector was on the record merely for the protection of the minor's interests (q).

II. Since notice to a public officer is necessary only in respect of any act purporting to be done by him in his official capacity, it follows that the only class of suits in which it is necessary to give notice to a public officer is where the suit is founded upon *tort*, in other words, where the suit is in respect of a wrong committed by him in the discharge of his official duties, and that no notice is necessary if the suit is *founded upon contract* (r), or *any other cause of action* (s).

Illustrations.

(1) *Suit founded upon contract*.—A sues B, a public officer, to recover the price of certain timber supplied by him to B. No notice is necessary, for the suit is not in respect of any tort or wrong done by B, but is one for damages for breach of a contract: *Rajmal v. Hanmant* (1896) 20 Bom. 697.

(2) *Suit founded upon a contract implied in law*.—A suit against a public officer for the recovery of money paid to him under protest is one sounding substantially in tort, though in form it is one for money had and received. Notice, therefore, of such a suit must be given before the suit is instituted: *Cecil Gray v. The Cantonment Committee of Poona* (1910) 34 Bom. 583. See Indian Contract Act, s. 72, ill. (b).

(3) *Suit founded upon other causes of action*.—No notice is necessary in a suit against the Official Trustee to determine the rights of beneficiaries to trust funds in his hands. The reason is that such a suit is not in respect of any wrong or tort committed by the Official Trustee in the discharge of his official duties: *Shahebzadee v. Ferguson* (1881) 7 Cal. 499.

III. A suit may be one founded upon tort as stated in Rule II above, but the wrongful act complained of may have been done inadvertently or it may have

(o) *Ganoda v. Nalini* (1909) 36 Cal. 28.

(p) *Mumtaz Hussain v. Lewis* (1910) 7 All. L. J. 301.

(q) *Anantharaman v. Ramasami* (1888) 11 Mad. 317.

(r) *Bhau v. Nana* (1889) 13 Bom. 342; *Sardar Singji v. Ganpat* (1890) 14 Bom. 895;

Rajmal v. Hanmant (1896) 20 Bom. 697.

(s) *Shahebzadee v. Ferguson* (1881) 7 Cal. 499.

S. 80, been done *mala fide*, that is maliciously or dishonestly. If the wrong is done *inadvertently*, there is no doubt that notice is necessary under this section. But there is a conflict of decisions as to whether notice is necessary under this section when the public officer acts *mala fide*, that is, maliciously or dishonestly, in the discharge of his duties, it being held in some cases that it is not (t), while in others that it is (u). The cases in which it is held that notice is not necessary proceed on the ground that an act done *mala fide* by a public officer cannot be said to be an "act purporting to be done by such public officer in his official capacity" within the meaning of this section. On the other hand, the cases in which it has been held that notice is necessary proceed on the ground that the section makes no distinction between acts done *bona fide* and acts done *mala fide* and that notice is necessary in every case of tort done by a public officer provided it was in the discharge of his duties. Thus where a suit was brought against a police officer, the action complained of being that he searched the house of the plaintiff, dragged him to the thana, and detained and kept him in confinement for several hours maliciously and without cause, it was held that the officer having acted *illegally and in bad faith* could not be said to have acted in *his capacity as a public officer* and therefore no notice was necessary (v). Similarly, where a suit was brought against a District Magistrate and two officers of Police for conspiracy and malicious arrest and search, it was held that the suit was one in which the public officer was sued in respect of an act *done in bad faith* and therefore no notice under this section was required (w). On the other hand, in *Jogendranath Roy v. Price* (x) where the plaintiff sued a District Magistrate for damages for illegal and malicious arrest under a warrant, it was held that though the act was said to be done maliciously, notice was required to be given under this section. The Court said, "The section does not seem to us to warrant the drawing of a distinction between acts of this kind done *inadvertently* or otherwise." Following the above decision, it was held by the High Court of Allahabad in a suit against a Police Officer to recover certain books seized by him in a search, the seizure of which was denied, that notice was necessary under this section (y). In a recent Madras case (z), A brought a suit against B and attached before judgment certain wood belonging to B. Thereafter the village munsif sold the said wood for arrears of revenue due from B though there was no necessity to sell the whole, and after retaining the amount due for arrears of revenue handed over the balance of the sale proceeds to B, although he had knowledge of the attachment. Thereupon A brought a suit against the village munsif for damages, alleging that the munsif colluded with B and paid the balance of the sale-proceeds to him. The Court found that the munsif was aware of the attachment and that he dishonestly and fraudulently paid over the balance of the sale-proceeds to B. On the question of notice under this section, it was held by a Full Bench of the Madras High Court that the munsif was entitled to notice under this section, although he acted *mala fide* in the discharge of his duties.

(t) *Shahabzadee v. Fergusson* (1881) 7 Cal. 499, per Cunningham, J.; *Muhammad v. Panna Lal* (1904) 26 All. 220, per Benarji, J.; *Raghubans Sahai v. Phool Kumari* (1905) 32 Cal. 1180, per Mukerjee, J.; *Peary Mohun Das v. Weston* (1906) 16 Cal. W. N. 145, per Fletcher, J., reversed on merits on appeal; *Ranchhod v. The Municipality of Dakor* (1884) 8 Bom. 421.

(u) *Jogendranath Roy v. Price* (1897) 24 Cal. 584; *Koti Reddi v. Subbiah* (1918) 41 Mad. 792 (F.B.); *The Collector of Bijoor v. Munwar* (1880) 3 All. 20; *Bhatwar Mall v. Abdul Latif* (1907) 29 All. 567; *Bachhu Singh v. Jaffer Beg* (1915) 13 All. L. J.

788; *Jugul Kishore v. Jugul Kishore* (1911) 33 All. 540; *Cecil Gray v. The Cantonment Committee of Poona* (1910) 34 Bom. 583; *Chhaganlal v. The Collector of Kaira* (1910) 35 Bom. 42, per Chaudavarkar, J.; *Vadapalli v. Taragunakata* (1901) Madras High Court, Second Appeal No. 1545 of 1901.

(v) *Muhammad v. Panna Lal* (1904) 26 All. 220.

(w) *Peary Mohan Das v. Weston* (1906) 16 Cal. W. N. 145.

(x) (1997) 24 Cal. 584.

(y) *Bhatwar Mall v. Abdul Latif* (1907) 29 All. 567.

(z) *Koti Reddi v. Subbiah* (1918) 41 Mad. 792.

IV. Where the suit is one founded upon tort, notice must be given whether the relief sought is for damages or merely for a declaration that the act complained of is against the provisions of law and therefore illegal (a).

S. 80.

Notice in suits for injunction.—Where a suit is brought against a public officer for an injunction to restrain him from doing an act threatened to be done by him, no notice is necessary to be given under this section. The reason is that this section applies where a relief is sought in respect of an act *done* by a public officer, and not where relief is sought in respect of an act not yet done, but threatened to be done (b). It must, however, be noted that the words “act purporting to be done” relate to a public officer and not to the *Secretary of State*. Therefore, notice must be given to the Secretary of State, even though the suit against him may be one for an injunction (c), unless the circumstances of the case are such that if notice has to be given and the plaintiff has to wait for two months, irreparable injury may be done to him in the meantime (d). Following this view, it has been held that where in a case of dispute between the plaintiff and the Government as to the title of certain land the plaintiff gave notice to the Secretary of State of an intended suit for a declaration of title as required by this section, but *during the currency of the notice* the Government threatened to demolish the structure on the land, the plaintiff was entitled to institute a suit even *before the expiry of two months from the date of the notice* for a declaration of title and for an injunction restraining the Government from demolishing the structure. The Court said: “It is small gain to a private person to enact that he may have redress against a defendant after two months’ notice if, during the currency of the two months, the defendant is allowed to make redress impossible. The right of suit, which is expressly granted by the Legislature, cannot, in reason, be deferred until its exercise has become illusory” (e).

The mere fact that the plaintiff sues for an injunction and in the alternative for damages is no ground for requiring a notice to be given if the necessity really exists for an injunction (f).

Death of complainant after notice but before suit.—Notice is given by A under this section to the Secretary of State of a proposed suit. A dies before the institution of the suit. The notice by A does not enure for the benefit of his legal representative, and he must give a fresh notice under this section before instituting the suit (g).

Amendment of plaint.—Where notice of a proposed suit is once given, it is not necessary to give a fresh notice of two months if the plaint has to be amended owing to discovery of facts not within the plaintiff’s knowledge at the time of the institution of the suit (h). But no amendment will be allowed if the effect of the amendment will be to convert the suit into another of a different character, e.g., a suit based on negligence into one based on nuisance. In such a case a fresh suit must be brought after giving fresh notice as required by this section (i).

(a) *Chhaganlal v. The Collector of Kaira* (1910) 35 Bom. 42.

(b) *Ganoda Sundary v. Nakini* (1909) 36 Cal. 28, 39.

(c) *Secretary of State v. Kalekhan* (1912) 37 Mad. 113. A fortiori where the case is one in which no injunction can be claimed at all against the Secretary of State; *Hari Pandurang v. Secretary of State* (1903) 27 Bom. 424, 450.

(d) *Secretary of State v. Gajanan* (1911) 35 Bom.

362; *Sakharam v. Secretary of State* (1912) 14 Bom. L. R. 353.

(e) *Secretary of State for India v. Gulam Rasul* (1916) 40 Bom. 392.

(f) *Nagninal v. Official Assignee* (1912) 14 Bom. L. R. 1148, 1153.

(g) *Bachchu v. Secretary of State* (1902) 25 All. 187.

(h) *Eera v. Secretary of State* (1903) 30 Cal. 36, 72.

(i) *McInerny v. Secretary of State* (1911) 38 Cal. 797.

Ss.
80-82.

Notice to Collector.—A Collector is entitled to notice under this section of a suit for damages in respect of an act done by him in his official capacity as agent of the Court of Wards; but he is not entitled to such notice if he is sued or joined as a party, not by reason of any act purporting to be done by him in his official capacity but merely for the protection of a minor's title (*j*).

Notice to Cantonment Committee.—A Cantonment Committee constituted under the Indian Cantonments Act, 1889, is a "public officer" within the meaning of this section (*k*).

Notice to Official Assignee.—No notice is necessary to the Official Assignee in a suit to restrain him by an injunction from selling goods claimed by the plaintiff to belong to him (*l*).

Limitation.—In computing the period of limitation prescribed for a suit under this section, the period of the notice should be excluded (*m*).

Place of suing.—See notes to s. 79, "Jurisdiction," on p. 209 above.

81. [Ss. 427, 428.] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

Exemption from arrest and personal appearance.

- (a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and
- (b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

"Otherwise than in execution of a decree."—The object of clause (a) is to exempt a defendant who is a public officer from mesne arrest and his property from mesne attachment. See O. 27, r. 8.

82. [s. 429.] (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

(j) *Anantharaman v. Ramasami* (1888) 11 Mad. 817; *Bhau v. Nana* (1889) 13 Bom. 343.
(k) *Ocell Gray v. The Cantonment Committee of Poona* (1910) 84 Bom. 588.
(l) *Nagindal v. Official Assignee* (1912) 14 Bom.

L. R. 1148.
(m) Limitation Act, 1908, s. 15 (2); *North-Western Railway v. Ram Dhanish Lal* (1917) P. R. no. 52, p. 187.

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND
NATIVE RULERS.

Ss.
83, 84.

83. [S. 430.] (1) Alien enemies residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the Courts of British India as if they were subjects of His Majesty.

When aliens may sue.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of subsection (2), be deemed to be an alien enemy residing in a foreign country.

Alien enemy.—As to who are alien enemies, see the undermentioned case (n).

Alien enemy residing in British India: with permission of Government of India.—A filed a petition in the Allahabad High Court for judicial separation against her husband. The parties were Germans, and the petition was filed while England was at war with Germany. At the time of filing the petition, A was residing in Lucknow apparently with the permission of the Government of India, while her husband was in Germany. After filing the petition, A applied for an order directing the summons together with a copy of the petition to be sent to the Probate, Divorce and Admiralty Division of the High Court in England for transmission to the Foreign Office for service upon the respondent. The Court granted the application (o).

Limitation.—Where the right of alien enemies to sue is suspended by an order of the Government, the period during which the right is suspended is not to be excluded from the time prescribed by the Limitation Act for the suit (p).

84. [S. 431.] (1) A foreign State may sue in any Court of British India:

When foreign States may sue.

Provided that such State has been recognised by His Majesty or by the Governor-General in Council.

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(n) *Janson v. Driefontein Consolidated Mines, Ltd.* [1902] App. Cas. 484, p. 505. (p) *Deutsch Asiatische Bank v. Hira Lall* (1919) 46 Cal. 526.
(o) *Angelina v. Joseph* (1917) 39 All. 377.

Ss. (2) Every Court shall take judicial notice of the fact
84, 85. that a foreign State has or has not been recognized by His Majesty or by the Governor-General in Council.

Proviso (2) to sub-section (1).—The second proviso to the corresponding s. 431, C. P. C., 1882, ran as follows:—

“Provided that the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.”

The language of that proviso was liable to be construed as conferring upon the head of a foreign State a general power to litigate in respect of the private rights of his subjects. Such, however, was not the object, and the language has accordingly been modified to make it clear that the object of litigation by a foreign State must be the enforcement of a private right vested in the head of the State or in an officer of the State as such.

Private right vested in the head of a State.—That is, those private rights of a State that must be enforced through a Court of Justice as distinguished from its *political* rights (g).

85. [S. 432.] (1) Persons specially appointed by order of the Government at the request of any Sovereign, Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

Recognized agents specially appointed under this section.—This section is an enabling section. It enables a Sovereign Prince or Ruling Chief to prosecute or defend suits through recognized agents *specially* appointed in that behalf; it does

not prevent the institution of a suit by a Sovereign Prince in his own name or through a recognized agent appointed under O. 3, r. 2 [Code of 1882, s. 37] (r),

Ss,
85, 86.

A plaint in a suit instituted on behalf of a Ruling Chief is signed by A.B. At the time of signing the plaint A.B. was not *especially* appointed to sue on behalf of the Chief under this section. The plaint is nevertheless valid, if A.B. is subsequently appointed to sue on behalf of the Chief, and if the appointment is made before the expiration of the period of limitation prescribed for the suit (s).

A Political Agent not specially appointed under this section cannot sue on behalf of a Prince (t).

Discovery.—A foreign State is not exempt from giving discovery (u).

86. [S. 433.] (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

- (a) has instituted a suit in the Court against the person desiring to sue him, or
- (b) by himself or another trades within the local limits of the jurisdiction of the Court, or
- (c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(r) *Maharaja of Bharatpur v. Kacheru* (1897) 19 All. 510; *Beer Chunder v. Ishan Chunder* (1884) 10 Cal. 186.
(s) *Maharaja of Rewah v. Swami Saran* (1903) 25 All. 685.

(t) *Venkatrao v. Madhavrao* (1887) 11 Bom. 53.
(u) *United States of America v. Wagner* (1867) 2 Ch. App. 590; *Republic of Peru v. Waguslin* (1875) L. R. 20 Eq. 140.

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(4) The Governor-General in Council may, by notification in the Gazette of India, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing subsections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

Consent shall not be given "unless it appears to the Government that."—The words "it appears to the Government that" have been added in subsection (2) to make it clear that the decision of the Government is final and not open to question by the Court. The contrary was assumed in the undermentioned cases (v).

Consent must be obtained before institution of suit.—This section provides that a Sovereign Prince or Ruling Chief may be sued in any competent Court with the consent of the Governor-General in Council. Such consent must be obtained before the institution of the suit; a consent given after the institution of the suit is not a sufficient consent under this section. If the consent is not obtained before the institution of the suit the Court should dismiss the suit, or, perhaps, allow the plaintiff to withdraw it with liberty to bring a fresh suit under O. 23, r. 1 [Code of 1882, s. 373] (w).

Waiver of objection to want of consent.—It has been seen in the notes to s. 21 that where a Court has *no jurisdiction at all* to entertain a suit, the objection to its jurisdiction may be taken at any stage of the suit even though the defendant may have waived the objection: the reason is that a defect in the jurisdiction *cannot be cured by waiver*. But if the case is one of *irregular exercise of jurisdiction*, the defect may be cured by waiver on the part of the defendant. If a suit is instituted against a Sovereign Prince without the consent of the Governor-General in Council and the plaintiff is admitted, the case is one of *irregular exercise of jurisdiction*, and if the defendant fails to object to the institution of the suit in his written statement, and does not object until the suit is ripe for hearing, he will be deemed to have waived the objection and will be precluded from taking the objection at a later stage of the suit (x). It was so held by the High Court of Bombay after an exhaustive review of the authorities on the subject. This view has been dissented from by the High Court of Madras on the ground that the recognition of cases of waiver, as excepted from the ordinary provisions of International Law as understood in England, cannot be imported into the clear language of the Indian Code (y). The fact that a Sovereign Prince chooses to waive his privilege in one suit does not preclude him from pleading it in another suit (z).

(v) *Beer Chunder v. Raj Coomar Nobodeep Chunder* (1883) 9 Cal. 535; *Maharaja of Jaipur v. Lajpt Sahai* (1907) 29 All. 379.

(w) *Chandulal v. Awad bin Umar* (1897) 21 Bom. 351, 355-56.

(x) *Chandulal v. Awad bin Umar* (1897) 21 Bom. 351. As to what amounts to a submission

to jurisdiction, see *Miguel v. Sultan of Johore* [1893] 1 Q. B. 149.

(y) *Narayana v. The Cochin Sircar* (1915) 39 Mad. 661.

(z) *Beer Chunder v. Raj Coomar Nobodeep Chunder* (1883) 9 Cal. 535.

Money charged on immoveable property.—Unless maintenance has been made a charge upon immoveable property, a mere claim for maintenance is not a claim for money charged on immoveable property within the meaning of sub-section (2), cl. (c) (a).

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Suit against Ruling Chief in his private capacity.—The provision of this section apply whether the suit is brought against a Ruling Chief in his Sovereign capacity or in his private capacity such as a trustee of a temple in British India (b).

Sovereign Prince.—The Maharaja of Hill Tipperah is a Sovereign Prince within the meaning of this section, in that the Tipperah State governs itself without dependence on any foreign power. "It makes and administers its own laws, and the Maharaja admittedly exercise the power of life and limb within his own territory." Its acknowledgment of the British Government as the paramount power, and the nazar paid on the recognition by that Government of succeeding Maharajahs, do not take away from it the status of a Sovereign State (c).

Ruling Chief.—The Desai of Patadi is a Ruling Chief within the meaning of this section (d). The Kurundwad Jahageerdars are also Ruling Chiefs (e).

Sub-section (4).—For notifications issued under this sub-section, see General Statutory Rules and Orders, Vol. I, pp. 625-638.

Style of Princes and
Chiefs as parties to suits.

87. [S. 434.] A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section the Governor-General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

INTERPLEADER.

88. [S. 470.] Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person who claims no interest therein other than for charges or costs, and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself :

Where interpleader suit
may be instituted.

(a) 9 Cal. 535, *supra*.

(b) *Narayana v. The Cochin Steamer* (1913) 38 Mad. 635, *affmd.* (1915) 39 Mad. 661.

(c) *Beer Chunder v. Raj Coomar Nobodsep Chun-*

der (1883) 9 Cal. 535.

(d) *Kambhai v. Himatsinghji* (1884) 8 Bom. 415.

(e) *Krishnaji v. Secretary of State* (1918) 21 Bom. L. R. 376.

- S. 88. Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

English Law.—Compare R. S. C., O. 57, rr. 1, 2.

Changes in the section.—This section corresponds with s. 470 of the Code of 1882 except in the following particulars:—

- (1) The words “the same debt, sum of money or other property, moveable or immoveable” have been substituted for the words “the same payment or property.”
- (2) The words “who claims no interest therein other than for charges or costs” have been borrowed from R. S. C., O. 57, r. 2, and have been substituted for the words “whose only interest therein is that of a mere stakeholder.”

Procedure.—As to procedure in interpleader suits, see O. 35 below.

What is an interpleader suit.—An interpleader suit is one in which the real dispute is between the defendants only and the defendants *interplead*, that is to say, plead against each other instead of pleading against the plaintiff as in an ordinary suit. In every interpleader suit there must be some debt or sum of money or other property in dispute between the defendants only, and the plaintiff must be a person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to such of the defendants as may be declared by the Court to be entitled to it. Thus suppose certain property is claimed by *A* as well as by *B*, and *X* is in possession of that property and claims no interest in the property himself and is ready and willing to deliver it to such party as may be declared by the Court to be the rightful owner of it. *X* as plaintiff may institute an interpleader suit against *A* and *B* as defendants. In such a case *X* will, as a rule, be dismissed from the suit at the first hearing after his costs are provided for, and *A* and *B* will be left to interplead and to fight the matter out between themselves exactly as if one of them was plaintiff and the other was defendant (O. 35, r. 4). But before the plaintiff is dismissed from the suit, he must deposit the property in dispute in Court (O. 35, r. 2).

Who claims no interest other than for charges or costs.—A railway company which claims no interest in goods in its possession other than a lien on the goods for wharfage, demurrage and freight, may institute an interpleader suit, where the goods are claimed by two persons adversely to each other (*f*).

A holds in his hands a sum of Rs. 5,000 which is claimed by *B* and *C* adversely to each other. *A* institutes an interpleader suit against *B* and *C*. It is found at the hearing that *A* had entered into an agreement with *B* before the institution of the suit that if *B* succeeded in the suit he should accept from *A* Rs. 4,000 only in full satisfaction of his claim. The suit must be dismissed, for *A* has by virtue of the agreement, an interest in the *subject-matter* of the suit (*g*).

A suit must not be regarded as an interpleader suit and subject therefore to the provisions of this section, merely because *one* of the reliefs claimed by the plaintiff requires the defendants to interplead together concerning certain claims. The Court must have regard to all the prayers of the plaint to determine the exact nature of the suit (*h*).

(*f*) *Bombay and Baroda Ry. Co. v. Sassoon* (1898) 18 Bom. 281; *Allenborough v. St. Katharine's Docks* (1878) 3 C. P. D. 450. (*g*) *Murrietta v. South American Co.* [1898] 62 L. J. Q. B. 896.
(*h*) *Juggannath v. Tulka Kera* (1908) 82 Bom. 592.

PART V.

Special Proceedings.

ARBITRATION.

89. [*New.*] (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second Schedule.

Arbitration.

(2) The provisions of the second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

Arbitration.—The provisions of the Code of 1882 relating to arbitration have been transferred with certain modifications to a separate Schedule “in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act.” See Sch. II.

Indian Arbitration Act, IX of 1899—Application of the Act.—The Act came into force on the first day of July 1899. It relates to “arbitration by agreement without the intervention of a Court of Justice,” that is to say, to private arbitrations only. Sec. 3 of the Act provides that sections 523 to 526 of the Code of 1882 [now paras. 17, 19 and 20 of Sch. II] shall not apply to any submission or arbitration to which the Act applies. The question then arises, to what cases does the Act apply? Sec. 2 of the Act provides that the Act “shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town.” The terms of that section show that two conditions must be present before the provisions of the Arbitration Act can be applied to an agreement to refer matters in dispute to arbitration, namely, (1) that there must be no suit pending in respect of those matters (i) [note the words “could be instituted”], and (2) that the case must be one in respect of which if either party wanted to bring a suit the suit could be instituted in a Presidency town. It is only in those cases that the Arbitration Act applies. In other cases the provisions of paras. 17, 19 and 20 of Sch. II apply.

Sec. 2 of the Arbitration Act empowers the Local Government, with the previous sanction of the Governor-General in Council, to declare the Act applicable to local areas other than Presidency towns as if they were Presidency towns.

“Any other law for the time being in force.”—This, it has been held, has reference *inter alia* to the provisions of O. 23, r. 3: see notes to O. 23, r. 3, “Adjustment: submission and award.”

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The expression "any other law" has also reference to the rule of law which enables a party to institute a regular suit on an award. Thus a "submission" under the Arbitration Act [s. 4] means a *written* agreement to submit differences to arbitration. If the agreement is not in writing, and an award is made, a suit, it is submitted, may be brought on the award. As to the form of a suit on an award, see Sch. I, App. A form No. 10. See also notes to Sch. II, para. 20, "This paragraph is no bar to a regular suit to enforce an award."

In this connection may be noted the provisions of s. 30 of the Specific Relief Act of 1877, by which it is enacted that the provisions of Chapter II of the Act relating to the specific performance of contracts shall *mutatis mutandis* apply to awards. See Pollock and Mulla's Indian Contract and Specific Relief Acts, notes to s. 30 of the latter Act.

SPECIAL CASE.

90. [New.] Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

Power to state case for opinion of Court.

See O. 36 below, of which the rules correspond with ss. 527-531 of the Code of 1882.

Re-opening of case.—It is settled practice that where a special case is stated by consent, it can only be re-opened by mutual consent (j).

SUITS RELATING TO PUBLIC MATTERS.

91. [New.] (1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

Public nuisances.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

This section is new. It creates a right of action where there was none before.

Remedies for a public nuisance.—Nuisances are of two kinds—(1) public and (2) private.

A public nuisance is an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right [Indian Penal Code, s. 268].

Where a person commits a public nuisance—

- (a) he is liable to criminal prosecution under the Indian Penal Code ;
- (b) he may be proceeded against under this section ;
- (c) he is liable to damages in a suit at the instance of a private individual who suffers special damage by reason of the nuisance, that is, damage beyond what is suffered by him in common with all other persons affected by the nuisance (k).

These remedies, it is conceived, are concurrent. The institution of a criminal prosecution does not bar a *sui* under this section (l), nor does the institution of a suit under this section bar a criminal prosecution, though cases can be conceived where the Advocate-General may, in the exercise of his discretion, refuse his consent under this section where a criminal prosecution is pending in respect of the same act or omission.

Illustrations.—A keeps his horses and waggons standing for an unreasonable time in the highway.

(a) This is a public nuisance for which a criminal prosecution may be instituted against A.

(b) Further, a suit may be instituted against A under the present section by the Advocate-General, or by two or more persons with the consent in writing of the Advocate-General, though no special damage has been caused, for an order requiring A to abate the nuisance, and for an injunction restraining him from continuing the nuisance. If the nuisance is repeated or continued, notwithstanding the injunction, he is liable for contempt where the decree granting the injunction is passed by a High Court (m), or he may be proceeded against under O. 21, r. 32, below, or he may be punished with imprisonment or fine or both under s. 291 of the Penal Code.

(c) If the horses and waggons are kept standing opposite a man's house, so that the access of customers is obstructed, the house is darkened, and the people in it are annoyed by bad smells, a suit may be brought against A by the occupiers for damages, the damage so caused being sufficiently *special* to entitle them to maintain the action (n). The mere fact that a suit has been instituted under this section against A by the Advocate-General at the relation of the occupiers, or by the occupiers themselves as plaintiffs with the consent of the Advocate-General, will not preclude the occupiers from maintaining a *private action* against A for the *special damage* caused to them. *Quære* whether they can claim damages for the special damage in a suit brought under this section? It is conceived they cannot. It is submitted that the words "such other relief as may be appropriate" do not include such damages. In England, however, persons who have suffered special damage from a public nuisance may join the Attorney-General as a co-plaintiff in a suit brought by the Attorney-General at their relation, and the Attorney-General may claim an injunction, and the persons specially damaged by the nuisance may claim damages (o). The present section does not warrant such a procedure in India. The suit contemplated by this section is a suit of a

(k) *Hubert v. Groves* (1794) 1 Esp. 148; *Winterbottom v. Lord Derby* (1867) L. R. 2 Ex. 316; *Salku v. Ibrahim* (1878) 2 Bom. 457; *Bhawan Singh v. Narotam Singh* (1909) 31 All. 444.

(l) Compare *Attorney-General v. Proprietor of the Bradford Canal* (1866) L. R. Eq. 71.

Joyce on Injunction, 130.

(m) See *Kochappa v. Sachi Devi* (1903) 26 Mad. 494.

(n) *Benjamin v. Storr* (1874) L. R. 9 C. P. 400; *Poorobashi Pal v. Bhobun Chunder Dev* (1874) 21 W. R. 408.

(o) See, for instance, *Attorney General v. Logan* [1891] 2 Q. B. 100..

- S. 91.** public nature, exclusively brought to vindicate a *public* right. The section finds its place in the Part headed "*Special Proceedings*" under the division "*Suits relating to public matters,*" and this affords a sufficient indication of the object of the section.

Nature of proceedings under this section.—Proceedings for a public nuisance in England were formerly commenced by an *Information* filed by the Attorney-General in the High Court of Chancery. They are now instituted by action in the High Court of Justice [see R. S. C., O. 1, r. 1]. The action may be brought like the *Information*—

- (1) by the Attorney-General acting *ex officio*, or
- (2) by the Attorney-General at the relation of a private individual.

Under the present section, a suit for a public nuisance may be instituted—

- (1) by the Advocate-General acting *ex officio*, or
- (2) by the Advocate-General at the instance of relators, or
- (3) by two or more persons having obtained the consent in writing of the Advocate-General.

Difference between suit by Advocate-General acting *ex officio* and suit by him at the relation of private individuals.—Except for the purposes of costs, there is no difference between an *ex officio* suit and a suit at the relation of private individuals. In both cases the Sovereign, as *parens patriae*, sues by the Advocate-General (*p*). "When the Attorney-General proceeds at the relation of a private person or a corporation he takes the proceeding as representing the Crown, and the Crown through the Attorney-General is really a party to the litigation. It is quite true that when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as the relator, and to make him responsible for the costs but I do not think that this practice in any sense makes the relator a party to the proceedings, although he is responsible for the costs, any more than (to take a converse case) an infant, who brings an action, is responsible for the costs of it. If I am right, it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant, but of the Crown" (*q*). "When once the matter is in the hands of the Attorney-General it becomes substantially a public proceeding, in which the Attorney-General, if there be no relator, becomes as prosecutor responsible for the costs, while if a relator is introduced, the responsibility for costs is upon the latter" (*r*).

Relator's interest in the suit.—"A relator need not have a personal interest in the matter except as one of the public; he need not, in fact, be himself damaged at all" (*s*).

Interest of persons suing with consent of Advocate-General.—Persons suing for a public nuisance with the consent of the Advocate-General under the section need not have any personal interest in the matter of the suit, except as members of the public. They are entitled to sue under this section, "though," to use the words of the section, "no special damage has been caused [to them]." In the other words, they need not have a cause of action in themselves.

(*p*) *Attorney-General v. Cockermouth Local Board* (1874) L. R. 18 Eq. 172, *per Jessel, M. R.* | 106 *per* Vaughan Williams, J.
 (*q*) *Attorney-General v. Logan* (1891) 2 Q. B. 100, | (*r*) *Ib.*, p. 103, *per* Wiles, J.
 (*s*) *Ib.*

Injunction.—The following are some of the leading principles by which the Courts are guided in granting injunctions:—

1. The injury complained of must be either irreparable or continuous (*t*). The remedy by way of injunction is therefore not appropriate for damage which is in its nature temporary and intermittent (*u*), or is accidental and occasional (*v*), or for an interference with legal rights which is trifling in amount and effect (*w*).
2. "Apprehension of future mischief from something in itself lawful and capable of being done without creating a nuisance is no ground for an injunction" (*x*). "There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial" (*y*).
3. Though no substantial damage is proved, the Court may grant an injunction if the defendants claim the right to continue doing that which the Court has held they are not entitled to do (*z*).
4. Where an illegal act is committed which in its nature tends to the injury of the public, an injunction will be granted to restrain the act without proof of actual injury to the public (*a*).
5. Where the plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to enquire in what way the defendant can best remove it; the plaintiff is entitled to an injunction at once, and it is the duty of the defendant to find his own way out of the difficulty whatever inconvenience or expense it may put him to. But where the difficulty of removing the nuisance is considerable, the Court may suspend the operation of the injunction for a time (*b*).
6. No length of time can legalize a public nuisance. Though twelve years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance apart from the length of time for which it may have continued (*c*).
7. A public nuisance is not excused on the ground that it causes some convenience or advantage [Indian Penal Code, s. 268].

"Declaration."—A suit may be instituted under this section by two or more Mahomedans for a declaration that they are entitled to carry *tabuts* in procession along a public road for immersion in the sea, against persons who obstruct them in doing so, and for an injunction restraining them from interfering in the exercise of their right (*d*).

"Other relief."—The removal of a public nuisance may be directed by the Court under this part of the section.

(*t*) *Attorney-General v. Cambridge Gas Consumer Co.* (1868) L. R. 4 Ch. 71, 81.

(*u*) *Attorney-General v. Sheffield Gas Consumers Co.* (1853) 3 D. M. G. 304; *Attorney-General v. Cambridge Gas Consumers Co.* (1868) L. R. 4 Ch. 71.

(*v*) *Cooke v. Forbes* (1867) L. R. 5 Eq. 166.

(*w*) *Gaunt v. Fynney* (1872) L. R. 8 Ch. 8 Cr.; *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705.

(*x*) *Attorney-General v. Corporation of Manchester* [1898] 2 Ch. 87 (a leading case on injunctions in *quia timet* action).

(*y*) *Fletcher v. Bealey* (1884) 28 Ch. 688 at p. 698.

(*z*) *Attorney-General v. Action Local Board* (1882) 22 Ch. D. 221.

(*a*) *Attorney-General v. Shrewsbury Bridge Co.* (1882) 21 C. D. 752.

(*b*) *Attorney-General v. Colney Lunatic Asylum* (1868) L. R. 4 Ch. 146.

(*c*) *Municipal Commissioners of the Suburbs of Calcutta v. Mahomed Ali* (1871) 7 B. L. R. 499; *Weld v. Hornby* (1806) 7 East 195 199.

(*d*) See *Salku v. Ibrahim* (1878) 2 Bom. 457; *Kandasami v. Subroya* (1909) 2 Mad. 472.

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91, 92.

Sub-section (a).—The Code of Criminal Procedure contains provisions for the removal of public nuisance by summary proceedings before a Magistrate (e). It has been held by the High Court of Calcutta that where special damage is caused to a private individual by a public nuisance, he has a right of suit against the person causing the nuisance for a removal of the nuisance, and a Civil Court may pass a decree for removing the nuisance, notwithstanding that an order for the like purpose might be made by a Magistrate (f). This right is saved by sub-section (2).

Instances of public nuisance—"Public or common nuisance affect the King's subjects at large or some considerable portion of them, such as the inhabitants of a town; and the person therein offending is liable to criminal prosecution. A private nuisance affects only one person out of a determinate number of persons, and is the ground of civil proceedings only" (g). Building over any part of a public street is a public nuisance, for such act *must necessarily cause obstruction* to persons who may have occasion to use their public right over the part encroached upon. The public is entitled to the full width of the public street, however wide it may be, and whoever appropriates any part of the street by building over it infringes the right of the public *quoad* the part built over (h). An obstruction is not the less a nuisance, because it is on a part of the street not commonly used, or otherwise leaves room enough for the ordinary amount of traffic (i). On the other hand, it has been held by the High Court of Calcutta, as regards tidal navigable rivers, that it is not any encroachment, however slight, that would constitute a public nuisance. "It seems to us rather," the Court said, "that there must be some evidence that such encroachment *causes* one of the results specified in section 268" [of the Indian Penal Code] (j).

Acts which merely offend the sentiments of a class do not amount to a public nuisance. In India it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. Upon this principle it has been held that the placing of a Mahomedan symbol in the neighbourhood of a Hindu temple is not a public nuisance, though likely to cause annoyance to Hindus (k). Similarly, it is not a public nuisance to expose on the verandah of a house meat cut up for a dinner, though it may annoy the feelings of Jains frequenting a temple close by the house (l). But wilfully slaughtering cattle in a public street so that the groans and blood of the animals could be heard and seen by the passers-by is a public nuisance, for it must necessarily cause annoyance to every one of the passers-by Hindu, European Mahomedan or other, who was not utterly devoid, not merely of refinement, but also of all proper feelings (m).

92. [S. 539.] (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the

Public charities.

(e) As to conditional orders by Magistrates for the removal of nuisances, see s. 133 to 143 of the Criminal Procedure Code. As to the power of a Magistrate to issue orders in urgent cases where a speedy remedy is desirable, see s. 144 of the same Code.

(f) *Raj Koomar Singh v. Sahabzada* (1878) 3 Cal. 20. See also *Jina Ranchod v. Jodha Ghella* (1868) 1 B. H. C., A. C. 1, which appears to be imperfectly reported.

(g) Pollock on Torts, 7th ed., p. 393.

(h) *Queen-Emress v. Virappa Chetti* (1897) 20 Mad. 438.

(i) *Turner v. Ringwood Highway Board* (1870) L. R. 9 Eq. 418.

(j) *Jugal Das v. Queen-Emress* (1893) 20 Cal. 665, dissenting from *dicta* to the contrary in *Umesh Chandra Kar, In the matter of* (1887) 14 Cal. 656.

(k) *Muttumira v. Queen-Emress* (1884) 7 Mad. 590.

(l) *Queen-Emress v. Byramji* (1888) 12 Bom. 437.

(m) *Queen-Emress v. Zakhuddin* (1888) 10 All. 4.

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Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

- (a) removing any trustee ;
- (b) appointing a new trustee ;
- (c) vesting any property in a trustee ;
- (d) directing accounts and inquiries ;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ;
- (g) settling a scheme ; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

Changes introduced by the section.—This section corresponds with s. 539 of the Code of 1882 except in the following particulars :

1. The words, “public purposes of a charitable or religious nature,” have been substituted for the words, “public, charitable or religious purposes,” to remove the misconception that “public” is merely co-ordinate with “charitable” or “religious.”
2. The words, “whether contentious or not,” have been added to give effect to a Calcutta decision. See notes “Whether contentious or not.”
3. The words “in the principal Civil Court of original jurisdiction” have been substituted for the words “in the High Court or the District Court.”
4. The words “or any other Court empowered in that behalf by the Local Government” have been added in order to invest *Courts subordinate to District Courts* with power to try cases under this section.

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5. Clause (a) is new. It is intended to supersede a Madras decision, and give effect to the Calcutta, Bombay and Allahabad decisions noted below in the commentary under the head "Clause (a): removing any trustee."
6. Clause (d) is also new. It gives legislative recognition to a Bombay decision noted below in the commentary under the head "Clause (d); directing accounts and inquiries."
7. Sub-section (2) is new. It is intended to give effect to the view of the section taken by the Bombay High Court that this section is mandatory, and to supersede the decision to the contrary of the other High Courts. See notes under the head "Sub-section (2): this section is mandatory."

Object of the section.—"The real object of the special provisions of this section seems to us to be clear. Persons interested in any trust were, if they could *all* join, always competent to maintain a suit against any trustee for his removal for breach of trust; but where the joining of all of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate-General or of the Collector of the District: and this condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust" (n).

Who may sue under this section.—A suit under this section may be brought—

- (1) by the Advocate-General, and outside the Presidency towns, by the Collector or such officer as the Local Government may appoint in that behalf [see s. 93], or
- (2) by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General. The "consent in writing" must be a specific permission given to two or more persons *by name*; a permission given to one applicant by name "and another" is not a sufficient compliance with the terms of this section (o). A suit under this section brought by only one plaintiff with the consent of the Advocate-General is bad at its institution, and the plaint cannot be amended by the addition of a second plaintiff, though the Advocate-General may consent to the amendment. The section nowhere speaks of the consent of the Advocate-General to an *amendment* of the plaint (p).

"Interest in the trust."—When a suit under this section is not instituted by the Advocate-General, it must be brought by at least two persons, and such persons must have an interest in the trust. The interest in the trust need not be *direct*. Thus persons entitled to worship in a temple have such an interest in the trust as to enable them to institute a suit with the consent of the Advocate-General against the trustees of the temple (q). Similarly persons residing in a village, whose business it was to conduct pilgrims to a shrine and perform the worship of the idol on their behalf, were held to have a sufficient interest to entitle them to sue under this section (r). But the interest must be an existing one, and not a mere contingency

(n) *Sajedur Raja v. Gour Mohun Das* (1897) 24 Cal. 418, 425; *Budres Das v. Choont Lal* (1906) 33 Cal. 789, 804; *D'Cruz v. D'Silva* (1909) 32 Mad. 131, 135.
 (o) *Gopal Dei v. Kanno Dei* (1903) 26 All. 162.
 (p) *Darves Haji Mahamad v. Jatinudin* (1906) 30 Bom. 603.

(q) *Sajedur v. Gour Mohun* (1906) 24 Cal. (418) *Jugalkishore v. Lakshmandas* (1899) 23 Bom. 659.
 (r) *Manohar v. Lakhmiram* (1888) 12 Bom. 247; *Chotalal v. Manohar* (1900) 24 Bom. 50; 26 I. A. 199.

the mere possibility of succession to the managership of trust properties in respect of which the suit is brought is not sufficient to give a right to sue (s). Further, the interest must be a present and substantial interest and not sentimental or remote; thus where a suit was brought under this section by a Hindu residing in Madras and another residing in Tellicherry in respect of a temple situated in Tellicherry, and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry, it was held that though he had a right as a Hindu to worship in the temple, he had not such an interest in the trust as to entitle him to sue under this section (t).

Consent of the Advocate-General.—The “consent in writing” required by this section is a condition precedent to the institution of the suit to which such consent relates. If, therefore, no valid consent is given before the institution of the suit, the suit must be dismissed, or the plaintiff may be allowed to withdraw the suit with liberty to bring a fresh suit. The defect cannot be rectified *after* the institution of the suit (u). And where such consent is given, the suit must be confined to the matters included in the consent; it is not competent to the Court to grant reliefs other than those included in the terms of the consent (v). Further, where a suit is brought under this section, no amendment should be permitted without the sanction of the Advocate-General. Where a plaintiff in a suit brought under this section is amended without the consent of the Advocate-General, *e.g.*, where a new party is added as a defendant and possession of the trust property is claimed from him, the Court must dismiss the suit (w). It is an invariable practice in the Bombay Presidency for the Advocate-General to endorse his consent upon the plaint (x).

The Advocate-General in giving his consent has to exercise his judgment in the matter, and see not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the character defined in the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust (y). Where the sanction given by the Advocate-General is so worded as to indicate that the Advocate-General has not exercised his judgment, it is *not a defect fatal to the suit* but a mere irregularity falling within the scope of s. 99; hence the decree in the suit will not be interfered with in appeal, unless the irregularity is shown to have affected the decision of the suit on the merits (z).

“Public purposes”.—A *mutt* that is otherwise private does not become public simply because some persons are fed when *gurupuja* is performed and a water *pandal* is maintained in the *mutt* during the hot season (a). But where a number of the public had always used a temple and there was attached to it a *dharmashala*, and the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavart*, it was held that the intention of the founder was to devote the property to public purposes of a religious and charitable nature (b). A trust is none the less a trust for a public purpose within the meaning of this section even if the main object of the trust is the support of *fakirs* of a *particular* sect and the propagation of the tenets of that sect (c).

(s) *Mohiuddin v. Sayiduddin* (1893) 20 Cal. 810.
 (t) *Ramachandra v. Parameswaran* (1919) 42 Mad. 360.
 (u) *Tricundass v. Khimji* (1892) 16 Bom. 626;
Gopal Dei v. Kanno Dei (1904) 26 All. 162.
 (v) *Sayad Hussein v. Collector of Kaira* (1897) 21 Bom. 257; *Nizam-ul-Haq v. Muhammad* (1919) P. B. no. 144, p. 370; *Nizam-ul-Haq v. Muhammad* (1919) 1 Lab. L. J. 74.

(w) *Abdul Rehman v. Cassum* (1911) 36 Bom. 68.
 (x) *Suleman v. Shaikh Ismail* (1915) 39 Bom. 580.
 (y) *Sajedur Raja v. Gour Mohun Das* (1897) 24 Cal. 418, 428.
 (z) (1897) 24 Cal. 418, 428, *supra*.
 (a) *Sathappayyar v. Periasami* (1891) 14 Mad. 1, 6-7.
 (b) *Jugalkishore v. Lakshmandas* (1899) 23 Bom. 659.
 (c) *Mahant v. Darshan* (1912) 34 All. 468.

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“Where the direction of the Court is deemed necessary for the administration of any such trust.”—The directions which are referred to in this section are such as are necessary for the carrying out of the trust and as are given to a trustee, either the existing trustee, where there is one, or the new trustee, where one is to be appointed. The nature of the reliefs (specified in the section) shows what is meant by the words ‘deemed necessary for the administration of any such trust’ (d). The view thus expressed derives support from the language of sub-sec. (2) which implies that it is only a suit claiming *one or more of the reliefs specified in sub-sec. (1)* that requires to be instituted in conformity with the provisions of sub-sec. (1).

“Whether contentious or not.”—These words are new. They are intended to give effect to a decision of the Calcutta High Court under s. 539 of the Code of 1882 that that section was not confined to non-contentious proceedings and that it applied to contentious suits also (e), and the opinion to the same effect of Best and Weir, JJ., in an earlier Madras case (f).

Clause (a): removing any trustee.—This clause is new. In the absence of this clause in the correspondings. 539 of the Code of 1882, it was held by the High Courts of Calcutta, Bombay and Allahabad (g), following an earlier decision of the Madras High Court (h), that a suit for the removal of a trustee of a public trust and for the appointment of a new trustee came under that section, though the removal of a trustee was not one of the reliefs specified in that section. Such a relief, it was said, was either covered by the words “such further or other relief as the nature of the case may require,” or it was implied in the clause providing for the appointment of new trustees. On the other hand, it was held by the Madras High Court in a later case that such a suit did not come under that section (i). Clause (a) of the present section gives effect to the Calcutta, Bombay and Allahabad decisions. A suit for the removal of a trustee must therefore be instituted in conformity with the provisions of this section. A suit by the trustees of a temple for a declaration that the appointment by the Devasthanam Committee of the defendant as a trustee in place of a deceased trustee is invalid, is in effect a suit for the removal of the defendant from the office of trustee, and it cannot be instituted without the sanction required by this or the next section (j).

In framing a scheme of management under this section [see clause (g)], it is desirable to include a provision for the removal of trustees for breach of trust, for where such a provision is included, the removal of a defaulting trustee may be obtained by an *application* in execution of the decree, and the costs and trouble of a *regular suit* which would otherwise be probably necessary may thus be avoided (k).

In connection with the removal of a trustee, it may be noted that there is no hard and fast rule that because a manager of a shrine has arrogated to himself the position of owner he should be removed from the office of trustee. Each case must be decided with reference to its circumstances (l). Thus it has been held that mere lax and improvident management on the part of the manager of a shrine, fostered

(d) *Per Woodroffe, J.*, in *Budres Das v. Choont Lal* (1906) 33 Cal. 789 at p. 800. But see *Amritram v. Ramji* (1908) 10 Bom. L. R. 87.
(e) *Mohammed v. Sayiduddin* (1898) 20 Cal. 810.
(f) *Subbaya v. Krishna* (1891) 14 Mad. 186, 208, 221.
(g) *Safedur Raja v. Gour Mohun Das* (1897) 24 Cal. 418; *Sayed v. Collector of Kaira* (1897) 21 Bom. 43; *Husseni Begam v. Collector of Moradabad* (1898) 20 All. 46; *Girdhari*

Lal v. Ram Lal (1899) 21 All. 200.
(h) *Subbaya v. Krishna* (1891) 14 Mad. 186.
(i) *Rangasami v. Varadappa* (1894) 17 Mad. 462. See also *Narayana v. Sumarasami* (1900) 23 Mad. 637.
(j) *Subramanta v. Krishnaswamy* (1910) 42 Mad. 668, 671, per Spencer, J.
(k) *Damodaribhai v. Bhoglal* (1900) 24 Bom. 45.
(l) *Damodar Bhatji v. Bhat Bhoglal* (1898) 22 Bom. 493.

by the belief that he was entitled to manage the trust property free from control and very much as though he was its absolute owner, is no ground for removing him from the trust (m).

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"Trustee."—A person appointed trustee by the Court, though his appointment may be impeached as being illegal, is a trustee within the meaning of clause (a), and not a trespasser (n). And so also is a trustee *de son tort*, that is, a person who is not appointed a trustee, but who takes charge of the trust property and purports to manage it as trust property (o).

Clause (b): appointing new trustee.—A suit for the appointment of new trustees of a temple on the ground that the defendants are not lawful trustees and that the trusteeships are therefore vacant, is a suit under clause (b) of this section (p).

Clause (c): vesting any property in a trustee.—Under this section, the Court in sanctioning a scheme may provide for the appointment of additional or new trustees though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it (q).

Clause (d): directing accounts and inquiries.—This clause is new. Under the corresponding s. 539 of the Code of 1882 it was held by the High Court of Bombay, that a suit to remove the trustees of a public charity, and to compel them to account, and to make good the losses sustained by the charity by reason of default on the part of the trustees, and for the appointment of new trustees, was a suit within that section, though a relief for accounts was not one of the reliefs specifically mentioned in that section. Such a relief, it was said, was covered by the words "further or other relief" (r). The present clause gives legislative recognition to the above decision.

Clause (g): settling a scheme.—This section vests a very wide discretion in the Court as regards directions to be given for the administration of public trusts. In giving effect to the provisions of the section and in appointing new trustees and settling a scheme the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management is carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation (s).

A scheme framed by the Court may be varied, if good cause is shown (t). But where a scheme is once settled, it precludes a suit to establish a private right to manage the property [e.g., hereditary trusteeship] which, if established, would interfere with the scheme settled by Court (u).

The Court has power under this section to frame a scheme in respect of a temple though it be under the control of a Temple Committee constituted under the Religious Endowments Act 20 of 1863 (v).

(m) *Annaji v. Narayan* (1897) 21 Bom. 556.

(n) *Satyid Ali v. Ali Jan* (1912) 35 All. 98.

(o) *Jugal Kishore v. Lakshmandas* (1899) 23 Bom. 659; *Budree Das v. Choont Lal* (1906) 33 Cal. 789, 805-806.

(p) *Neki Rama v. Venkatacharulu* (1908) 26 Mad. 450.

(q) *Prayag Dass v. Tirumala* (1905) 28 Mad. 319.

(r) *Syed v. Collector of Kaira* (1897) 21 Bom. 48; *Amritram v. Ramji* (1908) 10 Bom.

L. R. 87.

(s) *Mahomed Ismail v. Ahmed* (1916) 43 I. A. 127, 135, 43 Cal. 1085, 1101-1102.

(t) *Prayag Dass v. Tirumala* (1905) 28 Mad. 319; *Ramadas v. Hanumantha* (1911) 36 Mad. 364.

(u) (1911) 36 Mad. 364, *supra*.

(v) *Sitharama v. Subramania Iyer* (1915) 39 Mad. 700.

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Clause (h) : further or other relief.—"The words 'granting such further or other relief as the nature of the case may require,' must be read with what has preceded as referring to further relief to which the party may be entitled which arises out of the *existence of the trust* in respect of which the suit has been brought." Therefore, where the *only* relief claimed in a suit is for a *declaration* that certain property is *wakf* property, the suit does not come within the purview of this section. Such a relief does not come within the words "further or other relief" (w). "The general clause dealing with 'further or other relief' ought to be read with the [seven] preceding specific clauses, and the nature of the reliefs which may be properly granted under it is of the same character as the reliefs which may be granted under the preceding clauses. The [seven] specific clauses are not merely illustrative, but furnish an indication of the nature of the relief which may be granted in a suit under this section. Thus it has been held that the mere fact that the plaintiffs sue for a *declaration* that they are the trustee of a temple and of the properties attached thereto, does not bring the suit within this section; such a relief does not come within the words "further or other relief" (x). There is a conflict of opinion as to whether a prayer that a deed of trust may be construed by the Court and the true scope and object of the trust fund may be determined by the Court comes within the words "further or other relief" (y). See notes below "Suits merely for a declaration of trust."

When the section applies.—This section does not apply, unless—

- (1) there is an express or constructive trust created for public purposes of a charitable or religious nature;
- (2) there is a breach alleged of such trust, or the direction of the Court is deemed necessary for the administration of such trust [see notes above, "Where the direction of the Court, etc."]; and
- (3) the relief claimed is one or other of the reliefs mentioned in the section (z) [see notes above, "Clause (h) : further or other relief"].

If all the three conditions are satisfied, the suit *must* be instituted in conformity with the provisions of this section, that is to say, it must either be instituted by the Advocate-General or by two or more persons interested in the trust with the consent of the Advocate-General [see sub-section (2) and notes thereto]. If the suit is not brought in conformity with the provisions of this section, it should be dismissed [see notes above "Consent of the Advocate-General"]. But if any one of these three conditions is absent, the suit is outside the scope of the present section, and it is to be instituted in the ordinary manner. The mere fact that a suit *relates* to a public charitable or religious trust, or that it *relates* to property held on such trust, is not sufficient to bring it within the scope of this section [see notes below "Suits to enforce private rights," and "Suits for possession of trust property against trespassers and against alienees from trustees"]. At the same time it is to be remembered that a suit which is clearly within the scope of this section cannot be treated as one outside its scope, because besides the reliefs permissible by this section reliefs not allowed by the section are claimed in the suit [see notes below, "Suits for removal of trustee, etc."].

Suits to enforce private rights.—Suits brought not to establish a *public right* in respect of a public trust, but to remedy a particular infringement of an *individual right*, are not within this section (a). Such suits are to be instituted in the ordinary

(w) *Jamal-uddin v. Muftaba Husain* (1903) 25 All. 631, 635; *Sajid Ram v. Bassao Mal* (1919) 1 Lab. L. J. 150.

(x) *Budree Das v. Choonilal* (1906) 33 Cal. 789, 810.

(y) *Dinsha Petit v. Jamsetji* (1909) 33 Bom. 510,

per Davar, J., at pp. 526-531, per Beaman, J., at pp. 562-568.

(z) See the judgment of Woodroffe, J., in *Budree Das v. Choonilal* (1906) 33 Cal. 789.

(a) See per Davar, J., in *Dinsha Petit v. Jamsetji* (1909) 33 Bom. 510, 529-530.

manner and not in conformity with the provisions of this section. The following are instances of suits of this character :— S. 92.

- (1) a suit by a person claiming to be a co-trustee of a certain *dargah* and entitled as such to a share with the defendant trustee in the management and profits thereof : *Miya Vali Ulla v. Sayad Bava* (1898) 22 Bom. 496 ;
- (2) a suit by the trustees of a fire temple for the vindication of the right of management which was vested in and actually being exercised by them at the date of the obstruction by the defendants : *Navroji v. Dastur Kharshedji* (1904) 28 Bom. 20, 54 ;
- (3) a suit between two individuals each claiming certain rights as *mutawali* over *wakf* property : *Manijan v. Khadem Hossein* (1905) 32 Cal. 273 ;
- (4) a suit between two persons as to which of them is the lawful trustee of a charity : *Budree Das v. Chooni Lal* (1906) 33 Cal. 789, 808 ; *Muhammad v. Ahmed* (1913) 35 All. 459 ; *Niamat Ali v. Ali Rezu* (1914) 37 All. 86 ; *Ayahinessa v. Kulfu* (1914) 41 Cal. 749 ; *Giyana v. Kandusami* (1887) 10 Mad. 375 ;
- (5) It has been held by the High Court of Allahabad that the right of a Mahomedan to use a mosque is not a public but a *private* right. It is like the right to use a private road ; *any one* who has the right may maintain a suit in respect of it [*Jawahra v. Hussain* (1885) 7 All. 178, at pp. 182, 183]. To such a suit the provisions of this section do not apply. Thus it has been held that *any* Mahomedan entitled to frequent a mosque may, if property belonging to the mosque has been sold by the person managing the same for the time being for his private debts, maintain a suit for a declaration that the property is *wakf* property, and to set aside the sale and evict the purchaser [*Zafaryag Ali v. Bakhtawar Singh* (1883) 5 All. 497]. Similarly, if land attached to a mosque is encroached upon, *any* Mahomedan entitled to use the mosque may sue to eject the trespasser. And if the mosque be in a dilapidated condition, and a Mahomedan frequenting the mosque, or one looking after it, is desirous of repairing it, but is obstructed by a third person, he may maintain a suit to establish his right to repair the mosque [*Jawahra v. Akbar Husain* (1885) 7 All. 178]. The contrary, however, has been held by the High Court of Calcutta in *Jan Ali v. Ram Nath* (1882) 8 Cal. 32, and *Lutifunnissa Bibi v. Navirun Bibi*, (1885) 11 Cal. 33. According to these decisions, the right sought to be established in such suits as the above is not a private but a *public* right, and it can only be enforced by a suit brought in conformity with the provisions of this section. But in a later Calcutta case [*Mohiuddin v. Sayiduddin* (1893) 20 Cal. 810], it was pointed out that the reasoning of the Allahabad cases, showing that the right of worship of each worshipper in a Mahomedan mosque or religious endowment was an *independent* right wholly irrespective of the rights of the other worshippers, was correct.

Suits for possession of trust property against trespassers and against allenees from trustees.—Suits against strangers to the trust, that is, against trespassers and against transferees of trust property from trustees for recovery of possession of trust property from them, are not within this section. Such suits are to be instituted

S. 92. in the ordinary manner, and not in conformity with the provisions of this section (b). The following are instances of suits of this character :—

- (1) a suit by the disciples of a *mutt* for a declaration that the defendant was not the duly appointed successor to the late head of the *mutt*, and that he was in possession under a false claim of title, and for ejecting the defendant from the *mutt* properties: *Strinivasa v. Strinivasa* (1893) 16 Mad. 31. [Here the claim against the defendant is as against a trespasser];
- (2) a suit for a declaration that a certain piece of land of which it was alleged the defendants had taken wrongful possession was a public graveyard, and for the ejectment of the defendants from the land: *Muhammad v. Kallu* (1899) 21 All. 187; *Ghazaffar v. Yawar Husain* (1906) 28 All. 112, 117, 120, 121; *Dasondhay v. Muhammad* (1911) 33 All. 660. [Here also the claim against the defendant is as against trespassers]. Compare *Latifunnissa Bibi v. Nazirun Bibi* (1885) 11 Cal. 33, where the suit was for a declaration that certain property was *wakf* property and for recovery of possession thereof from a third party, and where the Court held that the suit ought to have been instituted in conformity with the provisions of this section. This decision would appear to be no longer law: see *Mohiuddin v. Sayiduddin* (1893) 20 Cal. 810, p. 816;
- (3) a suit to set aside an alienation of trust property alleged to have been wrongfully made by the trustees, and for the recovery of such property from the hands of the alienee: *Kazi Hassan v. Sagun* (1900) 24 Bom. 170; *Lakshmandas v. Ganpatrav* (1884) 8 Bom. 365; *Vishvanath v. Rambhat* (1891) 15 Bom. 148; *Ghelabhai v. Uderam* (1911) 36 Bom. 29. [Here the defendants are transferees from trustees];
- (4) a suit by the trustees of a temple against the manager and treasurer of the temple for accounts and for a decree for what may be found due on taking such accounts: *Malhar v. Narasinha* (1912) 37 Bom. 95.
- (5) a suit by two of the worshippers of a temple with the leave of Court under O. 1, r. 8, against the committee of management (not being trustees) and *archakas* of the temple for a declaration that a transfer made by the committee to the *archakas* of the right to collect and receive offerings made by the pilgrims is invalid: *Venkataramana v. Kasturiranga* (1917) 40 Mad. 212 [F. B.].

See notes above, "Trustee."

Suits for removal of trustee on ground of unlawful alienation of trust property and against alienee from such trustee.—A common type of suits under this section is a suit against the trustee of a charity for his removal on the ground of an unlawful alienation made by him of trust property, claiming it as his private property. It is clear that such suit is within this section for the relief claimed is one under cl. (a) of this section, and the ground on which relief is claimed is breach of trust in alienating the property. It is also clear that the Court cannot remove the trustee, unless it finds that the property is trust property and that it has been wrongfully alienated by the trustee. The question we have to consider is, whether the Court has power, in the absence of the alienee, to declare that the property is trust property and that the alienation is unlawful. It has been held by the High Court of Madras, that an alienee is not a proper

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party to a suit under this section, and that if he is joined as a party by the plaintiff, the suit as against him should be dismissed. But this, it has been held, does not preclude the Court from determining in a suit against the trustee alone whether the property is trust property, and declaring, if it is so found, that it is trust property. But the transferee, not being a party to the suit, is not bound by the declaration, and if a suit is subsequently brought against him for recovery of possession of the property from him, it is open to him to contend that the property is not trust property (c). On the other hand, it has been held by the High Court of Allahabad, that the alienee, though not a necessary party to the suit (d), is a proper party (e), and that if he is joined as a party, and the Court declares that the property is trust property, he will be bound by the declaration in a subsequent suit for possession against him (f). The High Court of Bombay has gone further and held, that the transferee is not only a proper but a necessary party, and that no such declaration can be made in his absence (g). As regards the High Court of Calcutta there is a conflict of decisions, it being held in some cases that he is not a proper party to the suit (h), while in others that he is (i). But all the High Courts are agreed that in a suit such as the above a decree cannot be passed against the alienee directing him to deliver possession of the property to the plaintiffs, though he be a party to the suit, as such a relief is neither specifically mentioned in the section nor is it implied in cl. (h), and that the remedy of the newly appointed trustee is to institute a separate suit for possession against him (j). In a recent Calcutta case (k), however, Greaves, J., went to the extreme length of holding that the alienee may be joined as a party to the suit having regard to the provisions of O. 1, r. 3, and, further, that if the transfer to him is invalid, he may be declared to be a trustee of the trust property and be directed to convey the trust property to the newly appointed trustees. It is true that where a suit is brought under this section for removing a trustee for wrongfully transferring trust property, the Court has to find whether the property is trust property and whether the transfer is valid, but it is difficult to see how, if no suit can be brought under this section for any reliefs except those mentioned therein, the Court can incorporate in a decree passed under this section a declaration that the property is trust property and that the transfer is invalid. If such a declaration cannot be legally incorporated in the decree, it is difficult to see how it can operate as *res judicata* against the alienee in a subsequent suit against him for possession. It is also difficult to see how, if a suit cannot be instituted under this section for any relief against the alienee, the Court can pass a decree directing the alienee to convey the trust property to the newly appointed trustee; such a direction is quite different in its scope from one vesting the trust property in the trustees as contemplated by cl. (c) of sub-sec. (1). The correct view seems to be that the Court may add the alienee as a party to the suit under the latter part of sub r. (2) of O. 1, r. 10, to enable the Court to determine the question of the validity of the transfer, but that when it comes to the point of passing a decree in the suit, the decree should not contain any reliefs except those expressly mentioned in the section. This course may involve a multiplicity of suits, but that is a matter for the Legislature, and not for the Courts.

(c) *Raghavalu v. Pellati* (1914) 27 Mad. L. J. 266; *Rangasamy v. Chinnaasamy* (1915) 28 Mad. L. J. 326.

(d) *Husni Begam v. Collector of Moradabad* (1898) 20 All. 46.

(e) *Ghazaffar v. Yawar Husain* (1906) 23 All. 112, 116, 118, 119.

(f) *Manohari v. Muhammad* (1911) 33 All. 752.

(g) *Collector of Poona v. Bai Chanchalbai* (1911) 35 Bom. 470. See also *Raghavalu v. Pellati* (1914) 27 Mad. L. J. 266, per Seahagiri Ayyar, J.

(h) *Budhsingh v. Nidadharan* (1905) 2 Cal. L. J. 431; *Badri Dass v. Chooni Lal* (1906) 33 Cal. 789, 805.

(i) *Sajedur v. Gour Mohun Das* (1897) 24 Cal. 418.

(j) *Budhsingh v. Nidadharan* (1905) 2 Cal. L. J. 431, dissenting from *Sajedur v. Gur Mohun* (1897) 24 Cal. 418; *Budree Das v. Chooni Lal* (1906) 33 Cal. 789, 805; *Assam v. Pellati* (1914) 27 Mad. L. J. 266; *Collector of Poona v. Bai Chanchalbai* (1911) 35 Bom. 470.

(k) *Ali Haffiz v. Abdur Rahman* (1915) 42 Cal. 1185.

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Suits merely for a declaration of trust.—This section presupposes the existence of a trust for the administration of which it is necessary to make provision. Hence it does not apply to a suit brought solely for the purpose of having a declaration of the Court that certain property is *wakf*, the fact of endowment being denied on the other side (*l*). Nor does this section apply to a suit brought merely for a declaration that the plaintiffs are the trustees of an endowment (*m*). See notes above "Clause (h)."

Courts competent to try suits under this section.—A suit under this section must be instituted either in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government. But this does not empower the Local Government to direct the transfer of a *particular* suit pending in a District Court to a particular Judge. The authority must be a *general* one to receive suits under this section (*n*).

The expression "principal Civil Court of original jurisdiction" in this section does not include the Court of an Additional District Judge appointed under s. 8 of the Civil Courts Act XII of 1887. An Additional District Judge therefore has no jurisdiction to try suits under this section. A District Judge therefore has no power under s. 24 of the Code to transfer such a suit for trial to an Additional District Judge (*o*).

Where a suit is brought against an executor in the Court of a Subordinate Judge for the administration of the testator's estate, the mere fact that the will contains directions for applying portions of the estate to charitable purposes does not bring the suit within this section. The Subordinate Judge *has* jurisdiction to entertain such a suit, but if any questions relating to charitable bequests arise before him and a scheme has to be framed under this section, he should hold the amount appropriated for charities in the possession of a Receiver until the Advocate General or the Collector obtains the directions of the District Court (*p*).

Sub-section (2): this section is mandatory.—The Legislature has by enacting this section constituted a special tribunal for the trial of a class of suits which it has removed from the cognizance of the ordinary Courts. These suits are suits respecting any "alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust." This class of suits *can only be instituted* in the special Courts mentioned in this section, and they *can only be brought either by* the Advocate General, or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General. It has been so enacted by sub-s. (2) of the present section. Under the corresponding section 539 of the Codes of 1877 and 1882 it was doubtful whether *every* suit of the character described above was to be instituted in the manner aforesaid. Sub-s. (2) makes it clear that it ought to be so instituted. The doubt referred to above arose in the following way. The Code of 1859 did not contain any special provisions for the institution of suits relating to public charities. Such provisions were introduced for the first time by s. 539 of the Code of 1877. They were reproduced in s. 539 of the Code of 1882, and they now find a place in sub-s. (1) of the present section. But neither the Code of 1877 nor the Code of 1882 contained any provision such as is contained in sub-s. (2). Before the enactment of the Code of 1877 suits relating to public

(l) *Jamal-uddin v. Muftaba Husain* (1903) 25 All. 681.

(m) *Budree Das v. Chooni Lal* (1906) 33 Cal. 789, 810; *Ramados v. Hanumantha* (1911) 36 Mad. 364.

(n) *Abdul Karim v. Abdus Sobhan* (1911) 38 Cal. 146.

(o) *Mahomed v. Abdul Hassan* (1914) 41 Cal. 866.

(p) *Bapuji v. Govindlal* (1916) 40 Bom. 439.

charitable or religious trusts could be instituted in the ordinary Courts by certain persons as plaintiffs. Thus— S. 92,

- (1) *persons appointed supervisors over trustees* could sue in any ordinary Court competent to hear the suit for the removal of the trustees for malversation and to obtain the appointment in their place of other fit and proper persons (q) : similarly,
- (2) *one or more of the members* of a defined class of the general public [such as the Satchasi community of Chatra] could sue on behalf of the whole class, *with the leave of the Court under s. 30*, in any ordinary Court competent to hear the suit, to obtain a declaration of their right to take part in the management of the worship of a goddess (r).

It will at once be seen that the above suits fall within the purview of the present section. They also came within the terms of s. 539 of the earlier Codes. In the absence of any provision in s. 539 similar to that contained in sub-s. (2), the question arose whether these suits were to be instituted in the special Courts mentioned in s. 539 and by the Advocate-General as plaintiff, or whether they could be instituted as before in ordinary Courts and by persons who could have sued if s. 539 had not been enacted. It was held by the High Court of Bombay that s. 539 was mandatory, in other words, that *every* suit of the character mentioned in that section must be brought in accordance with its provisions, and not otherwise. That is to say, the suits referred to above could no longer be brought by the supervisors as plaintiffs in the one case and by the members of the community in the other, but they must be instituted either by the Advocate-General or by two or more persons interested in the trust after obtaining the sanction of the Advocate-General; and further, that these suits could only be brought in the *special Courts* indicated in that section, namely, the High Court or the District Court, as the case might be (s). On the other hand, it was held by the other High Courts that section 539 was permissive, and that it did not take away the right of suit which existed prior to and independently of it. According to these Courts suits of the character mentioned above could, notwithstanding the enactment of section 539, be brought as before by the *abovenamed parties* as plaintiffs in any Court competent to entertain those suits, and it was not obligatory to institute them in accordance with the provisions of s. 539 (t). Sub-section (2) gives effect to the Bombay decisions, and supersedes the decisions of the other High Courts. It provides in distinct terms that no suit claiming any of the reliefs specified in sub-section (1) shall be instituted except in conformity with the provisions of that sub-section. At the same time it declares that the special provisions of the Religious Endowments Act 20 of 1863 for the institution of suits governed by that Act are not affected by the provisions of this section. We proceed to consider the provisions of that Act and their bearing on the present section.

“Save as provided by the Religious Endowments Act, 1863.”—After the downfall of the Mogul Empire in India, it was discovered that the income of many endowments granted in land “by the presiding Governments of this country and by individuals for the support of mosques, temples, colleges and for other pious and beneficial purposes” was misappropriated by persons managing the endowments. It

q *Nellaiyappa v. Thangama* (1898) 21 Mad. 406; *Ram Das v. Badri Narain* (1907) 29 All. 27.
 r *Monmotho v. Harish Chandra* (1906) 33 Cal. 905.
 s *Tricumdas v. Khimji* (1892) 16 Bom. 626; *Sayad Hussain v. Collector of Kaira* (1897

21 Bom. 48.
 (t) *Nellaiyappa v. Thangama* (1898) 21 Mad. 406; *Budres Das v. Chooni Lall* (1906) 33 Cal. 789, 800-804; *Monmotho v. Harish Chandra* (1906) 33 Cal. 905; *Ram Das v. Badri Narain* (1907) 29 All. 27.

S. 92. was therefore deemed expedient that the British Government should take charge of these endowments, and for that purpose and the purpose also of providing for the maintenance of bridges, serais, uttaras and other buildings erected for the use of the public, Regulation 19 of 1810 was passed, whereby the general superintendence of all *religious and charitable* endowments referred to above was vested in the Board of Revenue. That Regulation applied to endowments in Bengal. A similar Regulation, being Regulation 7 of 1817, was subsequently passed to provide for like endowments in the Madras Presidency (u). Several years after the passing of these Regulations, it was thought that the connection of a Christian Government with the religious establishments of Hindus and Mahomedans was inexpedient, and a report was therefore called for by the Government of India in the year 1841 from the Collectors of all Districts with a view to divest themselves of the management of *religious* endowments, and transfer the management to properly qualified individuals. As a result Act 20 of 1863 was passed, whereby such of the provisions of the abovementioned Regulations as related to *religious* endowments were repealed, and provision was made for the transfer of all such endowments, in certain cases to trustees, and in others to committees (ss. 3-8). But the duty of superintending over *charitable* endowments imposed on the Board of Revenue by the old Regulations is still retained, and, in fact, express care is taken in the Act to declare that this duty over *charitable* endowments is not intended to be affected or interfered with (ss. 21, 23).

The Religious Endowments Act applies only to *public* religious endowments, as did the old Regulations. It does not apply to *private* religious endowments. S. 14 of the Act provides that any person interested in any mosque, temple, or religious establishment may sue the trustees or members of a committee for *any misfeasance, breach of trust, or neglect of duty* committed by them in respect of the trust vested in them, and the Court may in such suit direct the specific performance of any act by them, and may decree damages and costs against them, and may also direct the removal of any of the trustees or any member of a committee. A suit which does not charge the trustees or member of a committee with misfeasance, breach of trust, or neglect of duty, does not fall under that section (v). S. 18 provides that *no suit under the Act shall be instituted without the leave of the Court.*

The Act is in force in all Presidencies except the Presidency of Bombay where it is in force in North Canara only. But it does not apply to Presidency towns; so that a suit instituted in a Chartered High Court in the exercise of its ordinary original jurisdiction inherited from the Supreme Court charging neglect of duty on the part of a temple trustee does not require the leave of the Court under s. 18 of the Act (w).

After the passing of the Regulations above referred to, the Board of Revenue took over the management of some endowments, but in the large majority of cases they did not take charge of endowments created by private individuals. The operation of the Act, however, is not confined to such endowments as *had actually been taken under the management* of the Board of Revenue under the old Regulations. The Act applies, to every public religious endowment to which the provisions of the old Regulations applied, that is to say, to every public religious endowment created "by the preceding Governments of this country and by individuals,"

(u) See *Sitharama v. Subramania Iyer* (1915)

39 Mad. 700, 703.

(v) *Subramania v. Krishnaswamy* (1910) 42

Mad. 668.

(w) *Panch Cowrie Mull v. Chumroo Lall* (1878)

3 Cal. 563; *Annasami Pillai v. Rama Krishna Mudaliar* (1901) 24 Mad. 219.

whether the management of the endowment was taken over by the Board of Revenue or not (x). S. 92.

Reading s. 92 of the Code and the Religious Endowments Act together we have the following result:—

- (1) No suit in respect of *charitable* endowments of a public nature, claiming any of the reliefs specified in sub-section (1) of section 92, can be brought except in conformity with the provisions of that sub-section.
- (2) In the case of *religious* endowments of a public nature to which the *Religious Endowments Act* applies, a suit charging the trustee, manager, superintendent, or a member of a committee of a mosque, temple or religious establishment, with *misfeasance, breach of trust or neglect of duty*, may be brought under the provisions of that Act with the leave of the principal Civil Court of original civil jurisdiction in the District in which the mosque, temple, or religious establishment is situate as provided by s. 18 of the said Act, or it may be brought under the provisions of the Code with the consent of the Collector as provided by s. 92 of the Code (y).
- (3) No suit in respect of *religious* endowments of a public nature to which the *Religious Endowments Act* does not apply, claiming any of the reliefs specified in sub-section (1) of section 92, can be brought except in conformity with the provisions of that sub-section.

Operation of decree under this section.—It is not settled whether a decree in a suit under this section is binding only on the parties thereto or whether it is binding on all persons affected thereby whether they be parties to the suit or not (z).

Death of one of the plaintiffs pending suit.—It has been held by the High Court of Allahabad, that where a suit is brought by two persons under this section, and one of them dies pending the suit, the suit abates unless some other person is brought on the record in place of the deceased. Such person must be one who has an interest in the trust, and he must have obtained the consent of the Advocate-General as required by this section (a). On the other hand, it has been held by the High Court of Madras that a suit brought under this section being a representative suit, there is no question of abatement, and the Court has power under O. 1, r. 10 (2), to add other persons interested in the trust as parties not because they are the legal representatives of the deceased plaintiff, but because they had become parties to the representative suit by the very fact of its being instituted on behalf of all persons interested in the trust; from this point of view, the consent of the Advocate-General is not necessary to add any other person interested in the trust as a party (b). The Chief Court of the Punjab has followed the Madras decisions (c).

Death of defendant trustee pending suit.—Where a suit is brought under this section against a trustee not only for his removal, but for framing a scheme, and the scheme is one of the main reliefs sought, the suit does not abate on the death of the trustee, and his successor in office may be brought on the record as a party defendant (d). The suit, of course, would abate, if it was solely for removal of the trustee.

(x) *Jan Ali v. Ram Nath* (1882) 8 Cal. 32; *Sheoratan v. Ram Pargash* (1896) 18 All. 227; *Muthu v. Gangathara* (1894) 17 Mad. 95.
 (y) *Venkataranga v. Krishnama* (1912) 37 Mad. 184; *Hansraj v. Anani* (1918) 42 Bom. 742, 750.
 (z) *Dinsha Petit v. Jamselji* (1909) 33 Bom. 510 per Davar, J., at pp. 526-531, per Beaman J., at pp. 562-568.

(a) *Chhabile Ram v. Durga* (1915) 37 All. 296.
 (b) *Varadappa v. Munusami* (1911) 10 Mad. L. T. 514; *Parameswaran v. Narayanan* (1917) 40 Mad. 110.
 (c) *Gopi Das v. Lal Das* (1918) P. R. no. 97, p. 321.
 (d) *Sivagnana v. Adv.-Gen.* (1915) 28 Mad. L. J. 174.

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92, 93.

Specific Relief Act, 1877, s. 42.—Where a suit is maintainable under this section, and the plaintiff seeks any of the reliefs specified in the section, s. 42 of the Specific Relief Act does not apply. Thus if a suit is brought under this section for a declaration that the defendants are not the lawful trustees and for the appointment of new trustees, the suit will not be dismissed merely because there is no prayer for delivery of the trust property to the new trustees that may be appointed by the Court (e). [Sec. 42 of the Specific Relief Act provides in effect that where a suit is brought for a declaratory decree, and the plaintiff is able to seek further relief than a mere declaration, but omits to do so, the suit should be dismissed].

Limitation Act.—The de jure managers and trustees of a public charity losing their right by limitation to oust the de facto trustees, does not confer on the latter immunity from suit on the part of the Advocate-General under this section (f).

Relators cannot appeal in their own right.—Where a suit instituted under this section by the Advocate-General at the instance of relators is dismissed, and the Advocate-General does not think fit to appeal, it is not competent to the relators to file an appeal on their own account against the decree dismissing the suit (g). The reason is that relators are not parties to the suit (h).

Cy-pres doctrine.—Though the section does not expressly empower the Court to apply the cy-pres doctrine in the settling of schemes, it would seem that the Court has the power to apply the doctrine (i).

93. [S. 539, last para.] The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Collector.—An Assistant Collector has no power under this section to give his consent to the institution of a suit of the kind contemplated by s. 92 [or s. 91] in the absence of the Collector. Where such a suit is instituted with the consent of the Assistant Collector, but not with the consent of the Collector, the plaint must be rejected under O. 7, r. 11 (j).

(e) *Neti Rama v. Venkatacharulu* (1903) 26 Mad. 450; *Strinivasa v. Strinivasa* (1893) 16 Mad. 81.

(f) *Lakshmandas v. Jugalkishore* (1898) 22 Bom. 216.

(g) *Jan Mahomed v. Syed Nurudin* (1908) 32 Bom. 155.

(h) *Attorney-General v. Wright* (1841) 3 Beav 447; *Attorney-General v. Logan* [1891] 2 Q. B. 100, 106.

(i) *Mayor of Lyons v. Advocate-General of Bengal* (1876) 1 Cal. 303, 31. A. 32.

(j) *Somchand v. Chhaganlal* (1911) 35 Bom. 243.

PART VI.

Supplemental Proceedings.

94. [*New.*] In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed.—

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison ;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ;
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

This section summarizes the general powers of the Court in regard to interlocutory proceedings. The details of procedure have been relegated to Schedule I.

Arrest and attachment before judgment.—See O. 38 below.

Temporary injunctions and interlocutory orders.—See O. 39 below.

Appointment of receiver.—See O. 40 below. See also notes to s. 51, “Receiver in execution proceedings.”

95. [Ss. 491, 497.] (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

- (a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

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(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

Changes introduced by the section.—This section corresponds with ss. 491 and 497 of the Code of 1882 except that the words “by its order” have been substituted for the words “in its decree.” The words “by its order” indicate that the award should no longer form part of the decree, but should be embodied in a separate order. The order is now made appealable by s. 104.

Scope of the section.—This section provides for compensation to the defendant in the two following cases :—

- I. (1) Where an arrest or attachment before judgment *has been effected* or a temporary injunction *has been granted* (see Orders 38 and 39) ; and
- (2) such arrest, attachment or injunction was *applied for on insufficient grounds.*
- II. (1) Where an arrest or attachment before judgment *has been effected* or a temporary injunction *has been granted* ;
- (2) the plaintiff *fails* in the suit ; and
- (3) there was *no reasonable or probable ground for instituting the suit.*

In case II it is not necessary to show that the arrest, attachment or injunction was applied for on insufficient grounds. It is enough if the plaintiff *fails* in the suit, and there was no *reasonable or probable ground* for instituting the suit. The principle is that a plaintiff who has obtained an arrest, attachment or injunction by instituting a *suit* without any probable ground, should be punished as much as a plaintiff who has obtained the *process* on insufficient grounds.

This section is no bar to a regular suit.—This section provides a summary remedy for an injured defendant and enables him to seek compensation for the injury done to him by the plaintiff by instituting proceedings by an *application* to the Court instead of by a *suit*. But the remedy under this section is optional, and an injured defendant may, if he so chooses institute a regular suit against the plaintiff for compensation for wrongful arrest, attachment or injunction. This clearly appears from sub-section (2),

which impliedly recognizes the right of a defendant to institute a regular suit for compensation (*k*). In a *suit*, however for compensation, the plaintiff must prove malice in fact in addition to the facts required to be proved by this section (*l*). But whether the proceeding is by way of suit or by an application under this section, the defendant is not entitled to any compensation unless the attachment "has been effected." Merely procuring an order for attachment before judgment however maliciously is not sufficient to entitle the defendant to compensation (*m*). As to the period of limitation for such a suit, see Limitation Act, 1908, sch. I, arts. 19, 29, 36 and 42, and also the undermentioned cases (*n*). As to suits for damages for temporary injunction improperly obtained, see the undermentioned cases (*o*).

"On Insufficient grounds".—These words are equivalent to "without reasonable and probable cause" (*p*).

An award under this section is a bar to a regular suit.—Once an application is made by a defendant under this section for compensation for wrongful arrest, attachment or injunction, and an award is made under this section, the defendant cannot institute a regular suit for compensation for the *same wrong* whether any compensation is awarded to him or not. In other words, the disposal of an application, under this section has the effect of *res judicata* so as to bar any subsequent suit in respect of the *same cause of action*. Note that it is the disposal of the application, and not the *mere presenting* of the application, that is a bar to a regular suit.

Amount of compensation.—Note that the amount of compensation under this section cannot exceed Rs. 1,000. Where a defendant claims a larger amount of compensation, he must institute a regular suit.

Right of defendant not served with summons to apply for compensation under this section.—If a defendant is arrested before judgment, he is entitled to apply for compensation under this section, though he has not been served with a summons in the suit (*q*).

Counter-claim for compensation in a summary suit.—If a defendant who is arrested before judgment in a summary suit brought against him on a negotiable instrument under O. 37, claims compensation for arrest under this section, he is entitled on that ground to apply for leave to defend the suit under O. 37, r. 3, and if a *prima facie* case is made out, leave to defend should be given (*r*).

Provincial Small Cause Courts.—A Provincial Small Cause Court has jurisdiction under this section to award compensation to a defendant for wrongful arrest or attachment (*s*). See s. 7, cl. (b).

Appeal.—An appeal lies from an order under this section : see sec. 104, sub-sec. (1), cl. (f).

S. 491 of the Code of 1882 provided for compensation for a wrongful arrest and attachment. S. 497 provided for compensation for wrongful injunction. An order under s. 497 was appealable under that Code (*t*), but as to orders under s. 491 it was held that

k See *Palani v. Udayar* (1909) 32 Mad. 170.
l *Naryappa v. Ganapathi* (1911) 35 Mad. 598.
n *Rama v. Govinda* (1915) 39 Mad. 952.
n *Ram Narain v. Umrao Singh* (1907) 29 All. 615; *Surajmal v. Maneckchand* (1904) 6 Bom. L. R. 704.
o *Nand Comar v. Gour Sunkar* (1870) 13 W. R.

305; *Mohini v. Surendra* (1914) 42 Cal. 550, 556-557.
p *Roulet v. Fetterle* (1894) 18 Bom. 717, 720.
q *Syed Ali v. Adib* (1891) 15 Bom. 160.
r *Roulet v. Fetterle* (1894) 18 Bom. 717.
s *Ibrahi v. Sangaram* (1903) 26 Mad. 504.
t See Code of 1882, s. 588, cl. (24).

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they were not appealable (u). The present section combines the provisions of ss. 491 and 497, and s. 104 gives a right of appeal from all orders under this section, whether they are orders made on an application for compensation for wrongful injunction, or for wrongful arrest or attachment.

Undertaking.—Where a temporary injunction has been granted on an undertaking by the plaintiff to compensate the defendant for any loss that may arise by reason of the injunction, the undertaking is to be enforced by an application under this section to the Court which granted the injunction. *A* attaches a house in execution of a decree against *B*. *C* sues for a declaration that the house belongs to him, and obtains a temporary injunction staying the sale on his undertaking to pay interest to *A* at 6 per centum on the value of the house if his suit be dismissed. *C*'s suit is dismissed. In such a case the procedure to be adopted by *A* to recover the interest from *C* is to apply not to the Court executing the decree, but to the Court which granted the injunction (v).

(u) *Narsinga v. Govinda* (1901) 24 Mad. 62;
Lok Nath v. Amir Singh (1906) 23 All. 81.

(v) *Varajlal v. Kastur* (1898) 22 Bom. 42.

PART VII.

Appeals.

APPEALS FROM ORIGINAL DECREES.

96. [S. 540. Jud. Act, 1873, s. 49.] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

Appeal from original decree.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

Changes introduced by the section.—Sub-section (3) is new. In other respects this section corresponds with s. 540 of the Code of 1882. As to the effect of sub-section (3), see notes below under the head “Sub-section (3): consent decrees not appealable.”

Compare Judicature Act, 1873, s. 49, which provides that “no order made by the High Court or any judge thereof, by the consent of parties, shall be subject to any appeal except by leave of the Court or judge making such order.”

Letters Patent appeal.—Appeals from decrees of a single Judge of a High Court to the High Court are governed not by this section, but cl. 15 of the Letters Patent. “The Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on clause 15 of the charter” (*w*).

Right of appeal.—It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Court; such right must be given by statute, or by some authority equivalent to a statute (*x*). “Unless a right of appeal is clearly given by statute, it does not exist, whereas a litigant has independently of any statute a right to institute any *suit* of a civil nature in some Court or another” (*y*). No right of appeal can be given except by *express* words (*z*). Note in the present section the express words “an appeal shall lie from every decree.”

w) *Debedra Nath v. Bibudhendra* (1916) 43 Cal. 90, 93-94; *Sabhapathi v. Narayanasami* (1901) 25 Mad. 555, 558; *Nawab Behram Jung v. Haji Sultanali* (1912) 37 Bom. 572; *Surajmal v. Horniman* (1917) 20 Bom. L. R. 185, 217-218.
(z) *Minakshi v. Subramanya* (1888) 11 Mad. 26, 33, 14 I. A. 180; *Parasurama v. Seshier*

(1904) 27 Mad. 504; *Rangoon Botatoung Co. v. Collector of Rangoon* (1912) 40 Cal. 21, 27, 39 I. A. 197, 200.
(y) *Zair Husain Khan v. Khurshed Jan* (1906) 28 All. 549, 550.
(z) *Narayan v. Secretary of State* (1896) 20 Bom. 803.

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Agreement not to appeal.—An agreement whereby the parties agree not to appeal from a decree is binding upon the parties thereto, if it is for a lawful consideration and is otherwise valid (a). But an agreement by the next friend of a minor not to appeal is not binding on the minor (b).

Decree.—As to the distinction between a decree and an order, see p. 4 *ante*. All decrees are appealable, unless the appeal is barred under this Code or any other law. But all orders are not appealable; it is only those orders that are specified in s. 104 that are appealable.

No appeal can be entertained from a decree unless the decree has been drawn up (c). See notes to s. 33, on p. 99 above.

Appeal from ex parte decree.—Sub-section 2 provides that an appeal may be preferred from a decree passed *ex parte*. Suppose that an appeal is preferred from a decree *ex parte*, and the appellate Court comes to the conclusion that the lower Court was wrong in proceeding to decide the suit *ex parte*: what procedure should the appellate Court adopt in such a case? According to the Bombay High Court, the appellate Court should not remand the case to the lower Court for re-hearing, for an order of remand under O. 41, r. 23 [Code of 1882, s. 562] can only be made when the lower Court has disposed of a suit on a *preliminary* point, but should proceed as directed by O. 41, rr. 27 and 28 [Code of 1882, ss. 568, 569] (d). The Madras High Court has held that the Court has inherent power independently of the provisions of O. 41, r. 23, to remand a case for re-hearing, and the appellate Court may in such a case remand the case to the lower Court for re-hearing (e).

Forum of appeal.—The value of a suit, that is, the amount or value of the subject-matter thereof, determines the forum of suit, that is, the Court in which the suit is to be filed. It also determines the forum of appeal, that is, the Court to which the appeal lies. We have already dealt in the notes to s. 15 with questions relating to the forum of suit. The present note is confined to forum of appeal. Now an appeal may lie to the District Court or it may lie directly to the High Court. How is this to be determined, in other words, what is it that determines the forum of appeal? There is no doubt as stated above that it is the value of the suit that determines the forum of appeal. But the question that presents difficulty is, what is the value of a suit for the purposes of appeal? Now a plaintiff may in his plaint fix a sum *definitively* as the amount of his claim as in a suit for debt, or he may fix it *approximately or tentatively* as in a suit for accounts or for mesne profits [O. 7, r. 2]. Where the plaintiff fixes a sum *definitively*, it is that sum that determines the forum of appeal, and not the amount affected by the decree and involved in the appeal (f). Where the plaintiff fixes a sum *approximately*, there is a difference of opinion as to the forum of appeal. According to the Calcutta High Court it is the amount determined by the first Court as the amount due to the plaintiff that determines the forum of appeal (g). According to the Bombay (h) and Allahabad (i) High Courts, it is the amount determined by the first Court as the amount due to the plaintiff and accepted by the plaintiff by payment of additional court-fee that determines the forum of appeal. According to the Madras High Court, it is the amount or value

(a) *Ameer Ali v. Inderjeet* (1871) 14 M. I. A. 203; *Protab Chunder v. Arathoon* (1882) 8 Cal. 455.
 (b) *Rhodes v. Swithenbank* (1889) 22 Q. B. D. 577.
 (c) *Bai Divali v. Shah Vishnoo* (1909) 34 Bom. 182.
 (d) *Parvathankar v. Bai Naval* (1893) 17 Bom. 735.
 (e) *Sadhu v. Kuppan* (1907) 30 Mad. 54. See also *Jonardan v. Ramdhons* (1896) 23 Cal. 738.

(f) *Boidya Nath v. Makhan* (1890) 17 Cal. 680.
 (g) *Mohini v. Satis Chandra* (1890) 17 Cal. 704; *Gulab Khan v. Abdul Wahab Khan* (1904) 31 Cal. 965; *Izzatulla Bhuyan v. Chandra Mohan* (1907) 34 Cal. 954 [F. B.].
 (h) *Ibrahimji v. Bejanji* (1895) 20 Bom. 265.
 (i) *Goswami Sri Raman Lalji v. Bohra Desraj* (1910) 32 All. 222. See also 34 Cal. 954, 958, *per Mookerjee, J.*

of the subject-matter as fixed in the plaint, *though* approximately, that determines the Court to which the appeal lies; it has accordingly been held by that Court that where in a suit for account filed in the Court of a District Munsif, the plaintiff fixed his claim approximately at Rs. 2,000 and the Munsif passes a decree for more than Rs. 5,000, the appeal from the Munsif's decree lies not to the High Court, but to the District Court (j). According to the Calcutta High Court, the Munsif cannot pass a decree for more than the amount of his pecuniary jurisdiction; the appeal, therefore, from his decree lies to the District Court. We are inclined to think that the value of the subject-matter of a suit is its value at the date of instituting the suit, and that the view taken by the Madras High Court is the right one. Where the suit is *dismissed* by the first Court—in which case the mesne profits remain undetermined—the sum as fixed in the plaint determines the forum of appeal (k). See notes to s. 6, p. 15 above, also notes to s. 15, "Over-valuation and Under-valuation," p. 74 above.

A decree is passed by Court *M* in respect of a cause of action which arose at Kadiri. Appeals from decrees of Court *M* lie to Court *C*. Subsequently Kadiri is transferred to the territorial jurisdiction of Court *P* from which appeals lie to Court *B*. To which Court does the appeal from the decree lie, to Court *C* or to Court *B*? The answer is, to Court *B*. The reason is that a transfer of territorial jurisdiction *ipso facto* effects a transfer of venue (l).

Who may appeal.—An appeal under this section may be preferred by any of the following persons:—

1. Any party to the suit *adversely affected by the decree (m)*, or, if such party is dead, by his legal representative (n) [see s. 146];
2. any transferee of the interest of such party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit (o). [See notes to s. 47 under the head "Representative," on p. 130 above.]
3. An auction-purchaser may appeal from an order in execution setting aside the sale on the ground of fraud. [See notes to s. 47 under the head "Appeal" on p. 136 above.]

No person unless he is a party to the suit is entitled to appeal under this section (p).

We have said above that any party to a suit adversely affected by the decree may prefer an appeal from the decree. The question whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its particular circumstances. Thus it is quite clear that if the plaintiff's claim is decreed in its entirety, and all the issues are found in his favour, the plaintiff cannot appeal from the decree. Suppose now that the plaintiff's claim is decreed in its entirety, but that one of the issues is found against the plaintiff; can the plaintiff appeal from the finding adverse to him in such a case? It has been held that he cannot (q). The reason is that

(j) *Kannayya v. Venkata* (1918) 40 Mad. 1 [F. B.]. The jurisdiction of a Munsif under the Madras Civil Courts Act 3 of 1872 extends to suits of which the value does not exceed Rs. 2,500. Further, under that Act, appeals from decrees in suits of which the value exceeds Rs. 5,000 lie to the High Court, and not to the District Court. In the case cited above, it was held by the Madras High Court that though the decree was for a sum exceeding Rs. 5,000, the suit was for Rs. 2,000, and it is the value of the suit as given in the plaint, and not

the value determined by the decree, that determines the forum of appeal.

(k) *Satya Kinkar v. Raja Prasad Singh* (1910) 4 Pat. L. J. 447.

(l) *Subbayya v. Rachayya* (1914) 37 Mad. 477.

(m) *Krishna v. Mohesh Chandra* (1905) 9 Cal. W. N. 584.

(n) *Gajadhar v. Ganesh* (1871) 7 B. L. R. 149.

(o) *Moresheer v. Kushaba* (1878) 2 Bom. 248, 250.

(p) *Rustomji v. Official Liquidator* (1919) P. B. no. 79, p. 196.

(q) *Secretary of State v. Saminatha* (1911) 37 Mad. 25.

S. 96. the very fact that the decree is entirely in the plaintiff's favour notwithstanding a finding adverse to him on one of the issues shows that such finding was unnecessary to the determination of the plaintiff's suit. We have seen in the notes to s. 11, pp. 59-60 above, that when a finding on an issue is not necessary to the determination of a suit, such finding does not operate as *res judicata*; and it is an elementary principle that an appeal is not admissible on any point that does not operate as *res judicata*. Similarly, if a suit is brought by *A* against *B*, and the suit is dismissed in its entirety, *B* cannot appeal from the decree. And even if one of the issues is found against *B*, *B* cannot appeal from the finding, for such finding does not operate as *res judicata* for the reason stated above. See notes to s. 11 under the head "Decision in the former suit must have been necessary to the determination of that suit," on p. 59 above, and the cases there cited.

It sometimes happens, where there are *two or more* defendants, that although a suit is dismissed as against one of them, in other words, the decree on the face of it is entirely in his favour, the decree impliedly negatives the right claimed by such defendant as against the plaintiff and the other defendants. In such a case it has been held that an appeal will lie at the instance of such defendant on the ground that he is adversely affected by the decree. *X* owes Rs. 2,000 to *A*. *A* assigns the debt first to *B* and then to *C*. *C* sues *A* and *B* to recover the debt, alleging that the assignment to *B* had become void through non-fulfilment of the conditions upon which it was made. A decree is passed against *A*, but the suit is dismissed as against *B*. Here the decree necessarily implies the finding that the assignment to *B* had become void, inasmuch as but for such a finding the decree could not have been passed in favour of *C* who admittedly was the *second* assignee of the debt. *B* may therefore appeal from the decree, though as against him the suit was dismissed (*r*).

In some cases an appeal may be preferred by a defendant against his co-defendants. *A* sues two Hindu brothers *B* and *C* on a promissory note passed by *B* for money borrowed by him (*B*) as manager of the family, alleging, that *B* and *C* were joint, and that the loan was obtained by *B* for family purposes. *B* does not appear at the hearing. *C* appears and admits that he and *B* are joint, but denies that the loan was obtained for family purposes. An issue is raised as to whether the debt contracted by *B* was for family purposes. It is found by the Court that the loan was obtained by *B* for family purposes, and a decree is passed against *B* and *C*. Here *C* can appeal from the decree as between himself and *B*. The rule is that when a Court deals with a case as raising not only a question between the plaintiff and the defendants, but also as between the defendants, one of the defendants can appeal from the decree as between himself and the other defendants (*s*). See notes to s. 11 under the head "Res judicata between co-defendants" on p. 47 above.

Joinder of appellants.—It is irregular for defendants with different defences to a suit and with different grounds for appeal to join in a single appeal (*t*).

Sub-section (3): consent decrees not appealable.—Sub-section (3) is new. It declares that no decree passed by consent of parties shall be appealable. Under the Code of 1882 consent decrees were passed under s. 375. Under the present Code consent decrees are to be passed under rule 3 of Order 23. This rule corresponds

(*r*) *Jamna Das v. Uday Ram* (1899) 21 All. 117; (*s*) *Sotru v. Narayanrao* (1894) 18 Bom. 520.

Krishna Chandra v. Mohesh Chandra (1905) 9 Cal. W. N. 584; *Yusuf Sahib v. Durg* (1907) 30. Mad. 447.

(*t*) *Hodges v. Delhi and London Bank* (1900) 5 Cal. W. N. 1.

with s. 375 of the Code of 1882 except that certain words which occurred at the end of s. 375 have now been omitted. S. 375 ran as follows:—

“If a suit be adjusted wholly or in part by any lawful agreement or compromise or if the defendant satisfy the plaintiff in respect to the whole
Compromise of suit. or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded and the Court shall pass a decree in accordance therewith so far as it relates to the suit, *and such decree shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction.*”

O. 23, r. 3, is a reproduction of s. 375 with the omission of the words italicized above (u). This omission has been supplied by sub-section (3) of the present section. Sub-s. (3), however, goes further than those words. The said words barred an appeal from a consent-decree *only so far as* such decree related to so much of the *subject-matter of the suit* as was dealt with by the agreement, compromise or satisfaction on which the decree was based. If a consent-decree dealt with any matter extraneous to the suit, that is, with matters that *did not relate to the subject-matter of the suit*, it was held that the decree, *though passed with the consent of parties*, was appealable, and that it should be modified by omitting therefrom such terms as did not relate to the subject-matter of the suit (v). As regards the terms so excluded it was held that they might be enforced in a separate suit as a *contract* (w). There is no such limitation in sub-section (3). It excludes an appeal from every decree passed with the consent of the parties, though it may comprise terms that do not relate to the suit. But in such a case it is open to either party to the compromise to appeal from the order recording the compromise on the ground that the Court had no power under O. 22, r. 3, to record a compromise containing matters not relating to the suit [O. 43, r. 1, cl. (m)].

Both under O. 23, r. 3, and the corresponding s. 375 of the Code of 1882, the agreement or compromise in terms of which the Court is invited to pass a consent-decree must be “lawful.” It was accordingly observed by the High Court of Bombay in *Gouldas v. James Scott* (x), a case under s. 375, that “notwithstanding the declared finality of the decree, an appeal against it would be maintainable, where the party against whom the decree was passed alleged that there had been in fact no ‘lawful agreement’ come to, in which case the condition precedent to the making of the decree would not be fulfilled.” These observations were mere *obiter dicta*, but they were adopted by the High Court of Madras in *Sridharan v. Puramathan* (y), where it was expressly held that an appeal would lie from a consent-decree, if the agreement in terms of which the decree was passed was not lawful. The present Code does not allow an appeal from a consent-decree in *any* case. But it is quite competent to either party to appeal from the order recording the compromise where the compromise is not a lawful compromise, on the ground that the Court had no power under O. 22, r. 3, to record a compromise that was not lawful [O. 43, r. 1, cl. (m)]. See notes to O. 22, r. 3, “Appeal.”

Procedure for setting aside consent decrees.—Sub-section (3), in so far as it bars an appeal from consent decrees, gives effect to the principle that a judgment by consent acts as an *estoppel* (z). But a consent-decree can be set aside on any ground

(u) There are certain words added at the commencement of rule 3 of Order 23, which it is not material to notice here. See notes to O. 23, r. 3.
(v) *Venkatappa v. Thimma* (1895) 18 Mad. 410; *Pragdas v. Giridhardas* (1902) 26 Bom. 76, 79; *Manager of Sri Meenakshi Devasthanam v. Abdul Kasim* (1907) 80 Mad. 427,

428.
(w) *Jasimuddin v. Bhuban* (1907) 34 Cal. 456.
(x) (1892) 16 Bom. 202, at p. 212. See also *Pragdas v. Giridhardas* (1902) 26 Bom. 76, 79.
(y) (1900) 23 Mad. 101.
(z) *Re S. American Co.* [1895] 1 Ch. 87.

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that would invalidate an agreement, such as misrepresentation, fraud or mistake (a). This, however, cannot be done by an appeal, but it must be done by a *fresh suit* brought for the purpose (b). In some cases it may be done by an application for a review (c). But it cannot be set aside by a Rule (d). See notes to s. 11, "Consent decree and estoppel," p. 62 above.

"By consent of parties."—To constitute consent there must be an agreement between the parties. Mere acceptance by a party of an order offered by the Court does not amount to consent (e).

97. [New.] Where any party aggrieved, by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Appeal from final decree where no appeal from preliminary decree.

Object of the section.—This section is new. The object of the section is to estop parties aggrieved by a preliminary decree, who do not appeal from such decree within the period of limitation, from afterwards disputing its correctness in any appeal which may be preferred from a decree.

A party aggrieved by a preliminary decree must appeal from the decree within the period of limitation. It is unreasonable that he should allow proceedings to be carried on to their final stage and large costs to be incurred and then object to the preliminary decree in an appeal from the final decree. Recent Calcutta decisions under the Code of 1882 were quite the other way. According to these decisions, a party aggrieved by an order in the nature of a preliminary decree was not bound to appeal from the order, though the order was appealable as a decree; he was at liberty to wait until the final decree was passed, and then to dispute the correctness of the order in an appeal from the final decree, though the period of limitation for an appeal from the order had then expired. Thus it was held that when an order was passed in a suit for dissolution of partnership and accounts, declaring the shares of the parties, and referring the case to a commissioner for taking accounts, it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree, though no appeal was preferred from the order, and the period prescribed by the law of limitation for appealing from the order had then expired (f). In a subsequent case it was held by a Full Bench in *Khadem Hossein v. Emdad Hossein* (g) [Maclean, C.J., and Rampini, J., dissenting], that where an order was passed in a suit for partition declaring the rights of the parties (h) it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree, though no appeal was preferred from the order within the time allowed by law. The contrary had been laid down in an earlier case decided by the same High Court (i), but that decision was dissented from by a majority of the Full Bench in *Khadem Hossein's* case. Under this section, omission to prefer an appeal

- (a) *Huddersfield Banking Co. v. Lister* [1895] 2 Ch. 278 (mistake common to both parties); *Wilding v. Sanders* [1897] 2 Ch. 584 (mistake of counsel). See also *Bibee Solomon v. Abdool Azeez* (1881) 6 Cal. 687, 706.
(b) *Huddersfield Banking Co. v. Lister* [1895] 2 Ch. 278; *Ainsworth v. Wilding* [1896] 1 Ch. 678; *Wilding v. Sanders* [1897] 2 Ch. 584; *Mirali v. Rahmoobhoy* (1891) 15 Bom.

594.
(c) *Aushoolosh v. Tara* (1884) 10 Cal. 612, 615.
(d) *Fatmabat v. Sonbat* (1921) 36 Bom. 77.
(e) *Aldam v. Brown* (1890) W. N. 116; *Hadida v. Foraham* (1898) 10 Times Rep. 159.
(f) *Biaya Nath v. Bani Kanta* (1896) 23 Cal. 406.
(g) (1902) 29 Cal. 758.
(h) See O. 20, r. 18 below.
(i) *Borom Dey v. Ram Chundra Dey* (1896) 23 Cal. 279.

from a preliminary decree precludes objections to it in an appeal from the final decree (j). It is to be noted that the present section applies only to preliminary decrees passed after the commencement of this Code.

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Preliminary decree.—As to what is a preliminary decree, see notes to s. 2, cl. (3), under the head “Preliminary decree,” on p. 6 above.

Final decree passed prior to or during pendency of appeal from preliminary decree.—Under the Code of 1882 it was held that where after the passing of the final decree a party appealed from the preliminary decree, but did not also appeal from the final decree, that circumstance was a bar to the hearing of his appeal from the preliminary decree (k). Under the present Code it has been held by the High Courts of Madras and Allahabad that the mere fact that there is no appeal preferred from the final decree is no ground for not hearing the appeal from the preliminary decree, whether the latter appeal is filed before or after the final decree. If the preliminary decree is set aside, the final decree falls with it (l). The Calcutta rulings are not uniform (m).

Consolidation of appeals.—The Code contains no provisions for consolidating suits or appeals. Whether or not the Court has jurisdiction to consolidate appeals, it would not do so unless before the hearing of the suits consolidation was asked for of the suits and unless the evidence given in the two cases is common to both of them (n). See s. 151, notes under the head “Inherent powers of Court,” cl. (a).

98. [S. 575.] (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

Decision where appeal heard by two or more judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

Difference between the old and new section.—This section corresponds with s. 575 of the Code of 1882 except that the proviso to sub-section (2) of the

(j) *Ahmed v. Hashim* (1914) 42 Cal. 914 [preliminary decree dissolving partnership].
(k) *MacKenzie v. Narasingh Sahai* (1909) 36 Cal. 382; *Kuriya Mal Bishambhar Das* (1910) 32 All. 225. See also *Muhammad Akbar v. Tasaddug* (1912) 34 All. 493.
Lakshmi v. Manu (1911) 37 Mad. 29; *Ram-*

vien v. Veerappudayan (1912) 37 Mad. 455;
Kanhaya Lal v. Tirbeni (1914) 36 All. 532 [F. B.].
(m) *Khirodamoni v. Adhar* (1912) 18 Cal. L. J. 321; *Abdur v. Amar* (1913) 18 O. L. J. 223.
(n) *Anardan v. Shik Pershad* (1916) 43 Cal. 95.

S. 98. present section differs in several material respects from the proviso to the second paragraph of s. 575. The proviso to the second paragraph of s. 575 ran as follows :—

"Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it."

As to the points of distinction between the old and the new section, see notes below under the head "The appeal shall then be heard upon that point only," and the head "By whom appeal to be heard upon the point of law stated."

"Differ in opinion on a point of law."—No reference can be made under this section if the Judges differ on a question of *fact*. The power to refer can only be exercised if there is a difference of opinion on a point of *law* (o).

"The appeal shall then be heard upon that point only."—Under the old section it was the *appeal* that was referred to a third Judge when the Judges hearing the appeal differed in opinion on a point of law and it was held that on such reference the *whole appeal* was open for argument, and not only the point of law on which the Judges had differed in opinion (p). The procedure to be adopted under the present section is to state the point of law upon which the Judges differ, and the appeal is then to be heard upon that point only.

By whom appeal to be heard upon the point of law stated.—Where a point of law on which the Judges hearing the appeal differ has been stated, the appeal is to be heard upon that point by one or more of the *other* Judges of the Court. This was, in fact, the practice followed in Bombay under the Code of 1882 (q). The practice of the Allahabad High Court was, however, different. The practice there was that the appeal should be heard by a Bench including the Judges who first heard the appeal (r). It is to be noted that while the appeal upon the point of law is under this section to be heard by a Judge or Judges other than those who first heard it, the point is to be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

Where the Judges differ on a point of law, but do not state the point.—A obtains a decree in a District Court against B. B appeals to the High Court. The appeal is heard by a Bench of two Judges. The Judges differ in opinion on a point of law, but they do not state the point of law, and deliver judgments as judgments of the Court without any reservation, one Judge holding that the appeal should be allowed with costs, and the other that the appeal should be dismissed with costs. In such a case the Judges are not competent subsequently to state the point of law (s), and their dissentient judgments will operate as confirming the decree of the District Court under para. 1 of sub-sec. (2) (t). But B may then appeal under the Letters Patent (u).

Appeal to High Court from awards under Land Acquisition Act.—This section applies to land acquisition appeals by virtue of the provisions of s. 54 of the Land Acquisition Act, 1894 (v).

(o) *Girdharji v. Romanlalji* (1890) 17 Cal. 8.

(p) *Seshadri v. Nataraja* (1898) 21 Mad. 179.

(q) *Nagu v. Saiu* (1891) 15 Bom. 424; *Jehangir v. Secretary of State* (1904) 3 Bom. L.R. 131.

(r) *Rohilkhand Bank v. Row* (1884) 6 All. 468.

(s) *Lal Singh v. Ghansham* (1887) 9 All. 625.

(t) *Devachand v. Hirachand* (1889) 13 Bom. 449, 459.

(u) *Keshav v. Vinayak* (1894) 18 Bom. 855; *Girdharji v. Purushotam* (1884) 10 Cal. 814; *Narayanadasami v. Oruru* (1902) 25 Mad. 548.

(v) *Manavikraman v. Collector of the Nilgiris* (1918) 41 Mad. 948.

Letters Patent appeal.—Where an appeal is heard by a Bench of two Judges of a Chartered High Court, and the Judges differ, then, if the appeal is from the Original Side of the High Court (that is, an appeal under cl. 15 of the Letters Patent), the procedure is governed by cl. 36 of the Letters Patent and the opinion of the senior Judge prevails (*w*), but if the appeal is a second appeal from the *mufassal*, the procedure is governed by the present section (*x*). See also cls. 10 and 27 of the Allahabad High Court set forth in Appendix II below.

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99. [S. 578.] No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, ~~not affecting the merits of the case~~ or the jurisdiction of the Court.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

Changes introduced by the section.—This section corresponds with s. 578 of the Code of 1882, except in the following respects :—

1. The words “any misjoinder of parties or causes of action” are new. As to the effect of these words see notes to O. 2, r. 3 under the heads “Procedure in case of misjoinder of plaintiffs and causes of action,” and “Procedure in case of multifariousness,” and notes to O. 2, r. 4, under the head “Leave of the Court.”
2. The words “in any proceedings in the suit” have been substituted for the words “whether in the decision or in any order passed in the suit or otherwise.” As to the effect of this alteration, see notes below under the head “In any proceeding in the suit.”

Scope of the section.—The mere circumstance of there being an error, defect or irregularity in any proceeding in a suit is no ground for reversing or varying a decree in appeal. But if it appears that the error, defect or irregularity affected the merits of the case or the jurisdiction of the Court, it would be a ground for reversing or varying the decree. Where an irregularity is one which affects the merits of a case or the jurisdiction of a Court, it is said to be a *material* irregularity. Where it does not, it is usually spoken of as a *mere* irregularity. This section cures a *mere* irregularity, error or defect. It does not cure a *material* irregularity, error or defect.

“Misjoinder of parties or causes of action.”—This expression may be amplified, and the rule contained in this part of the section may be stated as follows :—

No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of—

- (1) misjoinder of plaintiffs (O. 1, r. 1);
- (2) misjoinder of defendants (O. 1, r. 3);
- (3) misjoinder of plaintiffs and causes of action (O. 2, r. 3). [The practice was different under the Code of 1882: see notes to O. 2, r. 3, under the head “Procedure in case of misjoinder of plaintiffs and causes of action”].

(*) *Roop Lal v. Lakshmi Dass* (1905) 29 Mad. 1; *Surajmal v. Horniman* (1918) 20 Bom. L. R. 185, 218; *Lachman Singh v. Ram Lagan* (1904) 26 All. 10. (x) *Bhuta v. Lakadu* (1919) 21 Bom. L. R. 157.

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- (4) misjoinder of defendants and causes of action (O. 2, r. 3). [The practice was different under the Code of 1882: see notes to O. 2, r. 3, under the head "Procedure in case of multifariousness."]
- (5) misjoinder of causes of action (O. 2, rr. 3, 4 and 5). See notes to O. 2, r. 4, under the head "Leave of the Court."

The words "on account of any misjoinder of parties or causes of action" have been inserted in the section to make it clear that such a misjoinder is to be treated as a mere irregularity. Non-joinder stands on the same footing as misjoinder (*y*).

Error, defect or irregularity not affecting the merits of the case.—

A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped (*z*), or for admitting a document declared invalid where the judgment is not based on that document (*a*), or because the wrong side was allowed to begin (*b*), or because the suit was decided on a Sunday (*c*), for these are irregularities that could not affect the merits of the case or the jurisdiction of the Court. All these irregularities are cured by the present section. The exclusion of evidence by the lower Court is an irregularity which may or may not affect the merits of the case: if it does not, the irregularity is condoned under this section (*d*); see Indian Evidence Act, 1872, s. 167. For other cases see—

1. notes to s. 15 under the head "Where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of higher grade;"
2. notes to s. 92 under the head "Consent of the Advocate General;"
3. notes to O. 6, r. 14, under the head "Omission to sign plaint;"
4. notes to O. 16, r. 1, under the head "Remedy of party when witness-summons refused;"
5. notes to O. 21, r. 13, under the head "Omission to verify inventory;"
6. notes to O. 26, r. 4, under the head "May issue;"
7. notes to O. 32, r. 1, under the head "Objection to authority of next friend;"
8. notes to O. 41, r. 23, under the head "Effect of erroneous order of remand;"
9. notes to O. 41, r. 26, "Sending back case for a revised finding;"
10. notes to Schedule II, paragraph (1), under the head "Application shall be in writing."

"In any proceedings in the suit."—These words have been substituted for the words "whether in the decision or in any order passed in the suit or otherwise," which occurred in s. 578 of the Code of 1882. The latter words were held to apply only to irregularities in proceedings subsequent to the institution of the suit, and not to irregularities in the frame or institution of the suit (*e*). The present section applies to irregularities in any proceedings in the suit.

Irregularity affecting the jurisdiction of the Court.—See s. 21 and the notes thereto.

(y) *Yakkanath v. Manakkat* (1909) 33 Mad. 436.
 (z) *Devachand v. Hirachand* (1889) 13 Bom. 449.
 (a) *Womes Chander v. Chundes Churn* (1881) 7 Cal. 293; *Girāhar v. Ganpat* (1874) 11 B. H. C. 135.
 (b) *Makund v. Bahori Lal* (1881) 3 All. 824.

(c) *Sheoram v. Thakur* (1908) 30 All. 136, in app. from (1907) 29 All. 562.
 (d) *De Souza v. Pestanjí* (1884) 8 Bom. 408; *Suryamoni v. Kali Kanta* (1901) 25 Cal. 37, 62.
 (e) *Varajial v. Ramdat* (1902) 26 Bom. 259, 266.

Suits Valuation Act VII of 1887, section 11, modifies the provisions of the present section in cases where an objection is taken in appeal that by reason of the over-valuation or under-valuation of a suit a Court which had not jurisdiction with respect to the suit exercised jurisdiction with respect thereto. The said section runs as follows :—

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- (1) Notwithstanding anything in section '[99] of the Code of Civil Procedure an objection that by reason of the over-valuation or under-valuation of a suit or appeal, a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless—
 - (a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, and
 - (b) the appellate Court is satisfied, for reasons to be recorded by it in writing that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.
- (2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section, and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court.
- (3) If the objection was taken in that manner, and the appellate Court is satisfied as to both those matters, and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeal; but if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

APPEALS FROM APPELLATE DECREES.

100. [S. 584.] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

Second appeal.

- (a) the decision being contrary to law or to some usage having the force of law ;
- (b) the decision having failed to determine some material issue of law or usage having the force of law ;

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(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

The word "specified" in the expression "specified law or usage" which occurred in cl. (a) of s. 584 of the repealed Code has been struck out as being redundant.

Scope of the section.—This section deals with second or special appeals. A second appeal can lie only to the High Court. A Court of first appeal is competent to enter into questions of fact, and decide whether the findings of facts by the lower Court are or are not erroneous. But a Court of second appeal is not competent to entertain questions as to the soundness of a finding of fact by the Court below (f). A second appeal can only lie on one or other of the grounds specified in the present section (g). A judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case, and, if they do not, to reject the appeal summarily (h). The limitations to the power of the Court imposed by ss. 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first appellate Court upon a matter of fact (i). "Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section [100]. No Court in India or elsewhere has power to add to or enlarge those grounds" (j).

No second appeal will lie on the ground of an erroneous finding of fact.—There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. No doubt, a second appeal does lie where there is a substantial error or defect in procedure [see cl. (c)]. But an erroneous finding of fact is a different thing from an error or defect in procedure. Where there is no error or defect in procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding (k). The mere fact that the High Court would have upon the documents and evidence placed before the Court of first appeal come to a different conclusion, is no ground for a second appeal; it is precisely this revision of evidence which is excluded by the limited character of a second appeal (l). In this connection may be cited the observations of the Judicial Committee in *Nafar Chandra Pal v. Shukur* (m):—

"Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is necessarily a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on

(f) *Ram Gopal v. Shamskhaton* (1893) 20 Cal. 93, 19 I. A. 288.

(g) *Luckman v. Puna* (1889) 16 Cal. 753, 16 I. A. 125.

(h) *Rudr Prasad v. Baij Nath* (1893) 15 All. 367.

(i) *Pertab Chunder v. Mohendranath* (1890) 17 Cal. 291, 16 I. A. 223.

(j) *Durga Chowdhurani v. Jewahir Singh* (1891) 18 Cal. 23, 30, 17 I. A. 122.

(k) *Durga Chowdhurani v. Jewahir Singh* (1891) 18 Cal. 23, 17 I. A. 122; *Ram Gopal v. Sham-*

khaton (1893) 20 Cal. 93, 19 I. A. 228; *Fazl Karim v. Maula Baksh* (1891) 18 Cal. 448, 18 I. A. 67; *Ramratan v. Nandu* (1892) 19 Cal. 249, 19 I. A. 1; *Balkrishna v. Govind* (1904) 26 Bom. 617; *Lukhi Narain v. Jodu Nath* (1894) 21 Cal. 504, 21 I. A. 39; *East India Ry. Co. v. Changai* (1915) 42 Cal. 888.

(l) *Nafar Chandra Pal v. Shukur* (1918) 45 I. A. 183, 189.

(m) (1918) 45 I. A. 183, 187.

one side or the other ; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact."

A second appeal will lie where a fact has been found without any evidence to support it.—It follows from what is stated in the next preceding paragraph that a second appeal will lie where there is a finding *without any evidence* to support it, or if the finding is based on *irrelevant matters*, or on a *misconception of what the evidence is*. All these are cases of substantial error or defect in procedure, and a second appeal will therefore lie under cl. (c) of the section (n).

A second appeal will lie to impeach legal conclusions drawn from findings of fact.—Though a second appeal does not lie upon a finding of fact, yet if a legal conclusion is drawn from the finding, a second appeal will lie under cl. (a) of the section on the ground that the legal conclusion was erroneous. Thus where a suit involved a question of adverse possession, and it was held by the lower Courts that the proper legal conclusion to be drawn from the findings of fact in the case was that the defendant was in adverse possession, the Privy Council held that the correctness of this conclusion was a question open to second appeal, and that the High Court was not precluded from deciding to the contrary (o). See notes above, "No second appeal will lie on the ground of an erroneous finding of fact."

A second appeal will lie where the Courts below have misconceived the real question they had to try.—The High Court has jurisdiction under this section to set aside the decree of the trial Judge in favour of the plaintiff, affirmed on the facts by the first appellate Judge, on the ground that the evidence taken showed that the true question of fact, which had not been considered and as to which no issue had been framed, should have been answered in favour of the defendant (p).

Decision being contrary to law.—A second appeal will lie where the decision is contrary to "law." The term "law" in cl. (a) is not limited in its meaning to statute law : it means general law (q).

When the question is one of *construction* of a document (r), or of *legal inference* from a document (rr), the question is one of law, and a second appeal will lie. But where a suit involves a question of the *fact* of adoption, and documents are produced as *evidence of the fact of adoption*, the question whether the documents do or do not support the alleged adoption is a question of fact, and no second appeal will lie (s). Where the Court of first instance granted a mandatory injunction for the demolition of a building, and the decree was reversed in appeal on an erroneous view of the law, it was held that a second appeal would lie (t). Though a person may not have been duly appointed executor, he may render himself responsible as executor if he intermeddles with the estate of the deceased. Misapplication of law on this point is a good ground for a second appeal (u).

Where an appeal which ought to have been made to the High Court is made to a District Court, and the latter Court hears and decides the appeal, the decision is contrary

(n) *Anangamanjari v. Tripura Sundari* (1887) 14 Cal. 740, 747, 14 I. A. 101; *Hemantha v. Brojendra* (1890) 17 Cal. 875, 17 I. A. 65; *Shivabasaava v. Sangappa* (1905) 29 Bom. 1, 31 I. A. 154; *Vishvanath v. Dhondappa* (1893) 17 Bom. 475; *Palakdhari v. Manjers* (1896) 23 Cal. 179; *Gowind v. Vithal* (1896) 20 Bom. 763; *Lakkichand v. Lalchand* (1918) 42 Bom. 352; *Damusa v. Abdul Samad* (1919) 46 I. A. 140.
(o) *Lachmeswar v. Manowar* (1892) 19 Cal. 253, 19 I. A. 48; *Ram Gopal v. Shamkhatoon* (1898) 20 Cal. 93, 98, 19 I. A. 228; *Ishan Chunder v. Bishu* (1897) 24 Cal. 825; *Rajaram v. Ganesh* (1897) 21 Bom. 91.

(p) *Damusa v. Abdul Samad* (1910) 46 I. A. 140.
(q) *Ram Gopal v. Shamkhatoon* (1893) 20 Cal. 93, 19 I. A. 228.
(r) *Fateh Chand v. Kishan Kunwar* (1912) 34 All. 599, 39 I. A. 247; *Vithoba v. Mahadev* (1918) 42 Bom. 344, 350-351.
(rr) *Chaudhri Satgur v. Kishore Lal* (1919). 46 I. A. 197, 201.
(s) *Lachman Lal v. Kanhaya Lal* (1895) 22 Cal. 609, 22 I. A. 51.
(t) *Ram Bahadur v. Ram Shankur* (1905) 27 All. 688.
(u) *Maniram Seth v. Seth Rupchand* (1906) 33 Cal. 1047, 33 I. A. 165.

- S. 100.** to law within the meaning of cl. (a) of sub-sec. (1), and a second appeal lies to the High Court from the decree of the District Court (v). See notes to s. 96, "Forum of appeal, p. 246 above."

Usage having the force of law.—These words mean "a local or family usage as distinguished from the general law" (w). If the decree appealed from is based, on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom should be proved, the High Court will interfere in second appeal (x). The existence of custom or "usage having the force of law" is a mixed question of fact and law. The present section precludes the High Court from interfering in second appeal with the *findings* arrived at by the lower Courts of actual facts from which the existence of the custom has been inferred. But the *inference as to the existence* and the *decision as to the validity* of the custom are matters of law, and these may therefore be revised by the High Court in second appeal (y). Similarly, where the question is as to the existence or non-existence of a custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish the alleged custom, the question is *one of law*, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence (z).

Substantial error or defect in procedure.—Where secondary evidence was admitted in contravention of the provisions of the Evidence Act, s. 66, it was held that the case came within cl. (c), and that a second appeal would lie (a). On the same ground it was held that a second appeal would lie where an unregistered document was admitted in evidence (b). Similarly where the lower appellate Court proceeded to determine the appeal without waiting for the return of a commission issued by that Court, a second appeal was allowed (c).

Where the Court of first appeal disposes of a suit upon a case not raised by the parties or warranted by the evidence, the case is one of substantial error or defect in procedure and a second appeal will lie (d). Omitting to decide a material issue (e), omitting to examine witnesses tendered (f), refusing to receive documentary evidence which ought to have been accepted (g), allowing the plaintiff in the lower appellate Court to change the nature of his suit (h), have all been held to be good grounds for special appeal. But disregard of an Amin's second report made after a local investigation does not constitute a substantial error or defect of procedure within the meaning of this section, and is no ground for second appeal (i). The refusal by a lower appellate Court to exercise the discretion vested in it by O. 41, r. 27, with respect to the admission of additional evidence, is a substantial error or defect in procedure, and affords a ground of special appeal; but where the Court *has exercised its discretion* in a sound and reasonable way, and in the exercise of its discretion refused to admit additional evidence, the case is not one of substantial error or defect in procedure (j).

Refusal by Court of first appeal to extend time for filing an appeal.—Where an application is made to a Court of first appeal to admit an appeal from the

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| (v) <i>Bandiram v. Purna Chandra</i> (1918) 45 Cal. 928 | (b) <i>Basava v. Kalkapa</i> (1878) 2 Bom. 489; <i>Ramapa v. Umanna</i> (1883) 7 Bom. 123 |
| (w) <i>Ram Gopal v. Shamskhaton</i> (1893) 20 Cal. 93, 19 I. A. 228 | (c) <i>Madho Singh v. Kashi Singh</i> (1894) 16 All. 342. |
| (x) <i>Desai Runchhoddas v. Rawal</i> (1897) 21 Bom. 110. | (d) <i>Shivabasa v. Sangapa</i> (1905) 29 Bom. 1, 31 I. A. 154. |
| (y) <i>Kumarappa v. Manavala</i> (1918) 41 Mad. 374, overruling <i>Kakarla v. Raja Venkata</i> (1906) 29 Mad. 24, and approving <i>Pankajammal v. Secretary of State</i> (1917) 40 Mad. 1108, 1110. | (e) <i>Ramkor v. Gangaram</i> (1892) 18 Bom. 545. |
| (z) <i>Hassim Ali v. Abdul Rahman</i> (1906) 28 All. 698; <i>Ram Bilas v. Lal Bahadur</i> (1908) 30 All. 311 | (f) <i>Monilal v. Khiroda</i> (1893) 20 Cal. 740. |
| (a) <i>Lashman Singh v. Puna</i> (1889) 16 Cal. 753, 16 I. A. 125. | (g) <i>Talewar Singh v. Bhagwan Das</i> (1908) 12 C. W. N. 312. |
| | (h) <i>Terietput v. Sudersan Das</i> (1878) 4 Cal. 46. |
| | (i) <i>Lukhi Narain v. Jodu Nath</i> (1894) 21 Cal. 504, 21 I. A. 39. |
| | (j) <i>Ram Piari v. Kallu</i> (1901) 23 All. 121; <i>Durga Prasad v. Jai Narain</i> (1911) 33 All. 379. |

original decree after the expiration of the period of limitation, that Court has the power, on sufficient cause being shown, to admit the appeal [Limitation Act, s. 5]. If the lower appellate Court refuses to admit the appeal, holding in the exercise of its discretion that there was no sufficient cause for not presenting the appeal within the prescribed time, there is no ground for a second appeal. But if the lower appellate Court did not exercise its discretion at all, or exercised it capriciously and arbitrarily, or without proper legal material to support its decision, a second appeal will lie under cl. (a) of the section. The principle is that where a Court has exercised its discretion in a sound and reasonable way, the High Court has no power to interfere in second appeal (k).

Dismissal of appeal for default.—Though a second appeal will lie from an appellate decree passed ex parte no second appeal lies from an order dismissing an appeal for default. Such an order is not a decree (l); see O. 41, r. 11 (2), and s. 2, cl. (2), sub-cl. (b).

Changing nature of suit.—An appellant should not be allowed to set up a new case in second appeal (m).

Pleas which may be taken for the first time in special appeal.—An appellant will not be allowed to set up for the first time in second appeal a plea not taken by him in the lower Court. But if the objection is one which goes to the very root of the case, it may be allowed to be taken for the first time in second appeal (n). Thus, subject to the provisions of s. 21 above, an objection to jurisdiction may be taken for the first time in special appeal, if it is patent on the face of the record (o) [See notes to s. 21, "Objection to jurisdiction, etc."]. Similarly, the plea of *res judicata* may be taken for the first time in second appeal, provided it can be decided upon the record before the Court (p). So also the plea of want of notice in an ejectment suit (pp). As to the plea of limitation, the notes to O. 41, r. 2, under the head "Leave of Court: Limitation," which refer to first appeals, apply also to second appeals (q).

The High Court will allow in second appeal a new point to be raised for the first time, though the point may not have been taken in the memorandum of appeal before it, provided it is purely a question of law arising on the findings of the Courts below, and not affected by any facts outside those findings. Thus where the lower appellate Court awarded to the plaintiff one-third share of the property in suit on the ground that remoter *gotraj sapindas* inherit *per stirpes*, and the defendant preferred a second appeal to the High Court on the ground that the plaintiff was not entitled to any share at all, the defendant was allowed to contend at the hearing of the second appeal that the plaintiff was not entitled in any event to more than one-sixth share, as remoter *gotraj sapindas* inherit *per capita* and not *per stirpes* (r). But no question of law will be allowed to be raised for the first time at the hearing of a second appeal, if it sets up a new right differing in kind from that asserted throughout the trial, and not merely in degree as in the above case. Thus where the right claimed by one of the defendants was treated as one of maintenance only in the Courts below, she was not allowed to contend in second appeal that, besides maintenance, she was entitled to a half share in the property (s).

- (k) *Parvati v. Ganpati* (1899) 23 Bom. 513; *Tulsa v. Gajraj* (1903) 25 All. 71; *Hamid v. Gayadin* (1904) 26 All. 327.
 (l) See *Anwar Ali v. Jaffer Ali* (1890) 23 Cal. 827.
 (m) *Gopal v. Hanuman* (1882) 6 Bom. 107; *Mahomed v. Sitaramayyar* (1892) 15 Mad. 50.
 (n) *Kanhia v. Mahin Lal* (1888) 10 All. 495.
 (o) *Kuppa v. Dorasami* (1883) 6 Mad. 76.
 (p) *Bapuji v. Umedbhas* (1871) 8 B. H. C. A. C. 245; *Sidheshwar v. Harikar* (1888) 12 Bom. 155; *Sayad v. Nana* (1889) 13 Bom. 424; *Velazudam v. Arunuchalu* (1890) 13 Mad.

273.
 (p) *Kanahai Lal v. Suraj Kunwar* (1899) 21 All. 446.
 (pp) *Dodhu v. Madhavrao* (1893) 18 Bom. 110.
 (q) See *Shivapa v. Dod Nagaya* (1887) 11 Bom. 114.
 (r) *Nagesh v. Gururao* (1893) 17 Bom. 303; *Giriapa v. Ningapa* (1893) 17 Bom. 100; *Gavdappa v. Girimalappa* (1895) 19 Bom. 331, 676; *Nurimian v. Ambica* (1916) 44 Cal. 47.
 (s) *Rachawa v. Shivayogapa* (1894) 18 Bom. 679.

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Second appeal.—A second appeal does not lie from any order made in appeal under s. 104. But a second appeal will lie from an order made under s. 47, as such an order is deemed to be a “decree.” See s. 2, cl. (2).

101. [S. 585.] No second appeal shall lie except on the grounds mentioned in section 100.

Second appeal on no other grounds.

102. [S. 586.] No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

No second appeal in certain suits.

Suits of the nature cognizable by Courts of Small Causes.—Whether a suit is or is not of the nature cognizable by a Court of Small Causes is to be determined by a reference to the provisions of the Provincial Small Cause Courts Act 9 of 1887 [see ss. 15, 16 and 27]. If a suit is of the nature cognizable by a Small Cause Court, and the value of the subject-matter of the suit does not exceed Rs. 500 no second appeal will lie, even though for special reasons the suit cannot be or has not been tried in a Small Cause Court, or though the Small Cause Court to which the plaint was presented returns the plaint under s. 23 of the said Act to be presented to another Court on the ground that it involves a question of title, and is not therefore cognizable by that Court. The reason is that it is the nature of the suit, and not the Court in which it is tried, that determines the right of appeal (*t*). The words “any suit of the nature cognizable” mean any suit relating to a subject-matter over which a Court of Small Causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction (*u*). In determining whether a second appeal lies under this section, the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the Court (*v*). Nor should regard be had to the mode of trial of the suit; thus a suit which is of the nature cognizable by a Court of Small Causes is none the less so because instead of being tried under the summary procedure it has been tried in the ordinary manner (*w*).

Suit for mesne profits.—Section 15 of the Provincial Small Cause Courts Act gives jurisdiction to Courts of Small Causes to take cognizance of all suits of a civil nature of which the value does not exceed Rs. 500 except such suits as are specified in the second schedule of the Act. That schedule consists of several articles of which article 31 is the most important for the purposes of the present section. That article excludes from the jurisdiction of Small Cause Courts “any other suit for an account including.....a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.” This article contemplates cases in which the plaintiff claims an account of monies which the defendant has received and to an account of which the plaintiff is entitled, because the monies received belonged to him. It has been held by a majority of the Full Bench of the Calcutta High Court

(*t*) *Kalian v. Kalian* (1885) 9 Bom. 259; *Mahadeo v. Budhai Ram* (1904) 26 All. 358; *Sada v. Brij Mohan* (1898) 20 All. 480; *Lala Kanda v. Lala Lal* (1898) 25 Cal. 872; *Kali v. Izzatunnisa* (1897) 24 Cal. 557; *Annamalai v. Subramanyam* (1892) 15 Mad. 298; *Muttu Karuppan v. Sellan* (1892) 15 Mad. 98; *Ramkrishna v. The President*

of the Vengurla Municipality (1917) 41 Bom. 367.
(*u*) *Soundaram v. Sonnia* (1900) 23 Mad. 547, 556.
(*v*) *Lakshmandas v. Lane* (1908) 32 Bom. 356.
(*w*) *Indra Chandra v. Srisih Chandra* (1913) 40 Cal. 537; *Shankarbai v. Somabhai* (1900) 25 Bom. 417.

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that a suit for mesne profits does not fall under this article, in other words it is cognizable by a Small Cause Court. Such a suit is not a suit "for the profits of immoveable properties belonging to the plaintiff which have been wrongfully received by the defendant." A suit for mesne profits is a suit for damages in which the defendant would be liable even if no profits have been actually received by him during the period of dispossession. For it will be seen on referring to s. 2, sub-s. (12), of the Code that mesne profits are defined as profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom (x). On the other hand, it has been held by a Full Bench of the Madras High Court (y), that a suit for mesne profits does come within art. 31 of the said Act, and is not therefore cognizable by a Small Cause Court at all. As regards recent Bombay decisions, if we are to reconcile them all, we may say that a suit for mesne profits is, according to the Bombay Court, a "suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant" within the meaning of art. 31 (z), but, that it does not come within the said article, if the amount claimed is an ascertained sum so that no account has to be taken (a).

Suit for title.—A Small Cause Court has no jurisdiction to entertain a suit for title relating to immoveable property. A suit, however, which is otherwise cognizable by a Small Cause Court, does not cease to be so, because it incidentally involves a question of title (b).

Suit for a declaration.—A Small Cause Court has no jurisdiction to entertain a suit for a declaratory decree. The mere fact, however, that there is a prayer for a declaration will not prevent a suit from being of the nature cognizable by a Small Cause Court, if all the other reliefs claimed in the suit could be obtained without asking for a declaration (c).

Execution.—The expression "suit" in this section includes execution proceedings (d), from which it follows that if a suit is of the nature cognizable by a Small Cause Court, no second appeal will lie from an order made in execution of the decree passed in the suit, unless the value of the suit exceeds Rs. 500. It is immaterial that the order in execution is made by a Court other than a Court of Small Causes or a Court vested with the powers of a Small Cause Court, as where the property attached in execution of the decree is immoveable property and the order in execution is made by a First Class Subordinate Judge in his ordinary jurisdiction. The test is, what was the nature of the suit in which the decree sought to be executed was passed, and not the nature of the proceedings in execution (e). It is also immaterial that the amount sought to be recovered in execution exceeds Rs. 500. The test is not the amount claimed in execution proceedings, but the amount of the subject-matter of the suit (f).

103. [New.] In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal but not determined by the lower appellate Court.

Power of High Court to determine issues of fact.

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| <p>(x) <i>Kunjo Behary Sing v. Madhub Chundra</i> (1898) 23 Cal. 884.
 (y) <i>Savarimutthu v. Athurusu</i> (1902) 25 Mad. 103.
 (z) <i>Antone v. Mahadev</i> (1901) 25 Bom. 85.
 (a) <i>Girjabai v. Raghunath</i> (1906) 30 Bom. 147;
 <i>Vinayak v. Krishnarao</i> (1901) 25 Bom. 625, as explained in <i>Vasudev v. Damodar</i> (1904) 6 Bom. L. R. 370.
 (b) <i>Vinayak v. Krishnarao</i> (1901) 25 Bom. 625;
 <i>Keerisang v. Naransang</i> (1908) 32 Bom. 560.</p> | <p>(c) <i>Ramachandraiyyar v. Noorulla Sahib</i> (1907) 80 Mad. 101.
 (d) <i>Gorachand v. Baykanto</i> (1873) 12 Beng. L. R. 281 [F. B.]; <i>Din Dayal v. Patrakhan</i> (1896) 18 All. 481.
 (e) <i>Narayan v. Nagindas</i> (1906) 30 Bom. 113.
 (f) <i>Mavula Ammal v. Mavula Maracottir</i> (1907) 80 Mad. 212; <i>Bullov Bhattacharji v. Baburam</i> (1885) 11 Cal. 169.</p> |
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Ss.
103, 104.

Scope of the section.—This section is new. It empowers the High Court in second appeal to determine issues of *fact*—

- (1) where it is *necessary* to determine such issues for the disposal of the second appeal,
- (2) where such issues *have not been determined* by the lower appellate Court, and
- (3) where the evidence on the record is *sufficient* to enable the High Court to determine such issues. If the evidence on the record is not sufficient, the High Court should refer the issues for trial under O. 41, r. 25.

In the absence of any provision such as is contained in the present section, there was a conflict of decisions under the Code of 1882 as to the power of the High Court to determine issues of *fact* in second appeal in the circumstances specified in the present section. On the one hand, it was held that where the evidence on the record was sufficient to enable the High Court to deliver judgment, the High Court had the power at the hearing of a second appeal itself to fix and determine issues of fact necessary for the disposal of the appeal but not determined by the lower appellate Court, as a remand in such a case would merely cause delay and increase costs (*g*). On the other hand, it was held that even if the evidence on the record was sufficient, the High Court had no such power, and the only course open to it was to remand the issues for a finding to the lower appellate Court, the ground of the decisions being that the High Court had no power in second appeal to determine any issue of *fact* (*h*). The present section gives effect to the former view.

APPEALS FROM ORDERS.

104. [S. 588.] (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :—

Orders from which
appeal lies.

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court ;
- (b) an order on an award stated in the form of a special case ;
- (c) an order modifying or correcting an award ;
- (d) an order filing or refusing to file an agreement to refer to arbitration ;
- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;

(*g*) *Bal Kishen v. Jasoda Kuar* (1885) 7 All. 765; 768, 771, *per* Petheram, C.J., and Tyrrel, J.; *Deoktshen v. Banst* (1886) 8 All. 172, 176-178, *per* Petheram, C.J., and Oldfield, J. | (*h*) *Girdhari Lal v. Crawford* (1887) 9 All. 147 [F. B.]; *Deoktshen v. Banst* (1886) 8 All. 172.

- (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court ; S. 104.
- (g) an order under section 95 ;
- (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ;
- (i) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

This section and O. 43, r. 1, contain a full list of appealable orders. The words, " save as otherwise expressly provided in the body of this Code or by any law for the time being in force," are new. See notes below under the head " Letters Patent appeal."

Clause (a)—See Schedule II, paragraph (8), and notes thereto.

Clause (b)—See Schedule II, paragraph (11), and notes thereto.

Clause (c)—See Schedule II, paragraph (12), and notes thereto.

Clause (d)—See Schedule II, paragraph (17), and notes thereto.

Clause (e)—See Schedule II, paragraph (18).

Clause (f)—See Schedule II, paragraph (21), and notes thereto. This clause does not apply to proceedings under cl. (2) of s. 11 of the Arbitration Act, 1899. Hence no appeal lies under this clause from an order refusing to set aside an award made and filed under that Act. The High Court, however, has jurisdiction to hear the appeal under cl. 15 of the Letters Patent (i).

Clause (h)—See O. 16, rr. 10, 12, 17 and 21 (summoning and attendance of witnesses); O. 26, r. 17 (attendance and examination of witnesses before Commissioner); O. 38, r. 4 (arrest before judgment); O. 39, r. 2, sub-r. (3) (disobedience of injunction).

Clause (i)—See O. 43, r. 1.

Sub-section (2).—Thus if an appeal is preferred under O. 43, r. 1 (a), from an order under O. 7, r. 10, returning a plaint to be presented to the proper Court, and an order is made in appeal remanding the case under O. 41, r. 23, no appeal lies from such order (j). See notes to O. 41, r. 23, " Appeal."

Section 154.—There are some orders which were appealable under sec. 588 of the repealed Code, which are not appealable under this section. As to these it is provided by s. 154 that where the right to appeal has already accrued to a party before the commencement of this Code, such right shall not be affected by anything contained in this Code.

(i) *Campbell & Co. v. Jeshraj* (1918) 45 Cal. 502.
(j) *Naubat Singh v. Baldeo Singh* (1911) 38 All.

479; *Chhubsu Mian v. Haroharan Das*
(1912) P. E. no. 119. n. 404.

Ss.
104, 105.

Letters Patent appeal.—Clause 15 of the Letters Patent provides that an appeal will lie from every “judgment” of a single Judge of the High Court in the exercise of civil jurisdiction to other Judges of the Court. Now an order refusing to set aside an award is a “judgment” within the meaning of the said clause (k). It is clear that if such an order is made by a Munsif’s Court, or by the Court of a Subordinate Judge or by a District Court, no appeal will lie from it, for it is not an order specified in the present section. It is equally clear that if such an order is made by a Judge of the High Court an appeal will lie from it *under the Letters Patent*, for the present section expressly saves the right of appeal given by *any law for the time being in force*. Upon this point there was a conflict of decisions under the Code of 1882, for it was provided by s. 588 of that Code that an appeal lay from the orders specified in that section, *and from no other orders*. The question accordingly arose whether s. 588, by declaring that no appeal would lie from any order other than those specified in that section, took away the right of appeal given by the Letters Patent. It was held by the High Courts of Calcutta, Madras and Bombay, following a decision of the Privy Council (l), that s. 588 did not take away the right of appeal given by cl. 15 of the Letters Patent (m), and that an appeal therefore lay from an order of a single Judge of the High Court refusing to set aside an award to the other Judges of the Court. On the other hand, it was held by the Allahabad High Court, on a different reading of the Privy Council case referred to above, that s. 588 took away the right of appeal given by the Letters Patent (n), and that no appeal therefore lay from an order refusing to set aside an award, though the order might be made by a Judge of the High Court. The Allahabad ruling, it is submitted, is no longer law, having regard to the words “save as otherwise expressly provided by any law for the time being in force” which have been newly added into this section.

105. [S. 591.] (1) Save as otherwise expressly provided,
Other orders. no appeal shall lie from any order made by
a Court in the exercise of its original or
appellate jurisdiction; but, where a decree is appealed from,
any error, defect or irregularity in any order, affecting the
decision of the case, may be set forth as a ground of objection
in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Changes introduced by the section.—This section corresponds with s. 591 of the Code of 1882 except in the following particulars:—

1. Sub-section (2) is new. See notes below under the head “Sub-section (2): appeal from order of remand.”

(h) *Tooles Money v. Suderi* (1899) 26 Cal. 361.

(i) *Harish Chunder v. Kali Sunderi* (1883) 9 Cal. 482, 10 I. A. 4.

(m) *Tooles Money v. Suderi* (1899) 26 Cal. 361; *Sahbappaht v. Narayansami* (1902) 25 Mad. 555; *Chappan v. Moldin* (1899) 22

Mad. 68; *Secretary of State v. Jehangir* (1902) 4 Bom. L. R. 342.

(n) *Banno Bibi v. Mehdi Husain* (1889) 11 All. 375; *Muhammad v. Ishaan-ullah* (1892) 14 All. 226.

2. In s. 591 the words were "in any *such* order" after the word "irregularity." S. 105.
The word "*such*" has been omitted, as the expression "*such order*" gave rise to the contention in some cases before the Privy Council that s. 591 applied to non-appealable orders only, a contention that was overruled by the Privy Council" (o).

Scope of the section.—An interlocutory order made in a suit is either appealable (s. 104) or not appealable. This section, like the corresponding s. 591, applies to appealable as well as non-appealable orders. Where an interlocutory order is appealable, the party against whom the order is made is not bound to prefer an appeal against it, but he may make the irregularity in the order a ground of objection in the memorandum of appeal, where an appeal is preferred from the decree in the suit in which the order was made. In other words, s. 105 allows an appealable order which has not been appealed from to be made the subject of appeal in an appeal from the decree. There is no law prevailing in India which renders it imperative upon a party to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. Nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon a party the necessity of appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. It was so observed by their Lordships of the Privy Council in *Moheshur Singh v. The Bengal Government* (p) and subsequent cases (q), and it is this principle that underlies the present section. The present section makes it quite clear that an order appealable under s. 104 may be questioned under s. 105 in an appeal from the decree in the suit, although no appeal from the order has been preferred under s. 104 (r). And even where the interlocutory order is one *from which no appeal lies*, an error, defect or irregularity in that order may be set forth as a ground of objection in the memorandum of appeal, where an appeal is preferred from the decree in the suit in which the order was made (s).

Affecting the decision of the case.—According to the Calcutta and earlier Allahabad decisions, the words "affecting the decision of the case" mean affecting the decision of the case *on its merits*. It has accordingly been held that no order can be attacked in appeal from a final decree, unless the error, defect or irregularity in the order is one affecting the decision of the case *on the merits*. Thus an order under O. 9, r. 13, setting aside an *ex parte* decree, is not an order that could possibly affect the *merits* of the case; such an order merely ensures a hearing upon the merits. Hence the alleged wrongfulness of the order cannot be urged as a ground of objection in an appeal from the decree in the suit (t). The same remarks apply to an order made under O. 41, r. 19, re-admitting an appeal which has been dismissed for default (u). The Chief Court of the Punjab has followed the earlier Allahabad decisions (v). On the other hand, it has been held by the High Court of Madras (w) and in a recent case by the Allahabad High Court (x), that an order under O. 9, r. 13, setting aside an *ex parte* decree can be attacked in appeal from the final decree, even though the error or defect in the

(o) See the three Privy Council cases cited in note (q) below.

(p) (1859) 7 M. I. A. 283.

(q) *Forbes v. Amereoonissa Begum* (1865) 10 M. I. A. 340; *Sheonath v. Ramnath* (1865) 10 M. I. A. 413; *Shaha Mukhun Lall v. Sree Kishen Singh* (1868) 12 M. I. A. 157.

(r) See *Sho Nath v. Ram Din* (1896) 18 All. 19.

(s) See *Jamsetji v. Dadabhoy* (1900) 25 Bom. 302; and *Godavari v. Gajapati* (1900) 23 Mad. 494.

(t) *Tasadduq v. Hayatunnissa* (1903) 25 All. 280; *Chintamony v. Raghoonath* (1895) 22 Cal. 981.

(u) *Gulab Kunwar v. Thakur Das* (1902) 24 All. 464.

(v) *Fazal v. Hashmati* (1916) Punj. Rec. no. 40, p. 115.

(w) *Gopala Chetti v. Subbier* (1903) 26 Mad. 604, 605.

(x) *Nand Ram v. Bhopal Singh* (1912) 34 All. 592.

Ss.
105, 106.

order is not one affecting the decision of the case on the merits, the reason given being that the section does not contain the words "on the merits," and no such words can therefore be read into the section. For the same reason it has been held that an order setting aside an award and directing the case to be tried by the Court may be attacked in appeal from the final decree (*y*).

Error, defect or irregularity.—The error, defect or irregularity referred to in this section must be an error, defect or irregularity in law or procedure, and not in matters of fact (*z*).

Application of the section.—This section contemplates two things, namely, (1) a regular appeal from a decree, and (2) the insertion in that appeal of a ground of objection relating to an interlocutory order. Hence it has been held by the High Court of Allahabad that no appeal will lie where the appeal is *ostensibly* against the decree passed in the suit, but the grounds of appeal are solely directed against an interlocutory order made in the suit (*a*). On the other hand, it has been held by the other High Courts that an appeal will lie, though the only reason for the appeal is the erroneous decision in regard to an interlocutory order (*b*).

It should be noted that in order to take advantage of the provisions of this section, the ground of objection must be set out in the memorandum of appeal (*c*).

Sub-section (a): appeal from order of remand.—An order under O. 41, r. 23 remanding a case is appealable, where an appeal would lie from the decree of the Appellate Court [O. 43, r. 1, cl. (u)]. Such an order was also appealable under the Code of 1882 [sec. s. 588, cl. (28)]. Under s. 591 of the Code of 1882, it was held that a party aggrieved by an order of remand could object to its validity in an appeal against the final decree, though he might have appealed against the order under s. 588 and had not done so (*d*). Sub-section (2) has been added to preclude an appellant from taking, on an appeal from the final decree, any objection that might have been urged by way of appeal from an order of remand. But this sub-section does not apply to Privy Council appeals (*e*). See notes to s. 109, "Final Order."

106. [S. 589.] Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

What Courts to hear appeals.

Forum of appeal.—See notes under the same head to s. 96 above.

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| <p>(<i>y</i>) <i>Damodar v. Raghunath</i> (1902) 26 Bom. 551; <i>Achuthayya v. Thimmayya</i> (1908) 31 Mad. 345; <i>Ram Autar v. Deoki</i> (1915) 37 All. 456.</p> <p>(<i>z</i>) <i>Sankali v. Murlidhar</i> (1890) 12 All. 200.</p> <p>(<i>a</i>) <i>Sheo Nath v. Ram Din</i> (1896) 18 All. 19; <i>Sher Singh v. Diwan Singh</i> (1900) 22 All. 366.</p> <p>(<i>b</i>) <i>Raja Dhamara v. Bukkapatnam</i> (1910) 34 Mad. 228; <i>Geogloss v. Premiall</i> (1881) 7 Cal. 148.</p> | <p>(<i>c</i>) <i>Tilak v. Chakardhari</i> (1893) 15 All. 119.</p> <p>(<i>d</i>) <i>Savitri v. Ramji</i> (1890) 14 Bom. 232; <i>Subba v. Bala Chandra</i> (1895) 18 Mad. 421; <i>Rameshur Singh v. Sheodin</i> (1890) 12 All. 510. But see <i>Jammalamadaka Subba v. Jammala Venkatarayadu</i> (1909) 32 Mad. 318.</p> <p>(<i>e</i>) <i>Ahmad Husain v. Gobind Krishna</i> (1911) 33 All. 391.</p> |
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GENERAL PROVISIONS RELATING TO APPEALS.

Ss.

107, 108.

107. [S. 582.] (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

Powers of Appellate Court.

- (a) to determine a case finally ;
- (b) to remand a case ;
- (c) to frame issues and refer them for trial ;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

Sub-section (1).—Sub-section (1) is new. It is important to note that the powers of the appellate Court referred to in cls. (a) to (d) are limited by the rules as is shown by the opening words of the section (f).

“Prescribed.”—“Prescribed” means proscribed by the rules contained in the First Schedule or made under s. 122 or s. 125 of the Code : see s. 2, cls. (16) and (18).

Clause (a)—See O. 41, r. 24.

Clause (b)—See O. 41, r. 23.

Clause (c)—See O. 41, r. 25.

Clause (d)—See O. 41, rr. 27, 28.

Sub-section (2).—This sub-section corresponds to s. 582 of the Code of 1882. The Appellate Court has power under this section to add persons as parties to a suit (g) or appeal (h) ; also to give leave to a plaintiff to withdraw from a suit under O. 23, r. 1 (i).

108. [Ss. 587, 590.] The provisions of this part relating to appeals from original decrees shall, so far as may be, apply to appeals—

Procedure in appeals from appellate decrees and orders.

- (a) from appellate decrees, and
- (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

Compare O. 42, r. 1, and O. 43, r. 2.

(f) *Mani Mohan v. Ramratan* (1916) 43 Cal. 148.
 (g) *Uzir Ali v. Savai* (1916) 43 Cal. 938.
 (h) *SriMati Hemanigini v. Haridas* (1918) 3

Pat. L. J. 409.

(i) *Kamayya v. Papayya* (1917) 40 d 259.
 See notes to O. 23 r. 1.

S. 109.

APPEALS TO THE KING IN COUNCIL.

109. [S. 595.] Subject to such rules as may, from time to time be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

When appeals lie to King in Council.

- (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;
- (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and
- (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Ss. 109 and 110 are to be read together. See also cl. 39 of the Letters Patent. For rules of procedure in appeals to the King in Council, see O. 45 below.

Difference between the old and the new section.—This section corresponds with s. 595 of the Code of 1882 except that in cls. (a) and (b) the words “decree or final order” have been substituted for the words “final decree,” and in cl. (c) the words “or order” have been added after the word “decree.” This, however, does not introduce any change in the law. The Code of 1882 contained a section, being section 594, which ran thus : “In this chapter (that is chapter XLV) unless there be something repugnant in the subject or context, the expression ‘decree’ includes also judgment and order.” Chapter XLV of the Code of 1882 relating to appeals to His Majesty in Council has been split into two parts in this Code, ss. 595, 596, 597 and 616 being retained in the body of the Code [now ss. 109-112], and the remaining sections being relegated to O. 45. S. 594 has been reproduced with slight alterations in O. 45, r. 1. But it is not reproduced in this part of the Code, as four only out of the twenty-three sections of that chapter are retained in the body of the Code. What has been done instead is that the words “decree or final order” have been substituted where the words “final decree” occurred in the four old sections, and the words “decree or order” have been substituted where the word “decree” occurred in those sections.

Right of appeal to the Privy Council.—*Appeal in cases under the Provincial Insolvency Act.*—The right of appeal from the High Courts to the Privy Council now rests on cl. 39 of the Letters Patent, and this is elaborated in the Code of Civil Procedure, ss. 109 and 110. Therefore, though there is no express provision in the Provincial Insolvency Act (III of 1907) for appeal to the Privy Council from orders of the High Court made under that Act, an appeal to the Privy Council is competent, if the case comes under ss. 109 and 110 of the Code (j).

“Decree.”—An act of State is not a decree. Hence no appeal lies to the King in Council from an order of the Viceroy and Governor-General of India in Council depositing the Maharajah of a Native State in India, such an order being an act of State (*k*).

S. 109.

“Final order.”—A final order within the meaning of clauses (a) and (b) of the section is an order which finally decides any matter which is directly at issue in the case in respect to the rights of the parties. An order comprising the decision of a High Court upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit, and one that can never, while the decision stands, be questioned again in the suit, is final within the meaning of this section, notwithstanding that there may be subordinate inquiries to make (*l*). An order refusing the appointment of a receiver in a suit is not a final order, and no appeal lies from it to the Privy Council (*m*). Similarly an order made in revision under s. 115 of the Code deciding that the applicant should be allowed to sue in *forma pauperis* is not a final order (*n*). An order of the High Court directing the lower Court to proceed with the execution of a decree which the lower Court had refused to execute on the ground that it had no jurisdiction is not a final order (*o*). Nor is an order refusing an application to be brought on the record as the legal representative of a deceased party to a pending appeal a final order (*p*). But where an order directing the taking of accounts which the defendant contends ought not to be taken at all decides in effect that if the result should be found to be against the defendant he is liable to pay the amount, the order is final within the meaning of this section (*q*). Similarly an order under rules 90 and 92 of Order 21 setting aside or confirming a sale is appealable to His Majesty in Council. Such an order is clearly one which deals finally with the rights of parties, and there is no reason why it should be excluded from the privilege of an appeal; sub-sec. (2) of s. 104, which provides that no second appeal shall lie in the case of such an order [O. 43, cl. (j)], cannot restrict the provision of the present section which allows an appeal to the King in Council from final orders (*r*).

An order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council, being interlocutory ordinarily and not being final within the meaning of this section, but it would be a final order and therefore capable of appeal if it has the effect of deciding finally the cardinal point in the suit (*s*). It has thus been held that no appeal lies to His Majesty in Council from an order remanding a case for trial on the ground that the lower Court was wrong in dismissing the suit as barred by the provisions of O. 2, r. 2 (*t*), or as barred by limitation (*u*). In a recent Allahabad case an application was made by a company under sch. II, cl. 17, to file an agreement to submit to arbitration. The application was opposed on the ground that the agreement not being under the seal of the company was invalid and also on grounds of misrepresentation and fraud. The Court of first instance dismissed the application on the sole ground that the agreement not being under the seal of the company was invalid. On appeal the High Court reversed the decree holding that the agreement did not require to be under the seal of the company, and remanded the case for trial of the other issues, *vis.*, issues as to fraud and misrepresentation. From this order of remand the

(*k*) *Maharajah Madhava Singh, In re* (1905) 32 Cal. 1.

(*l*) *Mazhar Hossein v. Bodha* (1895) 17 All. 112, 22 I. A. 1.

(*m*) *Chandji Dutt v. Pudmanund* (1895) 22 Cal. 928.

(*n*) *Babu Sakar Singh v. Gopal* (1904) 8 Cal. W. N. 296.

(*o*) *Rajkumar v. Rameswar* (1919) 4 Pat. L. J. 461.

(*p*) *Gangappa v. Gangappa* (1914) 38 Bom. 421.

(*q*) *Rahimbohy v. Turner* (1891) 15 Bom. 155, 18 I. A. 6.

(*r*) *Krishna Pershad v. Moti Chand* (1913) 40 Cal. 635, 647-68, 40 I. A. 140, 148-149.

(*s*) *Radha Kishan v. Collector of Jaunpur* (1901) 28 All. 220, 28 I. A. 28; *Muzhar Hossein v. Bodha* (1899) 17 All. 112, 22 I. A. 1; *Habib-un-Nissa v. Munawar-un-Nissa* (1903) 25 All. 629; *Ananda Gopal v. Naffor Chandra* (1908) 35 Cal. 618.

(*t*) *Ahmad Husain v. Gobind Krishna* (1911) 38 All. 391; *Fenkataranga v. Narasimha* (1913) 38 Mad. 509.

(*u*) *Mahant v. Candasama* (1894) 8 Bom. 548.

S. 109. respondent applied for leave to appeal to His Majesty in Council. It was held by a Full Bench that the order was not a "final order" within the meaning of cl. (a) of this section, there being other important issues to dispose of, and it refused leave to appeal (v). Sec. 105, sub-s. (2), does not apply to appeals to His Majesty in Council (w).

"Order passed on appeal."—An order passed by a High Court rejecting an application to amend a decree is not an order "passed on appeal" within the meaning of cl. (a) of this section, and is therefore not appealable to His Majesty in Council. Moreover, it is doubtful whether such an order is a *final order* (x). Similarly it has been held that an order made by a High Court refusing to admit an appeal presented after the expiration of the prescribed period is not an order "passed on appeal" within the meaning of this section (y).

"Any other Court of final appellate jurisdiction."—An appeal lies to the Privy Council from a final order of a District Judge made under s. 104 [Code of 1882, s. 588], as no appeal lies to the High Court from such order (z). See s. 104, sub-s. (2).

Limitation.—The application for leave to appeal to the Privy Council must be made within six months from the date of the decree sought to be appealed from [Limitation Act, 1908, Sch. I, art. 179].

Under the Limitation Act of 1877, it was held that in computing the aforesaid period the time requisite for obtaining a copy of the decree appealed from could not be excluded as s. 12 of that Act did not apply to such applications (a). It was also held that the application could not be admitted after the expiration of six months, though there was sufficient cause for not presenting the application within the prescribed period, as s. 5 of the Act did not apply to such applications (b). Both these sections have now been amended in the Limitation Act of 1908, and they have been made applicable to applications for leave to appeal. The aforesaid decisions are, therefore, no longer law, and it has now been expressly held that under s. 12 of the Limitation Act of 1908 the time requisite to obtain a copy of the decree appealed from is to be excluded (c).

Prerogative of the Crown.—The Code does not limit the prerogative of the Crown to admit an appeal. Hence special leave may be granted to appeal where leave has been refused by the High Court (d). But no special leave will as a rule be granted, unless there is some substantial question of law or general interest involved (e). See s. 112.

Clause (c): Certificate as to fitness.—Leave to appeal to the Privy Council may be granted (1) when a case fulfils the requirements of s. 110, or (2) when it is otherwise a fit case for appeal to the Privy Council. In either case a certificate has to be granted by the High Court, in the first case, a certificate to the effect that the case fulfils the requirements of s. 110 and is therefore a fit case for appeal to the Privy Council, and, in the second case, that for other reasons it is a fit case for appeal to the Privy Council [see O. 45, rr. 2-3]. Clause (c) of the present section refers to the second class of cases. In this class of cases it is not necessary that the order

(v) *Nurimiah v. The Ganges Sugar Works Ltd.* (1916) 38 All. 150 [F. B.].

(w) 33 All. 391, *supra*; 38 Mad. 509, *supra*.

(x) *Sunder Koer v. Chandishwar* (1903) 30 Cal. 819.

(y) *Karsondas v. Gungabai* (1908) 32 Bom. 108.

(z) *Saadatmand v. Phul Kuar* (1898) 20 All. 412, 25 I. A. 146.

(a) *Moroba v. Ghanasham* (1895) 19 Bom. 301; *Anderson v. Periasami* (1892) 15 Mad. 169; *Shib Singh v. Gandharp Singh* (1906) 28 All. 391.

(b) *Shib Singh v. Gandharp Singh* (1906) 28 All. 391.

(c) *Abdullah v. Admr.-Genl. of Bengal* (1914) 42 Cal. 35; *Ram Sarup v. Jaswant Rai* (1915) 35 All. 82.

(d) *Rahimkhoy v. Turner* (1891) 15 Bom. 155, 18 I. A. 6; *Ikratul Huq v. Wilkie* (1906) 33 Cal. 893.

(e) *Moti Chand v. Ganga Prasad* (1902) 24 All. 174, 29 I. A. 40. See also *Sadagopa v. Krishnamoorthy Rao* (1907) 30 Mad. 185, at p. 188, 34 I. A. 93, 99.

should be a *final* one. Nor is it necessary that the value of the subject-matter of the suit should be Rs. 10,000 or upwards (*f*). The only condition necessary is that the case should be a fit one for appeal to the Privy Council. Referring to this clause, Lord Hobhouse said: "That is clearly intended to meet special cases—such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance" (*g*). Thus where an application was made by a Company for a certificate to appeal to the Privy Council on the ground that the financial and commercial position of the Company might be seriously affected by the questions at issue, and that those questions were of importance to Indian Companies generally, the High Court of Bombay granted the requisite certificate. The order sought to be appealed from in that case was an order dismissing a petition presented by the Company for a confirmation of a special resolution altering the memorandum of association of the Company (*h*). Similarly when a case involved a substantial question of law, and the point in dispute, though not measurable by money, was of considerable importance, namely, the *extent* of the control acquired by one who had built a fire-temple for Parsis at Udwarda, the High Court of Bombay granted leave to appeal to the Privy Council (*i*). Similarly the question as to what is the legal position of a person who has collected the debts of a deceased person by virtue of his being a holder of a succession certificate under the Succession Certificate Act, 1889, was held to be a substantial question of law of general public importance, and leave to appeal was granted under cl. (*e*) of this section (*j*). In fact, as observed by Beaman, J., in the undermentioned case (*k*), "what is contemplated in cl. (*e*) is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which while the right in dispute is not exactly measurable in money, it is of great public or private importance." "To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certificate" (*l*).

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As to certificate of fitness in the case of decrees passed by the High Court in cross-appeals from the *same* decree, see the undermentioned case (*m*). See also notes to O. 45, r. 3.

110. [S. 596.] In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or

Value of subject-matter. value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

(*f*) *Rahmubhoy v. Turner* (1890) 14 Bom. 428.
(*g*) *Banarsi Parshad v. Kashi Krishna* (1900) 28 I. A. 11, 13, 28 All. 227.
(*h*) *Bombay-Burmah Trading Corporation v. Dorabji* (1903) 27 Bom. 415.
(*i*) *Navroji v. Kharshedji* (1904) 6 Bom. L. R. 286, in appeal from (1904) 28 Bom. 20.

(*j*) *Najm-un-Nissa v. Amina* (1916) 38 All. 188.
(*k*) *Hirjibhai v. Jamselji* (1913) 15 Bom. L. R. 1021, 1083.
(*l*) *Banarsi Parshad v. Kashi Krishna* (1900) 28 I. A. 11, 13, 28 All. 227.
(*m*) *Muhammad v. Muhammad* (1914) 37 All. 124.

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Read with this section O. 45, rr. 4 and 5.

This section corresponds with s. 596 of the Code of 1882, except that the words "or final order" have been added in paragraphs 2 and 3 after the word "decree." See notes to s. 109 under the head "Difference between the old and the new section."

Date of valuation.—As regards "the amount or value of the subject-matter of the suit in the Court of first instance," the material date is the date of the institution of the suit. But there is a difference of opinion whether, if interest or mesne profits are claimed in a suit and awarded by the decree, the interest or mesne profits are to be calculated up to the date of the institution of the suit or up to the date of the decree. See notes below under the head "Amount or value of the subject-matter of the suit in the Court of first instance."

As regards "the amount or value of the subject-matter in dispute on appeal to His Majesty in Council," the material date, it is submitted, is the date of the petition for leave to appeal to His Majesty in Council.

As regards the value of "property" referred to in the second paragraph of this section, the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (n).

"The amount or value of the subject-matter of the suit in the Court of first instance."—Not only the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, but the amount or value of the subject-matter of the suit in the Court of first instance, must be Rs. 10,000 or upwards. The word "and" in the first paragraph of this section cannot be read as "or." It is obvious that though the amount of the subject-matter in dispute on appeal to His Majesty in Council may be Rs. 10,000 or upwards, the amount of the subject-matter of the suit in the Court of first instance may be less than Rs. 10,000. The words "amount or value of the subject-matter in dispute on appeal to His Majesty in Council" mean the amount or value at the date of the petition for leave to appeal to His Majesty in Council (o).

The only class of cases under the head "amount or value of the subject-matter of the suit in the Court of first instance" that present any difficulty are those which include a claim for interest or for mesne profits. Prior to the year 1874 appeals to the Privy Council were governed by the Order in Council of April 10, 1838. By that Order it was prescribed that the amount or value of the subject-matter in dispute in appeal to His Majesty in Council must be Rs. 10,000 or upwards. It was accordingly held by the Privy Council in cases which arose prior to 1874 that interest on money claims and mesne profits of immoveable property *subsequent to the date of the institution of the suit* actually awarded by the decree appealed from may be added in calculating the value of the matter in dispute in appeal to His Majesty in Council, but not interest or mesne profits *accruing subsequent to the decree*, and if that amount was Rs. 10,000 or upwards a party was entitled to appeal though the value of the subject-matter of the suit in the

(n) *Surendra Nath v. Dwarka Nath* (1917) 44 Cal. 119. (o) *Moti Chand v. Ganga Prasad* (1902) 24 All. 174, 29 I. A. 40.

Court of first instance was less than Rs. 10,000 (p). It was also held that in no case can the costs of the suit be added to the principal in calculating the appealable value (q). The condition that the amount or value of the subject-matter of the suit in the Court of first instance should also be Rs. 10,000 or upwards was first imposed by the Privy Council Appeals Act 6 of 1874, and it was subsequently inserted in the Code of Civil Procedure. The first authoritative decision we have on the meaning of the words "amount or value of the subject-matter of the suit in the Court of first instance" is that of the Judicial Committee in *Moti Chand v. Ganga Prasad* (r). In that case the Court of first instance passed a decree for the plaintiff for principal and interest up to the date of the decree amounting to Rs. 9,496, with further interest up to the date of realization. From this decree the defendant appealed to the High Court and that Court reversed the decree and dismissed the suit with costs. The plaintiff then applied to the High Court for leave to appeal to His Majesty in Council. On behalf of the plaintiff it was contended that interest subsequent to the decree should be added to the said sum of Rs. 9,496, and that if that was done, the value of the subject-matter of the suit would exceed Rs. 10,000. But this contention was overruled, and the application was refused on the ground that the claim and decree in the original Court were for less than Rs. 10,000. The plaintiff then applied to the King in Council for special leave to appeal, but the application was refused. In the course of the judgment their Lordships of the Judicial Committee said: "In the present case the amount or value of the subject-matter of the suit in the Court of first instance, *construing that in the manner most favourable to the proposed appellant*, was at the outside the amount for which he recovered his decree which was below Rs. 10,000, amounting in round numbers, I think, to about Rs. 9,500." It is conceived that the words "construing that in the manner most favourable to the proposed appellant" mean "even by including interest subsequent to the suit and up to the decree." It is not clear from the judgment of their Lordships whether interest from the date of suit up to the date of decree can be added to the principal in calculating the appealable value of Rs. 10,000. But this decision is certainly an authority for the proposition that interest subsequent to the decree cannot be added in calculating the amount of Rs. 10,000 (s).

In *Dalglish v. Damodar* (t), the High Court of Calcutta held that in calculating the amount of the subject-matter of the suit in the Court of first instance, mesne profits awarded by the decree are to be calculated up to the date of the decree. This decision proceeded on the authority of *Mohideen v. Pitchay* (u), a case under the Ceylon Ordinance No. I of 1889 which does not impose any condition as to the amount or value of the subject-matter of the suit in the Court of first instance. The Calcutta decision, it is submitted, is erroneous, and it was dissented from by the High Court of Madras in *Subramania Ayyar v. Sellammal* (v) where it was held that in calculating the amount of the subject-matter of the suit in the Court of first instance, mesne profits *only up to the date of the institution of the suit* can be added to the value of the property of which possession is claimed. The Calcutta decision was also doubted by the Patna High Court in *Maharaja Kesho Prasad v. Shiva* (w), but in a later case (x) the same Court

(p) *Gooroopersad v. Juggutchunder* (1860) 8 M. I. A. 166, 168; *Doorga Doss v. Rama Nauth* (1860) 8 M. I. A. 262, 264; *Goorodoss Roy v. Gohlam Mowla* (1862) Marshall's Rep. 24.
(q) *Doorga Doss v. Rama Nauth* (1860) 8 M. I. A. 262.
(r) (1902) 24 All. 174, 29 I. A. 40.
(s) *Maharaja Kesho Prasad v. Shiva* (1918) 3 Pat. L. J. 317, 320.

(t) (1906) 33 Cal. 1286. See also *Nand Kishore v. Ram Gulam* (1912) 39 Cal. 1037; *Surendra Nath v. Dwarka Nath* (1917) 44 Cal. 119, 128 [a case under the second paragraph of the section].
(u) [1893] A. C. 198.
(v) (1916) 39 Mad. 843.
(w) (1918) 3 Pat. L. J. 317, 320.
(x) *Mahabir Prasad v. Anup Narain* (1919,) 3 Pat. L. J. 377.

- S. 110.** followed the Calcutta decision having regard to the practice of that Court in matters of settled practice to follow the Calcutta High Court.

Where the dispute in the suit relates to the *income* of property of the value of Rs.10,000, the value of the subject-matter of the suit cannot be said to be Rs. 10,000 so as to give a right of appeal under this section (y).

In suits relating to immoveable property the value of the subject-matter of the suit is the selling or market value and not the value as deduced from the amount of the stamp upon the plaint. Hence if in a suit for possession of immoveable property the value of the property as laid in the plaint is under Rs.10,000 for the purpose of Court fees, it is open to the plaintiff to show, when applying for a certificate for leave to appeal to the Privy Council, that the market value of the property was Rs. 10,000 or upwards (z).

It has been held by the High Court of Bombay that where in a suit for accounts the plaintiff values his claim for less than Rs.5,000 and institutes his suit in a Court of the Second Class Subordinate Judge whose pecuniary jurisdiction is limited to Rs.5,000, he cannot be heard to say that the amount of the subject-matter is Rs. 10,000 or upwards (a). In the course of the judgment Beaman, J., said: "The amount or value of the subject-matter of a suit can in no case exceed the limits of the pecuniary jurisdiction of the Court in which it is instituted. It follows that the amount or value of the subject-matter of a suit for the purposes of s. 109, clauses (a) and (b), and s. 110 of the Civil Procedure Code, if that suit is instituted in a Court the pecuniary limits of whose jurisdiction is Rs. 5,000, can never be greater than Rs. 5,000." It is different, however, where a suit is for an injunction and a declaration relating to immoveable property, for such a suit according to the Bombay decisions may be brought in the Court of a Second Class Subordinate Judge though the value of the property may exceed Rs. 5,000. In such a case, it has been held that the case does not fall under the first paragraph of this section, but that it falls under the second paragraph, and that the plaintiff is not precluded from showing that the decree involved some claim or question to property of the value of Rs. 10,000 or upwards within the meaning of the second paragraph (b).

"The amount or value of the subject-matter in dispute on appeal to His Majesty in Council".—Not only the amount or value of the subject-matter of the suit in the Court of first instance, but the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, must be Rs. 10,000 or upwards. The word "and" in the first paragraph of the section cannot be read as "or." The words "amount or value of the subject-matter in dispute on appeal to His Majesty in Council" mean the amount or value at the date of the petition for leave to appeal to His Majesty in Council (c).

It may happen that the amount of the subject-matter of the suit in the Court of first instance is more than Rs. 10,000, while the amount of the subject-matter in dispute on appeal to His Majesty in Council is less than Rs. 10,000. A mortgages his property to B. C claims that a portion of the property of the value of about Rs. 6,000 belongs to him and that it did not belong to A. B then sues A on the mortgage; the

(y) *Husenbhoy v. Ahmedbhoy* (1902) 26 Bom. 319.

(z) *Mohun Lall v. Bebes Doss* (1880) 7 M. I.A. 428; *Lekraj Roy v. Kanhya Singh* (1874) 1 I. A. 317; *Gourmoy v. Abdul* (1860) 8 M. I. A. 268; *Pichayee v. Sivagami* (1892) 15 Mad. 237; *Hari Mohun v. Surendra Narain* (1904) 31 Cal. 301; *Surendra Nath*

v. Dwarka Nath (1917) 44 Cal. 119.

(a) *Hirjibhoy v. Jamshedji* (1913) 15 Bom. L.R. 1021. See notes to s. 6, "Pecuniary limits for passing decrees."

(b) *Mohunlal v. Bai Kashi* (1916) 40 Bom. 477.

(c) *Moti Chand v. Ganga Prasad* (1902) 24 All. 174, 29 I. A. 40.

mortgage-debt being Rs. 38,000, and joins *C* as a defendant. A decree is passed for *A* on the mortgage. *C*'s claim is allowed in part by the Court of first instance, but it is disallowed altogether by the High Court. Is *C* entitled to appeal to the King in Council? No, because though the amount of the decree passed in favour of *A* exceeds Rs. 10,000, the value of *C*'s claim is less than Rs. 10,000 (*d*). Note that *C* ought not to have been joined as a party to the suit at all [see notes to O. 34, r. 1, "Persons having an interest, etc"]".

Single decree in several appeals.—*A*, claiming to be the next reversioner on the death of a Hindu widow, sues *B*, *C* and *D*, being alienees of separate items of the estate of the last male holder, and obtains a decree against them. *B*, *C* and *D* prefer *separate appeals* which are all disposed of by one decree. *A* applies for leave to appeal to His Majesty in Council from the decision as to the items in possession of *B* and *D*. The claims against the several alienees being based on really different causes of action, the fact that only one appellate decree was drawn up does not affect the requirements of this section, and consequently no leave can be granted in such of the appeals in which the value of the subject-matter was below Rs. 10,000 (*e*).

Abandonment of appeal in part after grant of certificate.—*A* obtains a decree against *B* for Rs. 11,000. *B* applies for leave to appeal from the decree to the Privy Council, and a certificate is granted. Afterwards in the printed case and at the hearing *B* withdraws part of his appeal, reducing by so doing the amount in dispute to Rs. 9,000. Does this render the appeal incompetent? No, if *B* had a *bonâ fide* intention, when he applied for a certificate, to appeal in respect of the whole amount of the decree (*f*).

"Or the decree or final order must involve, directly or indirectly, some claim or question to property of the value of Rs. 10,000 or upwards."—The decree or final order referred to in the second paragraph of the section is the decree or final order from which the appeal is to be preferred to the Privy Council. The material date for determining the value of the "property" under this paragraph is the date of that decree or order (*g*).

Note that the expression used in the second paragraph of this section is "property", while that used in the first paragraph is "subject-matter of the suit" and "subject-matter in dispute on appeal to His Majesty in Council." It has been held by the High Court of Madras (*h*), that the second paragraph of this section applies only to cases which involve some claim or question to or respecting property additional to the actual subject-matter in dispute in the appeal and to be taken into account therewith in making up the appealable value, or it may possibly also apply to cases involving claims incapable of a money valuation such as claims to easements and the like, but apart from this if nothing beyond the actual subject-matter in dispute is involved, the first paragraph of the section alone applies. This decision is at variance with the view expressed by Maclean C.J., at the end of his judgment in *Dalgleish v. Damodar* (*i*), but that part of the judgment of the learned Chief Justice was not necessary for the determination of the case nor are any reasons given in support of that view. In a recent Patna case *Miller C. J.*, expressed his preference for the view taken by the Madras High Court (*j*).

(*d*) *Radha Kunwar v. Rooti Singh* (1916) 38 All. 488, 43 I. A. 187.
(*e*) *Vaithilinga v. Somasundaram* (1919) 42 Mad. 228.
(*f*) *Kalka Singh v. Paras Ram* (1895) 22 Cal. 434, 22 I. A. 68.
(*g*) *Surendra Nath v. Dwarka Nath* (1917) 44

Cal. 119.
(*h*) *Sutramania Ayyar v. Sellammal* (1916) 39 Mad. 843, 846, 849.
(*i*) (1906) 33 Cal. 1286.
(*j*) *Maharaja Kesho Prasad v. Shiva* (1918) 3 Pat. L. J. 317, 320.

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When the plaintiff, a tenant-in-common, obtained a decree against the defendant, another tenant-in-common, for a mandatory injunction to demolish buildings erected by the defendant on a plot of common land, the buildings being worth more than Rs. 10,000, the High Court granted leave to the defendant to appeal to the Privy Council, though the subject-matter of the suit was valued for purposes of court-fees at Rs. 1,500 (*k*). Similarly where the plaintiff obtained a decree for possession of a piece of land worth Rs. 2,000, and the result of the decree was to oblige the defendant to remove buildings worth more than Rs. 10,000, which the defendant had built on the land, leave was granted to appeal to the Privy Council (*l*). Where the value of the subject-matter of the suit was below Rs. 10,000, but the effect of a deed of gift, with regard to the construction of which there was a dispute, would govern the ownership of property worth five lacs, a certificate of appeal was granted (*m*). Similarly, where the value of the subject-matter in dispute on appeal to His Majesty in Council was below Rs. 10,000, but the proposed appeal to His Majesty in Council involved a decision as to the validity of an award which dealt with property worth over Rs. 10,000, a certificate of appeal was granted (*n*).

A sues *B* for a declaration that he is entitled to one-third share in certain property and for an order that the property should be partitioned and his share given to him. The property exceeds Rs. 10,000 in value, but the share claimed by *A* is of a value less than Rs. 10,000. A decree is passed for *A* as prayed. *B* then applies for leave to appeal to His Majesty in Council. Can it be said in such a case that the decree involves some claim or question to property of a value exceeding Rs. 10,000? Yes, according to the Calcutta High Court (*o*); no, according to the Bombay High Court, unless there be other property outside the subject-matter in dispute which can be affected by the decision (*p*). In the case last cited Sir Lawrence Jenkins, C.J., laid down that in order to determine the value prescribed by this section, the decree has to be looked at as it affects the interests of the parties prejudiced by it, and, where the detriment to the party seeking relief is estimated at less than Rs. 10,000, then the value of the matter in dispute in appeal is not of the prescribed value, and the decree itself does not involve any claim or question to, or respecting property of, the prescribed value, and the case does not fulfil the requirements of the section. The Patna High Court has followed the Bombay decision (*q*).

A obtains a decree against *B* for enhancement of rent of land in *B*'s possession from Rs. 85 to Rs. 800 per annum. In such a case leave may be granted under the second paragraph if the value of the land is Rs. 10,000 or upwards: the capitalized value of Rs. 800 does not afford any test as to the value of the subject-matter under the first paragraph (*r*).

Where the matter is under the appealable value or is not capable of valuation.—In such a case, a party desirous of appealing to the Privy Council may apply for a certificate that the case is “a fit one for appeal” to His Majesty in Council under s. 109, cl. (c) (*s*). See notes to s. 109 under the head “Certificate as to fitness.”

“Where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree.”—It is not enough where

(*k*) *Amar Chandra v. Shoshi Bhushan* (1904) 31 Cal. 305 [P. C.]

(*l*) *Devaseekamoney v. Palaniappa* (1911) 34 Mad. 535.

(*m*) *Aliman v. Hasiba* (1896) 1 Cal. W. N. lxxviii.

(*n*) *Sri Kishan v. Kachmro* (1913) 35 All. 445. See also *Khwaja Muhammad, in the matter of* (1896) 18 All. 196.

(*o*) *Lal Bhugwat v. Rai Pashupati* (1906) 10 C. W. N. 564.

(*p*) *De Silva v. De Silva* (1904) 6 Bom. L.R. 408.

(*q*) *Gosain Bhainath v. Bihari Lal* (1919) 4

Pat. L. J. 415.

(*r*) *Ranee Surnomoyee v. Maharajah Sutteeschunder* (1880) 8 M. I. A. 165 [a case under the Order in Council of April 10, 1885].

(*s*) *Moti Chand v. Ganga Prasad* (1902) 24 All. 174, 29 I. A. 40; *Bombay-Burmah Trading Corporation v. Dorabji* (1903) 27 Bom. 41; *Banarsi Prasad v. Kashi Krishna* (1906) 23 All. 227, 28 I. A. 11; *Naraji v. Kharseji* (1904) 6 Bom. L. R. 288; *Mowla Nawad v. Sajidunnissa Bibi* (1891) 18 Cal. 378.

the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, that the appeal involves some substantial question of law; it is further necessary that the amount of the subject-matter of the suit and of the subject-matter in dispute on appeal must be Rs. 10,000 or upwards, or that the decree must involve some claim to property of like amount. The existence of a question of law of itself does not give a right of appeal in the ordinary course of procedure under this section (t). This is clear from the word "and" with which the last paragraph of this section begins.

It has been held by their Lordships of the Privy Council that the word "decision" in this clause means merely the decision of the suit, and cannot, like the word "judgment," be defined as meaning the statement of the *grounds* on which the Court proceeds to pass the decree. It follows from this that in order to "affirm" the decision of the Court below it is sufficient if the appellate Court affirms the *decree* of the Court below; it need not also affirm the *grounds of fact* on which the judgment was passed. Thus where the decree of the appellate Court was that "the appeal be dismissed," but the reasons given were not the same as those of the lower Court in respect of some matters of fact, it was held that the decision of the Court below was "affirmed" within the meaning of this section, and that no certificate should be granted unless the appeal involved a substantial question of law (u). Nor is it necessary in order to "affirm" the decision of the Court below that the finding of the appellate Court should coincide in terms with that of the Court below: it is sufficient if the findings of fact of the two Courts are in effect the same (v). And it has been held that a decree of the High Court dismissing an appeal for want of prosecution the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing, is a decree "affirming" the decision of the Court below (w). Where the appellate Court agrees with the findings of the Court below upon the merits, but awards simple interest from a certain date instead of compound interest, it amounts to an affirmation of the decision of the lower Court (x). To determine whether the decree appealed from affirms the decision of the Court below we must look to the substance of the case (y).

In a suit by *A* against *B* a decree is passed in *A*'s favour. *B* appeals from the decree but the appeal is dismissed by the lower appellate Court. *B* then appeals to the High Court. The appeal is heard by a single Judge of the High Court who reverses the decree of the lower appellate Court. From this judgment *A* appeals to the High Court under cl. 15 of the Charter with the result that the judgment of the single Judge is reversed by a Bench of two Judges. *B* applies for leave to His Majesty in Council. Here the decree appealed from is the decree passed by the Bench of two Judges of the High Court. The Court "immediately below" the Court constituted by the two Judges is the lower appellate Court, and not the Court constituted by the single Judge of the High Court. This therefore is a case in which the decree appealed from *affirms* the decision of the Court immediately below, and no leave to appeal can therefore be granted unless the appeal involves some substantial question of law. The above result follows from the fact that the *Code* makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court: the right of appeal from the judgment of a single Judge of the High Court is conferred by cl. 15 of the *Charter* (z).

(t) *Banarsi Prasad v. Kashī Krishna* (1906) 28 All. 227, 28 I. A. 11; *Radha Krishna Das v. Rai Krishna Chand* (1901) 23 All. 415, 28 I. A. 182.
(u) *Tassaduq v. Kashī Ram* (1903) 25 All. 109, 30 I. A. 35; *Ashghar Reza v. Hyder Reza* (1889) 16 Cal. 237, would seem to be no longer law.
(v) *Thompson v. Calcutta Tramway Co.* (1894)

21 Cal. 523.
(w) *Bent Rai v. Ram Lakhan* (1898) 20 All. 387.
(x) *Bhagat Singh v. Jat Ram* (1915) P. R. no. 22, p. 125.
(y) *Raja Sree Nath Roy v. Secretary of State* (1904) 3 C. W. N. 294.
(z) *Debendra Nath v. Bibudhendra* (1915) 43 Cal. 90.

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Rule followed by Judicial Committee in case of concurrent findings of fact, when the appeal before it falls on the question of law on which leave to appeal was granted.—The Judicial Committee has undoubtedly power as a Court of review to review the concurrent findings of facts of the lower Court, though the appeal before it may fail on the question of law on which leave to appeal was granted. But as a general rule the Committee will not interfere with these findings on the ground that where the question is one of fact, it is a question of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance (a). In *Umrao Begum v. Irshad Husain* (b), Lord Hobhouse in delivering the judgment of the Board said: "The question is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be specially unwilling in such a case to depart from the general rule which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Court." The mere fact that the lower Courts do not agree on all the steps which lead to one and the same conclusion is no reason for disregarding the said rule (c). "It cannot detract from the weight of concurrent findings of fact, that different Courts, in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations. A difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, must necessarily lead to one and the same inference" (d). And sometimes the nature of the question may be such (as where the question is whether a deed of gift was executed by a Mahomedan under apprehension of death) that the Judicial Committee will not interfere with concurrent findings of the lower Courts on that question even where the evidence is such as to justify either view (e). "The rule [above referred to] however, is not an absolute rule; it presses upon the appellant with more or less weight according to the circumstances of the case, and no doubt the fact that the Courts have differed on some important but subordinate questions is a matter to be taken into consideration in determining whether the evidence before the lower Courts should be reviewed in detail" (f). Thus concurrent findings of facts have been allowed to be disputed where the question of fact appeared to be a good deal mixed up with law (g). They have also been allowed to be disputed where the decision, though ultimately one of fact, turned upon the admissibility or value of many subordinate facts, and involved the construction of documents and other questions of law (h).

The principle of concurrent findings of fact does not apply where the case is one of no evidence. The reason is that a decision that there is no evidence to support a finding is a decision of law (i). Nor does it apply to findings as to the existence of a custom, since that is a matter of mixed law and fact (j).

The appeal must involve some substantial question of law.—No appeal lies to the Privy Council from an appellate decree when there are concurrent findings of the appellate Court and of the Court below upon questions of fact and when

(a) *Fatima Bibi v. Ahmed Baksh* (1908) 35 Cal. 271, 35 I. A. 67, 72.

(b) (1894) 21 Cal. 997, 21 I. A. 168; *Moung Tha v. Moung Pan* (1901) 29 Cal. 1, 27 I. A. 166; *Srimati v. Khagendra Narayan* (1904) 31 Cal. 871, 31 I. A. 127; *Sundaralinga v. Ramasami* (1899) 22 Mad. 515, 26 I. A. 55.

(c) *Sameel Singh v. Satrupa* (1906) 28 All. 215; *Chitpal Singh v. Bhairon Baksh* (1906) 28 All. 219.

(d) *Nimoni Singh v. Kirti Chunder Chowdry* (1899) 20 Cal. 847, 852, 20 I. A. 95.

(e) *Fatima Bibi v. Ahmed Baksh* (1908) 35 Cal. 271, 35 I. A. 67.

(f) *Chitpal Singh v. Bhairon Baksh* (1906) 28 All. 219.

(g) *Pauliem v. Pauliem* (1879) 4 I. A. 108.

(h) *Venkateswara v. Shekari* (1883) 8 I. A. 143; *Chaudhri Satgur v. Kishore Lal* (1919) 46 I. A. 197.

(i) *Harendra Lal v. Haridas* (1914) 41 Cal. 972, 988, 41 I. A. 110, 119.

(j) *Palaniappa v. Deivasikamony* (1917) 44 I. A. 147, 40 Mad. 709.

upon such findings no substantial question of law arises (*k*). To grant leave to appeal on the ground that "there seems to be a point of law which however has not been argued here," is not a compliance with the provisions of this section (*l*).

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Involve.—Suppose that there are concurrent findings of fact of such a character that the Privy Council, having regard to the rule set forth on p. 278, would decline to disturb them in appeal: suppose, further, that no substantial question of law could arise before the Privy Council unless such findings were set aside by the Privy Council; could the proposed appeal be said in such a case to involve a question of law so as to entitle a party to leave to appeal to the Privy Council? No, according to the Allahabad High Court (*m*). Yes, according to the undermentioned decisions of the Calcutta and Bombay High Courts (*n*).

Substantial question of law.—The rejection of an application under O. 41, r. 27 [Code of 1882, s. 568] for the reception of additional evidence does not involve a substantial question of law (*o*). Omitting to state reasons in an appellate judgment as required by O. 41, r. 31 [Code of 1882, s. 574] is not a substantial question of law (*p*). Nor does the dismissal of an appeal for default in furnishing security for costs under O. 41, r. 10, involve any substantial question of law (*q*). The question whether a tenancy is to be regarded as one at will or one of a permanent nature is a matter in which a substantial question of law is involved (*r*). But awarding interest at 9 per cent. per annum, being the rate fixed in the mortgage bond, from the date of the suit under s. 34 above, is not such an arbitrary and unwarrantable exercise of discretion under that section as to constitute it a substantial question of law (*s*).

Review.—An order granting leave to appeal to the Privy Council is open to review (*t*).

Appeal.—See notes to O. 45, r. 3, "Appeal."

Rules observed by the judicial committee in appeals from decrees of Indian Courts:—

- (1) A point not raised in the plaint before the District Judge, or before the High Court, cannot be raised before the Judicial Committee (*u*).
- (2) The Judicial Committee will not disturb the findings of the Court below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage in the reception or in the appreciation of evidence (*v*).
- (3) In appeal from second appeals the findings of fact by the first Court are binding on the Judicial Committee, unless special leave to appeal from the decision of the first Court has been given (*w*).

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| <p>(<i>k</i>) <i>Nirbhai Das v. Rani Kuar</i> (1894) 16 All. 274;
 <i>Tulsi Persad v. Benayek</i> (1898) 23 Cal. 918, 23 I. A. 102; <i>Sukalbutty v. Babulal</i> (1901) 28 Cal. 190; <i>Vishwambhar, in re</i> (1898) 20 Bom. 699; <i>Pestonji v. Queen Insurance Co.</i> (1901) 25 Bom. 332 [suit for damages for malicious prosecution].</p> <p>(<i>l</i>) <i>Kruppanan v. Srinivasan</i> (1902) 25 Mad. 215, 29 I. A. 38.</p> <p>(<i>m</i>) <i>Banke Lal v. Jagat Narain</i> (1901) 23 All. 94; <i>Vir Singh v. Tirath Ram</i> (1916) P. B. no. 64, p. 197.</p> <p>(<i>n</i>) <i>Moran v. Mittu</i> (1877) 2 Cal. 323; <i>Gopi Nath v. Goluck Chunder</i> (1889) 18 Cal. 292, note; <i>Vishwambhar, in re</i> (1898) 20 Bom. 699.</p> <p>(<i>o</i>) <i>Premanand, in the goods of</i> (1894) 21 Cal. 484.</p> | <p>(<i>p</i>) <i>Sundar Bibi v. Bisheshar</i> (1887) 9 All. 93.</p> <p>(<i>q</i>) <i>Muhammad v. Secretary of State</i> (1914) 36 All. 325.</p> <p>(<i>r</i>) <i>Surenbra Nath v. Dwarka Nath</i> (1917) 44 Cal. 119.</p> <p>(<i>s</i>) <i>Bhagat Singh v. Jai Ram</i> (1915) P. R. no. 22, p. 125.</p> <p>(<i>t</i>) <i>Gopinath v. Goluck Chunder</i> (1889) 18 Cal. 292, note.</p> <p>(<i>u</i>) <i>Sambhu Nath v. Surajmoni</i> (1898) 25 Cal. 187, 24 I. A. 191.</p> <p>(<i>v</i>) <i>Richardson v. Government</i> (1864) 1 W. R. P. 47; <i>Cheynt Ram v. Chowdhree Noubut Ram</i> (1858) 7 M. I. A. 207.</p> <p>(<i>w</i>) <i>Anangamanjari v. Tripura</i> (1887) 14 Cal. 740, 14 I. A. 101; <i>Lachmon Singh v. Puna</i> (1889) 16 Cal. 754, 16 I. A. 125.</p> |
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- (4) The Judicial Committee will not criticise with any strictness opinions as to the credibility of witnesses, which is eminently a question for the Courts in India (x).
- (5) As to the circumstances in which the Judicial Committee will allow a re-hearing, see the undermentioned cases (y).

111. [S. 597.] Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

Bar of certain appeals.

- (a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or the *Government of India Act, 1915*, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or
- (b) from any decree from which under section 102 no second appeal lies.

The words and figures “or the Government of India Act, 1915,” were inserted in the section by the Amending Act 13 of 1916.

Decree or order.—In cl. (a) the words “decree or order” have been substituted for the word “judgment” which occurred in the corresponding s. 597 of the Code of 1882. See notes to s. 109 under the head “Difference between the old and the new section.”

Bar of certain appeals under clause (a).—The reason why no appeal is allowed from the decrees and orders referred to in cl. (a) of this section is that an appeal from such decrees and orders is provided for in cl. 15 of the Letters Patent. The object clearly seems to be that a party should not be permitted to appeal directly to the King in Council from the said decrees and orders, but that he should, in the first instance, appeal under the said cl. 15 to the other judges of the High Court (z).

112. [S. 616.] (1) Nothing contained in this Code shall be deemed—

Savings.

- (a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(x) *Shafiq-un-nessa v. Shaban Ali* (1904) 26 All. 581.

(y) *Rajundernarain Rai v. Bijai Govind Sing* (1836) Moo. P. C. 117; *Venkata Narasimha*

v. Court of Wards (1886) 11 App. Cas. 660; *Ram Narayan Singh v. Adhindra Nath* (1917) 44 I. A. 87.

(z) *Sadapathi v. Narayanasami* (1901) 25 Mad. 555. 558.

- (b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee. S. 112.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Clause (a).—See notes to s. 109, "Prerogative of the Crown," on p. 270 above.

PART VIII.

Reference, Review and Revision.

113. [S. 617.] Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

Reference to High Court.

See notes to O. 46, r. 1, below.

For rules of procedure, see O. 46 below.

114. [S. 623.] Subject as aforesaid, any person considering himself aggrieved—

Review.

- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed by this Code, or
- (c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

See notes to O. 47, r. 1, below.

As to rules of procedure, see O. 47 below.

115. [S. 622.] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—

Revision.

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, S. 115.

the High Court may make such order in the case as it thinks fit.

This section corresponds to s. 622 of the Code of 1882. There is no material alteration in the section.

Revisional Jurisdiction.—The jurisdiction exercised by the High Court under this section is called Revisional Jurisdiction. The powers of the High Court under this section can only be invoked in cases in which no appeal lies to the High Court, provided the case has been decided by any Court subordinate to such High Court and such subordinate Court appears—

- (1) to have exercised a jurisdiction not vested in it by law, or
- (2) to have failed to exercise a jurisdiction vested in it by law, or
- (3) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The High Court has no power to interfere in revision under this section except in one or other of the three cases mentioned in the section. Whether a particular order is expedient or not is not a ground on which the High Court can interfere under this section (a).

High Courts' powers of superintendence.—A case may not fall under this section, and yet it may fall under s. 15 of the Charter Act, 1861, now s. 107 of the Government of India Act, 1915.

Certiorari.—The provisions of this section are not exhaustive. Cases may be imagined, though rare ones, which may not fall under this section. For such cases it cannot be said that the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Courts to issue writs of certiorari have been taken away by the provisions of this section (b).

High Courts' power of revision.—In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order (c). If the High Court finds that the external conditions of jurisdiction, of investigation and of command have been satisfied by the inferior Court, it will not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior Court, in any matter committed by the Legislature to the discretion of the inferior Court (d).

"In which no appeal lies thereto."—The High Court cannot act under this section in any case in which an appeal lies to that Court. The word "appeal" is not confined to first appeal; it includes second appeal (e). Where an appeal is preferred in a case in which no appeal lies, the High Court may in a proper case treat the appeal as an application for revision and deal with it on that footing (f).

- (a) *Nawal Singh, In the matter of the petition of* (1912) 34 All. 893.
 (b) *Basant v. Adv.-Gen. of Madras* (1910) 46 I. A. 176, 190.
 (c) *Muhammad v. Ajudha* (1888) 10 All. 467.
 (d) *Shiva v. Joma* (1888) 7 Bom. 341.
 (e) *Tirupati v. Vissam* (1897) 20 Mad. 155;

- Mathura Nath v. Umesh Chandra* (1897) 1 Cal. W. N. 626, 631.
 (f) *Merali v. Sheriff* (1911) 38 Bom. 105, 107; *Baikanta Nath v. Sita Nath* (1911) 38 Cal. 421, 424; *Rajah Venkata Ramayya v. Veeraswami* (1918) 41 Mad. 554, 559.

S. 115. Interlocutory orders.—To give the High Court jurisdiction to revise an interlocutory order it is necessary among other things that it must be a “case decided” within the meaning of this section, and, further, that no appeal lies to the High Court from that order. For the purposes of this section interlocutory orders may be divided into two classes, namely—

A. Those from which an appeal lies under s. 104 (1). These are orders of the Court of first instance.

B. Those from which no appeal lies. These may be—

(a) orders of the Court of first instance from which no appeal lies under s. 104 (1); or

(b) orders passed in first appeal from which no second appeal lies having regard to the provisions of s. 104 (2).

As regards interlocutory orders falling under group A, the High Court has no jurisdiction to revise them as they are appealable orders.

As regards interlocutory orders belonging to group B, there is a difference of opinion as to whether they are subject to revision under this section. The High Courts of Allahabad (g) and Madras (h), have held that these orders are not subject to revision under this section, first, because an interlocutory order cannot be said to be a “case decided” within the meaning of this section, and, secondly, because a party aggrieved by such order, though he cannot appeal from the order, has another remedy open to him under s. 105, namely, to make the alleged wrongfulness of the order a ground of appeal from the final decree in the suit. The Allahabad cases were considered in *Dhapi v. Ram Pershad* (i), where the learned Judges of the Calcutta High Court took a different view, and, having regard to the comprehensiveness of the word “case” occurring in the section and to the possibility of grave injustice which might result from the adoption of the other principle, decided that under s. 115 of the Code the Court had jurisdiction to revise an interlocutory order. This decision was considered by Sargent, C. J., and Candy, J., in *Motilal v. Nana* (j) which took a course between the two extremes. According to that decision, the word “case” is wide enough to include an interlocutory order, but the word being of wide import it must be controlled by the purpose for which the section was framed. That purpose was to enable a party to obtain the rectification of a decision of a lower Court by the High Court when there would otherwise be no remedy. Hence the High Court should not entertain an application for revision of an interlocutory order, if the applicant has another remedy open to him as under s. 105 (k). But if the applicant has no other remedy open to him, as where s. 105 does not apply, the High Court should entertain the application for revision. Thus an order made by a District Judge on appeal granting a temporary injunction, having force temporarily only pending the suit, cannot be said to be an order “affecting the decision of the case” within the meaning of s. 105. It cannot therefore be called in question upon final appeal from the decree under s. 105. Hence the order may be revised by the High Court (l). In a recent Allahabad case, Walsh, J., held that an interlocutory order may be revised though the applicant has another remedy open to him under s. 105; Piggot, J., however, held differently (m).

(g) *Chattar Singh v. Lekhraj* (1883) 5 All. 293; *Farid Ahmad v. Dulari* (1884) 6 All. 233; *Dhandel v. Chotu Lal* (1916) 39 All. 254 262, per Piggot, J.
(h) *Nizam of Hyderabad*, in re (1886) 9 Mad. 256.
(i) (1887) 14 Cal. 768; *Sivaprasad v. Tricomdas* (1915) 42 Cal. 926, 932.

(j) (1894) 18 Bom. 35.
(k) (1894) 18 Bom. 35 *supra*. See also *Damodar v. Raghunath* (1902) 26 Bom. 551.
(l) *Bai Atrani v. Deeping* (1918) 40 Bom. 86. Note that no second appeal lies from the order of the District Judge.
(m) *Dhandel v. Chotu Lal* (1916) 39 All. 254.

As regards orders made on an application for leave to sue in *forma pauperis*, a distinction has been made by the Allahabad High Court between orders *granting* the application and orders *rejecting* the application. An order rejecting the application, it has been held, amounts to a *decision of the case* and is therefore open to revision; but an order granting the application is *not a decision of the case*, but a mere interlocutory order, and it is not therefore open to revision (n).

Where other remedies open.—The powers conferred upon the High Court by this section are discretionary. Hence though a party may not have a remedy by way of appeal, the High Court may, in the exercise of its discretion, refuse to interfere under this section if there is *any other remedy* open to the party. "The especial and extraordinary remedy by invoking the revisional powers of this Court should not be exercised unless as a last resource for an aggrieved litigant" (o). "The recognised rule . . . is that if a party to civil proceedings applies to us to exercise our powers under s. [115], he must satisfy us that he has *no other remedy* open to him under the law to set right that which he says has been illegally, irregularly or without jurisdiction done by a subordinate Court" (p). But when it is said by the opponent that there is some other remedy open to the applicant, and the application for revision is opposed on that ground, it must be shown that it is a *certain and conclusive* remedy allowed by law. Thus no application will be entertained to revise an order made under O. 21, rr. 60, 61 or 62 [Code of 1882, ss. 280, 281, 282], for though no appeal lies from such order, the party against whom the order is made has a special remedy by way of suit under O. 21, r. 63 [Code of 1882, s. 283] (q). Similarly no application will be entertained to revise a decree passed in a suit for possession instituted under s. 9 of the Specific Relief Act, 1877; for though no appeal lies from a decree passed in such suit, the party against whom the decree is passed is not precluded from instituting a regular suit to establish his title to possession (r). But if the remedy is a *doubtful* one, the High Court may interfere by way of revision under this section (s). And even if the remedy is certain and conclusive, the High Court may in an exceptional case interfere by way of revision under this section (t). "No doubt the ordinary rule is that where an aggrieved party has other remedy available, this Court is unwilling to interfere, but it is unquestionable that even if there be such remedy, this Court may interfere in exceptional cases" (u). Thus where the lower Court refused the application of a decree-holder for rateable distribution under s. 73 on the ground that there was another property of the judgment-debtor available for the satisfaction of his claim, the High Court of Madras interfered on revision under this section, though the applicant had clearly a remedy by suit. Miller, J., said: "I do not depart from the view . . . that where a party has a remedy elsewhere than in the High Court, the High Court should not except in special cases interfere under [this section]. But here we have a case in which there is no doubt as to the rights of the parties, and no remedy, if I do not interfere, except by a *suit to which there can be no defence*, and which therefore would surely multiply proceedings. In such a case, the lesser evil, at any rate, is interference under [this section]" (v). In a recent Patna case, Manuk, J., said:

(n) *Muhammad Ayab v. Muhammad* (1910) 32 All. 623; *Harsaran v. Muhammad* (1881) 4 All. 91.
(o) *Sheo Prasad v. Kastura Kuar* (1888) 10 All. 119, 122.
(p) *Gopal Das v. Alaf Khan* (1889) 11 All. 383; *Guisse v. Jaisraj* (1898) 15 All. 405.
(q) *Sheo Prasad v. Kastura Kuar* (1888) 10 All. 119; *Ittiachan v. Velappan* (1885) 8 Mad. 484.
(r) *Bhundal v. Pandol* (1888) 12 Bom. 221; *Vora Isabaili v. Daudbhai* (1890) 14 Bom.

371; *Kashinath v. Nana* (1897) 21 Bom. 731. See also *Ahmad Din v. Atlas Trading Co* (1915) P. R. 66, no. 287.
(s) *Ghulam v. Dwarka Prasad* (1896) 18 All. 163, 165.
(t) *Debi Das v. Ejaz Husain* (1906) 28 All. 72.
(u) *Omatul Mehdî v. Kulsom* (1908) 12 Cal. W. N. 16, 24; *Raghunandan v. Ram Charan* (1919) 4 Pat. L. J. 94, 105-106.
(v) *Shree Krishna Doss v. Chandook Chand* (1909) 32 Mad. 334.

- S. 115.** "When the High Court can by interfering under section 115 in appropriate cases terminate the litigation, the mere fact that another remedy *by suit only* lies should not *per se* be a reason for non-interference" (w).

High Court "may" call for record.—The powers of revision given by this section are very wide, and the High Court can of its own motion call for any record under this section, if it appears desirable so to do to that Court (x). It is not necessary to the exercise of its powers under this section that it should be put into motion by the party aggrieved by the proceeding complained of. It has been so held by the High Courts of Calcutta, Allahabad and Madras (y). In a Bombay case, however, where a Collector applied to the High Court to revise a decision of a Mamlatdar, the High Court declined to interfere, stating that in so doing it was following the established practice of the Court, and adding that the defendant, if he felt aggrieved, could himself apply to that Court (z).

"Case".—In a recent case before the Judicial Committee (a), the question arose whether proceedings by petition to a Civil Court in a matter under s. 10 of the Religious Endowments Act 20 of 1863 constituted a "case" within the meaning of this section. Dealing with that question, their Lordships said: "No definition is to be found in the Code of the word 'case.' It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties."

Subordinate Court.—A Collector acting under s. 11 of the Land Acquisition Act is not a Court within the meaning of this section (b). Nor is a District Registrar a Court within the meaning of this section (c). Nor is a District Judge acting under s. 4 of Bombay Act 12 of 1850 (d). The High Court therefore has no jurisdiction to revise orders made by them.

The Court of the Resident at Aden is subordinate to the High Court of Bombay as regards questions which should be stated by the Resident for the decision of the High Court under the provisions of s. 8 of the Aden Act 2 of 1864 (e). His Britannic Majesty's Courts in Zanzibar are also subordinate to the High Court of Bombay (f). A Collector exercising *judicial* functions under the Bombay Mamlatdar's Courts Act II of 1906 is a Court within the meaning of this section (g). And so is a Civil Court acting or purporting to act under the provisions of s. 10 of the Religious Endowments Act 20 of 1863 (h). Where an application is made to a Collector for a reference to the Civil Court under s. 18 of the Land Acquisition Act 1 of 1894, and the application is rejected, the Collector in rejecting the application acts *judicially* and his order is subject to revision by the High Court (i). Similarly an order by a Collector refusing to refer to the Civil Court a question under the second proviso to s. 49 of that Act is subject to revision by the High Court (j).

(w) *Raghunandan v. Ram Charan* (1919) 4 Pat. L. J. 94, 106.

(x) *Bisheshwar v. Hari Singh* (1883) 5 All. 42.

(y) *Puran Mal v. Janki Pershad* (1901) 28 Cal. 680; *Gulam Mahammad v. Saroda* (1900) 4 Cal. W. N. 695; *Debi Das v. Ejaz Husin* (1906) 28 All. 72; *Anthony v. Dupont* (1882) 4 Mad. 217.

(z) *Pandu v. Bhavdu* (1897) 21 Bom. 806.

(a) *Balakrishna v. Vasudeva* (1917) 44 I. A. 261, 40 Mad. 793.

(b) *British India Steam Navigation Co. v. Secretary of State for India* (1910) 38 Cal. 280.

(c) *Manavala v. Kumarappa* (1907) 30 Mad. 326.

(d) *Cooper, In re* (1918) 42 Bom. 119.

(e) *Rhimbai v. Mariam* (1900) 34 Bom. 267.

(f) *Merali v. Sheriff* (1911) 36 Bom. 105.

(g) *Purshottam v. Mahadu* (1912) 37 Bom. 114.

(h) *Balakrishna v. Vasudeva* (1917) 44 I. A. 261, 268-269, 40 Mad. 793, 801.

(i) *Parameswara v. Land Acquisition Collector Polghat* (1919) 42 Mad. 251; *Administrator-General of Bengal v. The Land Acquisition Collector* (1907) 12 Cal. W. N. 241; *Krishna Das v. Collector of Patna* (1912) 16 Cal. L.J. 165.

(j) *Saraswati v. The Land Acquisition Deputy Collector* (1917) 2 Pat. L. J. 204.

A Judge of a High Court sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court [clause 36, Letters Patent]; therefore, no decision of a single Judge can be revised under this section (*jj*).

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Exercise by Court of jurisdiction not vested in it by law.—In order to determine the “jurisdiction” of a Court, we must determine the *pecuniary* limits of its jurisdiction, the *local or territorial* limits of its jurisdiction, and its jurisdiction as regards the *subject-matter* of the suit or other proceeding instituted in it. These limits are fixed by the particular Act by which the Court is constituted. If a Court assumes a jurisdiction which, by reason of the pecuniary or territorial limits of the jurisdiction of such Court or by reason of the subject-matter of the suit or other proceeding instituted in it, is not vested in it by law, the High Court to which such Court is subordinate may exercise its revisional powers under this section. But the High Court will not interfere in revision, unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent upon the face of the record (*k*). As to the distinction between *absence of jurisdiction* and *irregular exercise of jurisdiction*, see notes to s. 21.

Local or territorial limits of jurisdiction.—S. 21 of the Code provides that no objection as to the *place* of suing shall be allowed by any revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

Pecuniary limits of jurisdiction: over-valuation and under-valuation of suits.—The provisions of s. 11 of the Suits Valuation Act (p. 255 above) apply, in so far as they are applicable, to the High Court exercising revisional jurisdiction under the present section.

Failure to exercise jurisdiction.—Where a Court having jurisdiction to act in a matter declines jurisdiction in the matter, this section will apply. Thus where a Court has jurisdiction to accept a plaint (*l*), or to execute a decree (*m*), or to review its judgment (*n*), but refuses to accept the plaint or to execute the decree or to review its judgment on the ground that it has no jurisdiction, the High Court will interfere under this section. Similarly where a Court refused to confirm a sale under s. 312 of the Code of 1882 [now O. 21, r. 92], believing that it had no power to do so if the purchaser objected to the sale on the ground of misrepresentation, it was held by their Lordships of the Privy Council that the case was one in which the Court had failed to exercise a jurisdiction vested in it by law, and that the decision was therefore subject to revision under the present section (*o*). Interference under this section is also appropriate where a Court has no discretionary power to refuse a relief, but refuses the relief, believing that it has a discretionary power to do so. Thus where a Court refused the application of a decree-holder for a rateable distribution under s. 73, though according to its own finding he was clearly entitled to such distribution, on the ground that there was other property of the judgment-debtor available for the satisfaction of his claim, the High Court of Madras interfered under this section (*p*).

Where a Court in the exercise of its jurisdiction has acted illegally or with material irregularity.—Cl. (c) of the section contemplates cases, other

(*jj*) *Debenendra Nath v. Bidudhendra* (1916) 43 Cal. 90, 94.
(*k*) *Mithr Ali v. Muhammad Husen* (1892) 14 All. 413.
(*l*) *Zamiran v. Fateh Ali* (1905) 32 Cal. 146.
Badami Kuar v. Dinu Rai (1886) 8 All. 111.

(*m*) *Shamray v. Niloje* (1886) 10 Bom. 200.
(*n*) *Akbar Khan v. Muhammad* (1909) 31 All. 610.
(*o*) *Birj Mohun v. Rai Uma Nath* (1893) 20 Cal. 8, 19 I. A. 154.
(*p*) *Sree Krishna Doss v. Chandook Chand* (1909) 32 Mad. 334.

S. 115. than those referred to in cls. (a) and (b), namely, cases where the Court has either exercised a jurisdiction not vested in it, or failed to exercise a jurisdiction vested in it. It is intended to refer to the class of cases where the Court *having jurisdiction and exercising it* appears to have acted illegally or with material irregularity in the exercise of such jurisdiction (q). The words "acted in the exercise of its jurisdiction illegally or with material irregularity," have given rise to a conflict of opinion. It is therefore best first to state how much is settled law, and then to deal with the various interpretations put on the words "illegally" and "material irregularity" by the various High Courts.

It is settled law that where a Court has jurisdiction to determine a question, and it has determined that question, it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision.—The leading case on the subject is *Amir Hassan Khan v. Sheo Baksh Singh* (r), decided by their Lordships of the Privy Council in the year 1884. In that case it was laid down by their Lordships that where a Court has jurisdiction to decide the question before it and in fact decides such question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity, *merely because its decision is erroneous*. The mere fact that the decision of the Court is wrong affords no ground for the interference of the High Court under this section. In the course of the judgment, their Lordships said: "The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they *had* perfect jurisdiction to decide the question which was before them [namely, whether the suit was barred as *res judicata*], and they did decide it. *Whether they decided it rightly or wrongly*, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity." Following this decision, it has been held that the High Court will not interfere under this section, merely because the lower Court wrongly decided that the suit was barred by limitation (s), or that it was barred as *res judicata* (t), or because the lower Court proceeded upon an erroneous construction of the sections of an Act (u), or misunderstood the effect of a document in evidence (v), or excluded evidence which it ought to have admitted (w), or held, though incorrectly, that there was no relation of landlord and tenant between the parties to a suit or proceeding (x). Similarly it has been held that no revision lies from an order passed in appeal refusing to file an award made without the intervention of the Court (y), or from an order passed in appeal remanding a case under O. 41, r. 23 below (z), or from an order passed in appeal that the Court of first instance had jurisdiction to hear the suit (a), though such orders may be erroneous in law. The cases cited above were all cases in which the Court *had* jurisdiction to decide the question before it, and in fact decided the question, but the decision was impeached as being erroneous in law and was sought to be revised under the present section. In all those cases the High Court held that though

(q) *Kristamma v. Chapa* (1894) 17 Mad. 410, 421.

(r) (1885) 11 Cal. 6, 11 I. A. 237; *Muhammad Yusuf Khan v. Abdul Rahman Khan* (1889) 16 Cal. 749, 16 I. A. 104; *Parasurama v. Seshier* (1904) 27 Mad. 504.

(s) *Sundar Singh v. Doru Shankur* (1898) 20 All. 78; *Ramgopal v. Joharmall* (1912) 39 Cal. 473; *Jhotu Lal v. Ganouri* (1918) 3 Pat. L. J. 376. It is otherwise where a Court entertains an application which on the face of it is barred by limitation and fails to adjudicate upon the question of limitation [Limitation Act, s. 3]: *Tara v. Basiruddi* (1915) 19 Cal. W. N. 970.

(t) *Amritrao v. Balkrishna* (1887) 11 Bom. 488.

(u) *Rababa v. Noorjehan* (1886) 13 Cal. 90; *Krishna v. Kedarnath* (1888) 15 Cal. 446; *Kali Charan v. Sarat Chunder* (1903) 30

Cal. 397; *Ganga Charan v. Shoshi Bhushan* (1905) 32 Cal. 572; *Ram Singh v. Salig Ram* (1906) 28 All. 84; *Malkarjan v. Narhari* (1901) 25 Bom. 337, 347, 27 I. A. 216.

(v) *Dasrath Rai v. Sheodin* (1894) 16 All. 39.

(w) *Madhavray v. Gulabbhai* (1899) 23 Bom. 177; *Enat Mondul v. Baloram* (1899) 3 Cal. W. N. 581.

(x) *Sheu Prasad v. Ramchunder* (1913) 41 Cal. 323.

(y) *Ahmad Din v. Atlas Trading Co.* (1915) P. R. no. 66, p. 287.

(z) *Chubbu Mian v. Harcharan Das* (1912) P. R. no. 119, p. 406.

(a) *Sardar Arur Singh v. Bua Ditta* (1911) P. R. no. 4, p. 7.

there was an error in law, the decision was not open to revision, on the ground that a mere error in law is not an "illegality" within the meaning of this section. In all these cases the High Court might well have said, to use the words of their Lordships of the Privy Council in another case (b), "It [the lower Court] made a sad mistake, it is true, but a Court *has jurisdiction* to decide wrong as well as right." The point was further emphasized by their Lordships of the Privy Council in *Balakrishna v. Vasudeva* (c). Referring to this section, their Lordships said: "It will be observed that the section applies to jurisdiction alone, the irregular exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved" (d).

The decision in *Amir Hassan Khan's* case presupposes jurisdiction in the Court whose decision is sought to be revised on the ground that it is erroneous. Hence the principle of that decision does not apply where a Court erroneously assumes a jurisdiction which is not vested in it by law (e). Thus if a Court proceeding upon an erroneous construction of a section of an Act assumes a jurisdiction which is not vested in it by law, the High Court will interfere in revision and set aside the decree of the lower Court as one passed without jurisdiction (f). Similarly, if a Court wrongly decides that a suit is of a civil nature, and entertains the suit on that basis, the decision is open to revision under clause (a) of this section, for no civil Court is competent to entertain a suit which is not of a civil nature (g); see s. 9 above. Likewise, if a Court proceeding upon a misapprehension of the law declines to exercise a jurisdiction vested in it by law, the High Court has the power to interfere under clause (b) of this section (h). These, however, are cases under clauses (a) and (b) of the present section. They are not cases under clause (c) being the clause now under consideration. The reason why these cases are mentioned here is that it was contended in those cases that as the assumption of jurisdiction or the refusal to exercise it had proceeded upon an *error of law*, the High Court had no power to interfere under this section, and the decision in *Amir Hassan Khan's* case was relied upon in support of that contention. But the High Courts held that if the case came under either clause (a) or clause (b), it was immaterial that the assumption of jurisdiction or the refusal to exercise it proceeded upon an *error of law*. The High Courts also pointed out that the basis of the decision in *Amir Hassan Khan's* case was that the lower Court *had* jurisdiction to determine the question before it and that it *had* determined it, and all that that case decided was that an *erroneous* decision of a case in the exercise of the Court's jurisdiction was no ground for interference under this section. As stated by the Judicial Committee in a recent case, "the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved" (i). Where a question of jurisdiction is involved, the High Court is competent to revise a conclusion of law or fact which bears on such question (j).

Amir Hassan Khan's case decides what an illegality or material irregularity is not. What then is an illegality or material irregularity within the meaning of this section? To find an answer to this question, the Courts have adopted *Amir Hassan Khan's* case as the basis. Different interpretations have been put by different Judges upon the

- (b) *Malkarjun v. Narhari* (1901) 25 Bom. 337, 27 I. A. 216; *Rajwant Prasad v. Ram Ratin* (1915) 42 I. A. 171, 176, 37 All. 485, 494-495.
 (c) (1917) 44 I. A. 261, 40 Mad. 793.
 (d) (1917) 44 I. A. 261, 267, 40 Mad. 793, 799; *Ashi, Ali v. Imtiaz Begam* (1916) 39 All. 723 [suit valuation]; *Jhunku Lal v. Bishe-shar D.* (1918) 40 All. 612 [O. 23, r. 1].
 (e) *Manisha v. Sivali* (1888) 11 Mad. 220.
 (f) *Vishvambhar v. Vasudev* (1892) 16 Bom. 708. See also *Birj Mohan v. Rai Uma Nath*

- (1893) 20 Cal. 8, 19 I. A. 154.
 (g) *Ross v. Pitambar* (1903) 25 All. 509; see the judgment of Blair, J., on p. 525 of the report.
 (h) *Maharajah of Burdwan v. Apurba* (1911) 15 O. W. N. 872.
 (i) *Balakrishna v. Vasudeva* (1917) 44 I. A. 261, 267, 40 Mad. 793, 799.
 (j) *Bihari Lal v. Baldeo* (1918) 40 All. 674; *Bhargava & Co. v. Jagannath* (1919) 41 All. 602.

S. 115. decision in that case and, hence we have a number of conflicting views on the meaning of the words in question of which the principal ones are set forth below :—

1. That the words “acted in the exercise of its jurisdiction illegally or with material irregularity” refer only to an *error of jurisdiction*, and apply only to cases of the kind contemplated by cls. (a) and (b) of this section (*k*). As against this view it has been said that the words in question did not occur in the Code of 1877, that they were first introduced by the amending Act of 1879, that errors of jurisdiction had already been provided for by the first two clauses of the section, and that the words in question must refer therefore to something else than errors of jurisdiction (*l*).

2. That the said words refer to *errors of procedure* only as distinguished from errors of *law* (*m*). This view proceeds mainly on the word “acted.” In a recent Calcutta case, Jenkins, C.J., said : “It appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the *faults of procedure* indicated in that section. If there was an error committed [by the Small Cause Court Judge], it was an error of *law*, and not of *procedure*, and in my opinion Mr. Justice Fletcher had no power to interfere” (*n*).

3. That the said words apply to cases where there is a *wilful disregard or conscious violation* by a judge of a rule of law or *procedure* (*o*). As against this view it has been said that it engrafts upon the Privy Council ruling a qualification to the effect that the High Court can interfere under the present section if the erroneous decision is the result of *conscious violation* by the lower Court of a rule of law or procedure, and that the distinction is in no way warranted by the language of the section (*p*). The answer given to that is that if the section did not apply to cases where a Judge consciously violated a rule of law or procedure, a lower Court might wilfully disregard the decisions of the High Court, or even of the Privy Council, and there would be no check upon it (*q*).

4. That the said words apply to cases where the decision complained of is vitiated by a *gross and palpable error* (*r*). According to this view, a mistake, though of law, if gross and palpable, would give jurisdiction to the Court under this section. But this view runs counter to the Privy Council decision (*s*).

It will be useless to discuss these conflicting views. Suffice it to say, as observed by the judicial Committee in *Balakrishna v. Vasudera* (*ss*), that “the section applies to jurisdiction alone, the *irregular exercise of it*, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.”

Having noted the different interpretations put upon the words in question, we proceed to note some of the decisions. A good many of them, it is conceived, will not stand the test laid down in *Balakrishna's* case.

It is an “illegality” to frame an issue on a point of fact expressly *admitted* by the defendant and to dismiss the suit on the ground that the fact is not proved (*t*). Similarly it is an “illegality,” if a Court passes a decree on an unstamped hundi. The Stamp

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- (*k*) *Mogni Ram v. Jiwa Lal* (1885) 7 All. 336 ;
Badami Kuar v. Dinu Rai (1886) 8 All.
 111.
 (*l*) *Kristamma v. Chapa* (1894) 17 Mad. 410,
 414-415.
 (*m*) *Kristamma v. Chapa* (1894) 17 Mad. 410,
 414-415.
 (*n*) *Shew Prasad v. Ramchunder* (1913) 41 Cal.
 323, 338.
 (*o*) *Shiva v. Joma* (1883) 7 Bom. 341, 358-359 ;
Kristamma v. Chapa (1894) 17 Mad. 410.
 (*p*) *Kristamma v. Chapa* (1894) 17 Mad. 410, 420.
 (*q*) *Ross v. Pitambar* (1903) 25 All. 509, 524, *per*
 Stanley, C. J.
 (*r*) *Mohunt v. Kheller Moni Dass* (1896) 1 Cal.
 W. N. 617 ; *Enat Mondul v. Baloram*
 (1899) 3 Cal. W. N. 581, 585 ; *Venkubai v.*
Lakshman (1888) 12 Bom. 617.
 (*s*) *Shew Prasad v. Ram Chunder* (1913) 41 Cal.
 323, 340.
 (*ss*) (1917) 44 I. A. 261, 267, 40 Mad. 793 799.
 (*t*) *Gorath v. Vithal* (1887) 11 Bom. 485.

Act expressly provides that an unstamped hundi *shall* not be acted upon (u) [see Stamp Act II of 1899, s. 35]. It is an "illegality," if the appellate Court calls in question the admissibility of a document not duly stamped after the same has been admitted in evidence in the Court of first instance. Such a course is manifestly against the provisions of the Stamp Act by which it is enacted that when an instrument has been admitted in evidence, such admission *shall* not be called in question at any stage of the same suit (v) [see Stamp Act II of 1899, s. 35]. It is also an "illegality" to pass a decree where there is no evidence at all to support it (w). It is an illegality to attach in execution of a decree the tools of an artisan contrary to s. 60 of the Code (x), or to attach money in a provident fund regulated by the Provident Funds Act 9 of 1897 (y).

It is a "material irregularity" within the meaning of this section if a Court, taking a mistaken view of the questions at issue, proceeds to determine an issue which does not really arise in the case, and bases its decision of the case on a determination of that issue (z). It is also a material irregularity to treat the delivery of a summons by post to a person who was not shown to have been the defendant as good service, and to pass a decree *ex parte* against the defendant on that footing (a); or to attach in execution of a *personal* decree against a defendant property which he holds as *trustee* for another (b), or to make an order against a person without hearing him at all (c). It is also a material irregularity for a Court to decline to go into evidence when required to do so, and to proceed to dispose of the suit upon the pleadings or upon allegations made in a petition (d); or to refuse to draw up its own decree, whether it be preliminary or final (e); or to refuse to grant a certificate for a refund of court-fees paid on the memorandum of appeal when a case is remanded under O. 41, r. 23 (f) [Court Fees Act 7 of 1870, s. 13]. It is also a material irregularity to apply to a case a section of an Act which is not applicable to it (g).

Wrong decision of the lower appellate Court that the first Court had or had not jurisdiction to entertain a suit.—It has been held by the Madras (h) Bombay (i) and Allahabad (j) High Courts, though on different grounds, that the High Court has jurisdiction to interfere under this section where the lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate Court that the Court of first instance had or had not jurisdiction to entertain a suit. The Calcutta decisions are not uniform, it being held in some cases that the High Court has jurisdiction (k), while in others that it has not (l). Cases of the kind referred to above arise where a court which *has jurisdiction* to entertain a suit returns the plaint in the suit on the ground that it has no jurisdiction, and the lower appellate Court erroneously affirms the decision of the Court of first instance; or where a Court which *has no jurisdiction* to entertain a suit accepts the plaint holding that it has jurisdiction, and the lower appellate Court erroneously affirms the decision; or where a Court which *has jurisdiction* to

- (u) *Chenbasapa v. Lakshman* (1894) 18 Bom. 369.
 (v) *Shiddapa v. Irava* (1894) 18 Bom. 737.
 (w) *Shields v. Wilkinson* (1887) 9 All. 398, 409.
 (x) *Badami v. Dinu* (1886) 8 All. 111, 115;
 Dhan Singh v. Basant Singh (1886) 8 All.
 519, 529; *Sew Buz v. Shibchunder* (1886)
 13 Cal. 225, 231.
 (y) *Hindley v. Joyanarain* (1919) 46 Cal. 962,
 970-973.
 (z) *Venkubai v. Lakshman* (1888) 12 Bom. 617;
 Sivaprasad v. Tricomdas (1915) 42 Cal. 926,
 931.
 (a) *Jagannath v. Sassoon* (1894) 18 Bom. 608;
 Abraham v. Donald (1906) 29 Mad. 324.
 (b) *Shard*, in the matter of (1901) 23 Cal. 574.
 (c) *Sato Koer v. Gopal Sahu* (1907) 34 Cal. 929, 933;
 Braja Bhusan v. Sris Chandra (1919)
 4 Pat. L. J. 20. But see *Mulchand v.*
 Tarni Prasad (1919) 4 Pat. L. J. 642.
 (d) *Braja Bhusan v. Sris Chandra* (1918) 4 Pat.
 L. J. 20.
 (e) *Sidhanath v. Ganesh* (1912) 37 Bom. 60.
 (f) *Bhausing v. Chaganiram* (1918) 42 Bom.
 363.
 (g) *Sew Buz v. Shib Chunder* (1886) 13 Cal. 225;
 Jugohundhu v. Jadu (1887) 15 Cal. 47;
 Sivaprasad v. Tricomdas (1915) 42 Cal.
 926, 931.
 (h) *Atchayya v. Sri Seetharamachandra* (1912)
 39 Mad. 195 [F. B.]; *Afsenachi v.*
 Ananthanarayana (1903) 26 Mad. 224.
 (i) *Vishvanath v. Rambhat* (1891) 15 Bom. 148.
 (j) *Badami Kuar v. Dinu Rai* (1886) 8 All. 111.
 (k) *Zamiran v. Fateh Ali* (1905) 32 Cal. 146;
 Jugobundhu v. Jadu (1888) 15 Cal. 47.
 (l) *Mathura Nath v. Umesh Chandra* (1896) 1
 Cal. W. N. 626.

S. 115. entertain a suit rightly accepts the plaint, but the lower appellate Court erroneously holds that the Court of first instance had no jurisdiction to entertain the suit; or where a Court which has no jurisdiction to entertain a suit rightly returns the plaint, but the lower appellate Court erroneously holds that the Court of first instance had jurisdiction to entertain the suit and directs the Court of first instance to take back the plaint and restore the suit to its file. According to the Madras, Bombay and Allahabad decisions the High Court has power in all these cases to revise the decisions of the lower appellate Court, according to some Judges, under the first part of this section, that is, under cl. (a) or cl. (b), and, according to others, under cl. (c).

Award.—See notes to Schedule II, paragraph 16, under the heading “Revision.”

Gross miscarriage of justice.—The interference of the High Court under this section in cases where the lower Court has acted illegally or with material irregularity should be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice (m). Hence the judgment of a lower Court should not be set aside upon a mere technicality (n).

Sanction to prosecute.—Where a Civil or a Revenue Court, acting under s. 476 of the Criminal Procedure Code, grants or refuses an application to prosecute a party to the suit or witnesses before it, it is a *decision of a case* within the meaning of the *present section*. The High Court, therefore, has no jurisdiction to interfere under s. 439 of the *Criminal Procedure Code* and to call for the proceedings of the lower Court under that section. But it has power under s. 115 of *this Code* as also under section 15 of the *High Courts Act* [now s. 107 of the *Government of India Act, 1915*] to call for the proceedings and to pass such order as it may deem expedient. In other words, the application in such cases lies on the *civil* revisional side of the High Court, and not on the *criminal* revisional side. But the Bench exercising criminal jurisdiction may deal with the matter, if authorised to do so by the Chief Justice under section 14 of the *High Courts Act* [now s. 108 of the *Government of India Act, 1915*] (o). The rule is the same where action has been taken by a Subordinate Civil Court under s. 195 of the *Criminal Procedure Code* (p). See also the undermentioned cases (q).

Appeal.—By cl. 15 of the Letters Patent as amended in March 1919 it is provided that no appeal lies from an order made in the exercise of revisional jurisdiction. Prior to the amendment there was a conflict of decisions as to whether an appeal lay to the High Court under cl. 15 of the Letters Patent from the judgment of a single Judge delivered in the exercise of revisional jurisdiction under this section. The position was this: it was enacted by cl. 15 of the Letters Patent as it stood before the amendment that an appeal shall lie to the High Court from the judgment of one Judge of the High Court or one Judge of any Division Court pursuant to s. 13 of the *Charter Act*. Now s. 13 of the *Charter Act* provides for the exercise by the Judges of the High Court of the *original and appellate* jurisdiction vested in the High Court. This gave rise to the question whether the division of jurisdiction into original and appellate was exhaustive or not. If the division was exhaustive, revisional jurisdiction must be treated as comprised in appellate

(m) *Per Davies, J.*, in *Kristamma v. Chapa* (1894) 17 Mad. 410, at p. 421; *Ismaji v. Macleod* (1907) 31 Bom. 138.

(n) *Asharfi Lal v. Deputy Commissioner of Bara Banki* (1895) 22 Cal. 729, 22 I. A. 90.

(o) *Bhup Kunwar, in the matter of the petition of* (1904) 26 All. 249, 257 [F. B.]; *Emperor v. Har Prasad* (1913) 40 Cal. 477 [F. B.]; *Emperor v. Kashi* (1916) 39 All. 695. But see *Ottupura v. Emperor* (1909) 33 Mad. 48 [F. B.].

(p) *Sakig Ram v. Ramji Lal* (1906) 28 All. 554; *Chennanagoud, In re* (1902) 26 Mad. 139.

(q) *Ram Prasad Mala, in re* (1909) 37 Cal. 13; *Bent Prasad v. Sarju Prasad* (1911) 33 All. 512; *Budhu Lal v. Chaitu* (1916) 43 Cal. 597, s. c. in appeal (1917) 44 Cal. 804, and (1917) 44 Cal. 816 [order made by a Judge of the Presidency Small Cause Court]; *Paramaswamy v. Alamelu* (1919) 42 Mad. 76 [Madras Estates Land Act]; *Ramasami v. Kali* (1919) 42 Mad. 310 [Madras Estates Land Act]; *Emperor v. Chota Lal* (1919) 39 All. 367 [non-specification of statements on which charge is brought].

jurisdiction, so that an appeal would lie under cl. 15 from the judgment of a single Judge exercising revisional jurisdiction. But if the division was not exhaustive, so that revisional jurisdiction was something outside the original and appellate jurisdiction, the case would not be one under s. 13 of the Charter Act, and no appeal could therefore lie under cl. 15 of the Letters Patent. It was held by the High Courts of Madras (r) and Calcutta (s), that the division of the jurisdiction of High Courts into original and appellate was exhaustive and that revisional jurisdiction was included in appellate jurisdiction, and that an appeal therefore lay under cl. 15 of the Letters Patent from an order of a single Judge made under the present section, provided such order amounted to a "judgment" within the meaning of the said clause. The High Court of Bombay took the contrary view (t). It does not, however, appear that there was any "judgment" in the Bombay case (u).

S. 115.

Laches.—An application for revision will not be entertained unless it is made without unreasonable delay (v).

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| <p>(r) <i>Chappan v. Moidin</i> (1898) 22 Mad. 68;
 <i>Tuljaram v. Alagappa</i> (1912) 35 Mad. 1;
 <i>Srinivasa v. Ramaswami</i> (1913) 39 Mad. 235.</p> | <p>(t) <i>Hiralal v. Bai Asi</i> (1897) 22 Bom. 891.
 See also <i>Nisar Ali v. Ali Ali</i> (1905) 28 All. 133.</p> |
| <p>(s) <i>Shew Prosad v. Ram Chunder</i> (1913) 41 Cal. 323;
 <i>Debendranath v. Bibudhendra</i> (1915) 43 Cal. 90.</p> | <p>(u) See (1913) 41 Cal. 323, 335, <i>supra</i>.
 <i>Durga Prasad v. Sheo Charan</i> (1882) 4 All. 154;
 <i>Balmakund v. Sheo Jalan</i> (1884) 6 All. 125.</p> |

PART IX.

Special Provisions relating to the Chartered High Courts.

116. [S. 631.] This Part applies only to High Courts *which are or may hereafter be established under the Indian High Courts Act, 1861, or the Government of India Act, 1915.*

Part to apply only to
certain High Courts.

117. [S. 632.] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

Application of Code to
High Courts.

The italicized words were inserted in the section by the Amending Act 13 of 1916.

Save as provided in this Part.—See s. 120.

Save as provided in Part X.—See s. 129.

Rules.—“Rules” means rules contained in the First Schedule or made under s. 122 or s. 125; see s. 2 (18), see also O. 49, r. 3.

118. [S. 634.] Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

Execution of decree before
ascertainment of costs.

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

119. [S. 635.] Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the

Unauthorised persons not
to address Court.

High Court to make rules concerning advocates, vakils and attorneys.

Ss.
119, 120.

See Letters Patent, cls. 9 and 10.

120. [Ss. 638, 639.] The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

Provisions not applicable to High Courts in original civil or insolvent jurisdiction.

As to *Rules* not applicable to Chartered High Courts, see O. 49, r. 3.

Sub-section (2) of this section by which it was provided that nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an insolvent Court has been repealed by the Presidency-Towns Insolvency Act III of 1909, s. 127.

PART X.

Rules.

121. [*New.*] The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Effect of rules in First Schedule.

The whole of this Part is new, except ss. 129, 130 and 131, which correspond to s. 652, paras. 2, 3 and 4, of the Code of 1882.

As to annulment and alterations of rules, see s. 124.

122. [*New.* Cf. S. 652, first para.] High Courts established under the Indian High Courts Act, 1861, or the *Government of India Act, 1915*, and the Chief Court of Lower Burma, may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

Power of certain High Courts to make rules.

The italicized words were inserted in the section by the Amending Act 13 of 1916.

The words "Chief Court of Lower Burma" were substituted for the words "Chief Courts of the Punjab and Lower Burma" by the Repealing and Amending Act 18 of 1919. The Chief Court of the Punjab is now the High Court of Lahore.

The rules made under this section by the High Courts are set out in Appendices at the end of this work.

Sections 122 to 128 excepting s. 125 provide for rules to be made by the Chartered High Courts and the Chief Court of Lower Burma for regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, in other words, Courts subject to their appellate jurisdiction (See High Courts Act, 1861, s. 15, and Government of India Act, 1915, s. 107). These rules must not be inconsistent with the provisions in the body of the Code (see s. 128). Further, they are subject to the previous approval of the authorities mentioned in s. 126. Sec. 129 provides for rules to be made by Chartered High Courts as to their original civil jurisdiction. These rules may be inconsistent with the provisions in the body of the Code, but they must not be inconsistent with the Letters Patent establishing those Courts.

None of the Courts empowered under this section to frame rules has power by any rule that it may make to alter the period of limitation prescribed by the Indian Limitation Act (*w*).

123. [New.] (1) A Committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts and of the Chief Court referred to in section 122. **S. 123.**

(2) Each such Committee shall consist of the following persons, namely :—

(a) three judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge, or (in Burma) a Divisional Judge for three years,

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court; and

(e) in the towns of Calcutta, Madras and Bombay an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf ; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the Local Government, as the case may be.

Ss.
123, 126.

The words "the town which is the usual place of sitting of each of the High Courts and Chief Courts referred to in section 122" in sub-sec. (1) were substituted for the words "each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon" by the Amending Act 13 of 1916. By the Repealing and Amending Act 18 of 1919, the words "of the Chief Court" were substituted for the words "Chief Courts."

The words and brackets "(in Burma)" in cl. (a) of sub-sec. (2) were substituted for the words and brackets "(in the Punjab or Burma)" by the Repealing and Amending Act 18 of 1919.

124. [New.] Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

Committee to report to High Court.

The provisions as to Rule Committees apply to Chartered High Courts and the Chief Court of Lower Burma as regards rules to be made under s. 122. Rules under that section can only be made after those Courts have taken the opinion of the Rule Committee attached to them.

125. [New.] High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor-General in Council may determine:

Power of other High Courts to make rules.

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

The rules to be made under this section should not be inconsistent with the provisions in the body of this Code. See s. 128, and contrast s. 129.

As to sanction, see s. 126.

126. [New.] Rules made under the foregoing provisions shall be subject to the previous approval of the following authorities, namely:—

Rules subject to sanction.

(a) if the rule is made by a High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, to the approval of the authority prescribed by the proviso to section 107 of the latter Act for rules made under that section;

(b) if the rule is made by any other High Court, to the *approval* of the Local Government.

Ss. :
126, 128

The word "approval" in the section was substituted for the word "sanction" wherever it occurred in the section by the Amending Act 13 of 1916.

The words and figures "or the Government of India Act, 1915," were inserted in the section by the Amending Act 13 of 1916. The words and figures "the proviso to section 107 of the latter Act" were substituted for the words and figures "section 15 of that Act" also by the Amending Act 13 of 1916.

Sanction.—This section requires, in the case of rules to be made by Chartered High Courts, the same sanction as is required by s. 107 of the Government of India Act, 1915, the object being that the rule-making power should correspond with the power conferred under section 107 of that Act. That section empowers the Chartered High Courts to make and issue general rules for regulating the practice and proceedings of Courts subject to their appellate jurisdiction, subject to the previous approval, in the case of the High Court of Calcutta, of the Governor-General in Council, and in other cases of the local Government.

127. [New.] Rules so made and *approved* shall be published in the *Gazette of India* or in the

Publication of rules.

local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

The word "approved" was substituted for the word "sanctioned" by the Repealing and Amending Act 24 of 1917, sch. I.

128. [New.] (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

Matters for which rules may provide.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely :—

(a) the service of summonses, notices and other process by post or in any other manner either generally or in any specified areas, and the proof of such service ;

(b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property and the proceeds of such sale ;

S. 128

- (c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction ;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts :
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not (x) .
- (f) summary procedure—
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—
 - on a contract, express or implied ; or
 - on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or
 - on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only ; or
 - on a trust ; or
 - (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant ;
- (g) procedure by way of originating summons ;
- (h) consolidation of suits, appeals and other proceedings ;
- (i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties ; and

(x) See *Balmukund v. Bissendoyal* (1919) 46 Cal. 48.

- (j) all forms, registers, books, entries and accounts which may be necessary, or desirable for the transaction of the business of Civil Courts. Ss.
128-131.

129. [S. 652, third para.] Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, *or the Government of India Act, 1915*, may make

Power of Chartered High Courts to make rules as to their original civil procedure.

such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

The italicized words were inserted in the section by the Amending Act 13 of 1916.

Rules as to original civil procedure of Chartered High Courts.—Rules made under s. 122 must not be inconsistent with the provisions in the body of this Code. Under this section any Chartered High Court may make rules to regulate its own procedure in the exercise of its original civil jurisdiction. Such rules may not be consistent with the provisions in the body of the Code, but they must not be inconsistent with the Letters Patent establishing it.

130. [S. 652, second para.] A High Court not established under the Indian High Courts Act, 1861, *or the Government of India Act, 1915*, may, with the previous *approval* of the

Power of other High Courts to make rule as to matters other than procedure.

Local Government, make with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 *or section 107 respectively of those Acts*, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

The words and figures “or the Government of India Act, 1915,” were inserted in the section by the Amending Act 13 of 1916. The words “or section 107 respectively of those Acts” were substituted for the words “of that Act” also by the Amending Act 13 of 1916.

The word “approval” was substituted for the word “sanction” by the Repealing and Amending Act 24 of 1917, sch. I.

131. [S. 652, fourth para.] Rules made in accordance with section 129 or section 130 shall be published in the *Gazette of India* or in the

Publication of rules.

local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law.

PART XI.

Miscellaneous.

182. [S. 640.] (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

Exemption of certain women from personal appearance.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

See notes to O. 26, r. 1, under the head "Persons exempted from attending Court."

183. [S. 641.] (1) The Local Government may, by notification in the local official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

Exemption of other persons.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

See O. 26, r. 1.

184. [New.] The provisions of sections 55, 57 and 59 shall apply, so far as far as may be, to all persons arrested under this Code.

Arrest other than in execution of decree.

This section is new. It supplies an omission.

135. [S. 642.] (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

S. 135.

Exemption from arrest
under civil process.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents, and recognized agents, and their witnesses, acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

Alterations in the section :—

1. The words "other than process issued by such tribunal for contempt of Court" in sub-s. (2) have been added to give effect to a Calcutta decision (*y*).

2. Sub-section (3) is new. It has been substituted for the words "except as provided in section 337A, sub-section (5), and sections 256 and 643" which occurred at the commencement of sub-section (2) in the Code of 1882.

Grounds of exemption from arrest.—The exemption here conferred is not for the personal benefit of the individual, but for the furthering of public interests and the better administration of justice. In other words, the exemption is not the privilege, of the person attending the Court, but that of the Court which he attends. If, therefore, a witness does not believe *bona fide* that his attendance was required, there is no privilege (*z*). For the same reason where a writ of attachment for *contempt* of Court has been issued against a party to a suit, he cannot claim privilege from arrest while proceeding to Court for the purpose of attending the hearing of the suit (*a*).

While going to or attending and while returning from Court.—A party to a suit is exempt from arrest under this section while going to or attending the Court before which the suit is pending, and while returning from such Court. The following are the leading cases bearing on this part of the section :—

(1) Where a plaintiff who was a native of Patna, and who had instituted a suit in the High Court of Madras, left Patna on receiving a letter from his solicitors that his presence was required, and arrived at Madras on 24th October, and the suit having come on for hearing on the 27th of October was adjourned till the 25th of December, and he was arrested in execution of a decree against him on the 10th of November,

(*y*) *John v. Carter* (1870) 4 B. L. R. O. C. 90.

(*z*) *Wooma Churn v. Teil* (1875) 14 B. L. R. App.

13; *Samarapuri v. Parry & Co.* (1890)

13 Mad. 150, 158; *Omritolal, In the matter of* (1876) 1 Cal. 78, 91.

(*a*) *John v. Carter* (1870) 4 B. L. R. O. C. 90.

Ss.
135, 136.

it was held by the High Court of Madras that he was privileged from arrest (b). It is difficult to conceive how it can be said of the plaintiff in this case that he was going to, or attending or returning from the Court at the time of his arrest. This decision has been disapproved by the Allahabad High Court (c).

(2) A, residing in Bombay, goes to Benares to prosecute an application to set aside an ex parte decree passed against him by the Benares Court, and puts up at a Dak bungalow in Benares. On the date fixed for the hearing of the application A attends the Court when his application is heard and dismissed. He then leaves the Court, returns to the Dak bungalow, and thence proceeds to the railway station where he is arrested while actually seated in the train in execution of the ex parte decree. It is found on evidence that A had taken a ticket for Allahabad when arrested. On the above facts the High Court of Allahabad held that A's arrest was legal. The Court said: "In the present case [A] had left the Court and had returned to the place where [he] was staying in Benares; he had then left that place and [was] actually on his way to Allahabad which is not his home. In these circumstances we cannot hold that he, at the time of arrest, was returning from a tribunal within the meaning of section 135" (d).

(3) The exemption from arrest continues during such period as is reasonably occupied in going to, attending at, and returning from the place of trial (e). But if there is a deviation, the privilege is forfeited. It is not a deviation sufficient to forfeit the privilege if the shortest road home is deviated from, and a less crowded and more convenient road adopted (f).

(4) A debtor who is released from jail under an order of the Court on the ground that the order under which he was committed was illegal, may be arrested under civil process immediately after he is released. He is not privileged from arrest as returning from Court. It does not follow, because imprisonment followed on an order which was illegal, that he should be treated when released from jail as returning from Court (g).

"Parties."—A defendant in a summary suit under O. 37 [Code of 1882, chapter 39] is privileged from arrest, though he has not obtained leave to defend the suit (h).

Civil process.—This section only applies to witnesses and parties arrested under writs issued by Courts to which the Code applies. Hence the section does not apply where a party is arrested under a writ issued from a Small Cause Court. There being no provision in the Small Cause Court Act corresponding to this section, questions as to exemption from arrest in the case of persons arrested under writs issued from Small Cause Courts must be governed by the principles of the English law on the subject. These are very much the same as those set forth in the present section (i).

136. [S. 648.] (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application

Procedure where person to be arrested or property to be attached is outside district.

(b) *Siva Bux, in the matter of* (1882) 4 Mad. 317.

(c) *Ardeshtirji v. Kalyandas* (1909) 32 All. 3, 6.

(d) *Ardeshtirji v. Kalyandas* (1909) 32 All. 3.

(e) *Appasamy v. Govinen* (1868) 4 Mad. H.C. 145.

(f) *Soorendro Nath, in the matter of* (1880) 5 Cal. 106.

(g) *Samarapurji v. Parry & Co.* (1890) 13 Mad. 150.

(h) *Soorendro Nath, in the matter of* (1880) 5 Cal. 106.

(i) *Soorendro Nath, in the matter of* (1880) 5 Cal. 106.

is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment. Ss
136, 137.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

137. [S. 645.] (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise directs.

Language of subordinate Courts.

Ss.
137-140.

(2) The Local Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Court shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English ; but if any party or his pleader is unacquainted with English, a translation into the language of the Court shall, at his request, be supplied to him ; and the Court shall make such order as it thinks fit in respect of the payments of the costs of such translation.

Sub-section (3) is new.

138. [S. 185A.] (1) The Local Government may, by notification in the local official Gazette, direct with respect to any Judge specified in the notification or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

Power for Local Government to require evidence to be recorded in English.

(2) Where a judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

Oath on affidavit by whom to be administered.

139. [S. 197.] In the case of any affidavit under this Code—

- (a) any Court or Magistrate, or
- (b) any officer or other person whom a High Court may appoint in this behalf, or
- (c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf.

may administer the oath to the deponent.

The words " or other person " in cl. (b) are new.

140. [S. 645A.] (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall, upon request of either party to such

Assessors in causes of salvage, etc.

cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly. Ss. 140, 141.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

141. [S. 647.] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Miscellaneous proceedings.

This section does not apply to proceedings in execution.—S. 647 of the Code of 1882, as it stood when that Code was first enacted, ran as follows;—

“The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction *other than suits and appeals*.”

The question arose under that section whether the words “proceedings other than suits and appeals” included proceedings in execution; in other words, whether that section had the effect of rendering the provisions of the Code relating to suits applicable to proceedings in execution of a decree. On the one hand, it was held by the High Courts of Allahabad (*j*) and Bombay (*k*), that that section applied to applications to execute decrees, so that the procedure relating to suits was to be applied to applications for execution. On the other hand, it was held by the High Court of Calcutta that that section did not apply to proceedings in execution (*l*). In this state of authorities the Legislature intervened, and an Explanation was added into the section by the Civil Procedure Code Amendment Act 6 of 1892, which ran as follows:—

“**Explanation.**—This section does not apply to applications for the execution of decrees which are proceedings in suits.”

The effect of the above Explanation was to supersede the Allahabad and Bombay rulings above referred to, and to give legislative sanction to the Calcutta decision.

In the meantime one of the Allahabad cases referred to above, namely, the case of *Fakir-ullah v. Thakur Prasad* (*m*), was taken up to the Privy Council, and that tribunal held, in the year 1894, that independently of the Explanation, s. 647 did not apply to applications for execution, but only to original matters in the nature of suits, such as proceedings in probates, guardianships, and so forth, thus overruling the Allahabad and Bombay cases (*n*). This decision, if it had been passed three years earlier, would have rendered the Explanation unnecessary. Now that we have got the Privy Council decision, and the rule firmly established that s. 647 does not apply to proceedings in execution, the Explanation is unnecessary, and it has accordingly been omitted in the present section (*o*). At the same time two alterations have been made in the section, namely, (1) the words “in regard to suits” have been added, and (2) the words “other

(j) *Kfayat Ali v. Ram Singh* (1885) 7 All. 350.
Sarju Prasad v. Sita Ram (1888) 10 All. 71; *Fakir-ullah v. Thakur Prasad* (1890) 12 All. 179; *Radha Charan v. Man Singh* (1890) 12 All. 392.
 (k) *Pirjade v. Pirjade* (1882) 6 Bom. 681.
 (l) *Bunko Behary v. Ali Madhub* (1891) 18 Cal.]

635.
 (m) (1890) 12 All. 179.
 (n) *Thakur Prasad v. Fakir-ullah* (1895) 17 All. 100, 22 I. A. 44.
 (o) *Hari Charan v. Manmatha* (1913) 41 Cal. 1, 4-5; *Balasubramania v. Swarnamma* (1913) 38 Mad. 199.

S. 141. than suits and appeals" have been omitted. In so doing the Legislature has now done what it could have done equally well in the year 1892.

The reason why the words "other than suits and appeals" which occurred at the end of s. 647 have been omitted in the present section is this. S. 647 applied to proceedings "other than suits and appeals." The High Court of Allahabad held that applications for the execution of decrees were proceedings "other than suits and appeals" and that s. 647 applied therefore to such applications (p). On the other hand, the High Court of Calcutta held that applications for the execution of decrees were not proceedings "other than suits and appeals" *they being proceedings in suits*, and that s. 647 did not therefore apply to such applications (q). The Legislature adopted the view of the Calcutta High Court, and enacted by way of Explanation to the section that the "section does not apply to applications for the execution of decrees *which are proceedings in suits*." It would have been a shorter cut if the Legislature had amended s. 647 by deleting the words "other than suits and appeals", as it was those words that gave rise to the conflict, instead of adding into the section an Explanation which certainly was not happily worded. What the Legislature omitted to do in the year 1892 has been done in 1908.

This section, we have said, does not apply to proceedings in execution; that is to say, the procedure provided in the Code in regard to *suits* does not apply to *applications for execution of decrees*. We proceed to note the decisions on the subject:—

1. The provisions of s. 11 relating to *res judicata* in regard to suits do not apply to applications for the execution of decrees. But though these provisions do not in terms apply to applications for execution, they are governed by principles analogous to those of *res judicata*. See notes to s. 11, p. 64 above

2. The provisions of O. 2, r. 2 [Code of 1882, s. 43] do not apply to applications for execution. Hence where a decree awards two distinct reliefs, an application to enforce one relief is no bar to a *subsequent application* to enforce the other relief, though both reliefs have been awarded by the same decree (r).

3. The provisions of O. 9 [Code of 1882, ss. 96 to 109] do not apply to applications for execution. Hence if the applicant fails to *appear* at the hearing of the application, the Court cannot dismiss the application under O. 9, r. 8 [Code of 1882, s. 102], though it may do so under its inherent power (s). And where in the exercise of this power an application for execution is dismissed, the Court has no power to *restore* it to the file under O. 9, r. 9 [Code of 1882, s. 103] (t) for that rule does not apply to execution proceedings. But though the Court has no power to *restore* to the file an application which has once been dismissed for default, such dismissal is no bar to a *fresh* application for execution (u).

4. The provisions of O. 17, rr. 2-3 [Code of 1882, ss. 157-158] do not apply to applications for execution. Hence an order dismissing an application for *default* is no bar to a fresh application for execution (v).

5. The provisions of O. 23, r. 1 [Code of 1882, s. 373] do not apply to applications for execution. Hence the *withdrawal* of an application, though it be without the leave of the Court, is no bar to a fresh application for execution (w). See now O. 23, r. 4.

(p) *Radha Charan v. Man Singh* (1890) 12 All. 392, at p. 395.

(q) *Bunko Behary v. Nū Madhub* (1891) 18 Cal. 635, at p. 638.

(r) *Radha v. Radha* (1891) 18 Cal. 515; *Sadho v. Hawal* (1897) 19 All. 98.

(s) *Dhonkal v. Phakkar* (1893) 15 All. 84.

(t) *Hajrat v. Vahinissa* (1894) 18 Bom. 429.

(u) *Thakur Prasad v. Fakirullah* (1895) 17 All. 106, 112, 22 I. A. 44.

(v) *Tirithasami v. Annappayya* (1895) 18 Mad. 131.

(w) *Thakur Prasad v. Fakir-ullah* (1895) 17 All. 106, 22 I. A. 44; *Bunko Behary v. Nū Madhub* (1891) 18 Cal. 635.

6. See O. 22, r. 12.

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"Proceedings in any Court of civil jurisdiction."—The proceedings spoken of in this section refer to *original* matters in the nature of suits, such as proceedings in probate, guardianship and so forth, and do not include execution (x). An application under s. 18 of the Religious Endowments Act, 1863, is a proceeding of this nature. Hence it must be verified as required by O. 6, r. 15 of the Code (y). A petition by a company to the High Court under the Indian Companies Memorandum of Association Act, 1895, for the confirmation of a special resolution altering the Memorandum of Association of the Company is also a proceeding of the kind contemplated by this section. Therefore where the petition was dismissed, and the company applied for leave to appeal to the Privy Council, the case was dealt with by the Court under s. 595 of the Code of 1882, now s. 109 (z). An application for the appointment of a Common Manager under s. 93 of the Bengal Tenancy Act 8 of 1885 is a proceeding of the kind contemplated by this section; a receiver therefore may be appointed under O. 40, r. 1, pending the application (a). Disciplinary proceedings taken under s. 14 of the Legal Practitioners Act 18 of 1879 are "not proceedings in any Court of civil jurisdiction" within the meaning of this section; therefore the procedure provided by s. 24 of the Code should not be followed in those proceedings (b). An application under para. 17 of Schedule II to file an agreement to refer to arbitration comes within this section; hence an applicant may under that para join several causes of action in one and the same application as provided by O. 2, r. 3 below (c).

The procedure provided in this Code.—This section extends the procedure provided in this Code in regard to suits to proceedings in civil Courts. It does not confer any *substantive right* upon any party to such proceedings not expressly given elsewhere by the Code, e.g., a right of appeal [s. 96] (d). Nor does it confer upon any Court entertaining such proceedings a *power* not expressly given elsewhere by the Code, e.g., the power to refer questions to the High Court [s. 113] (e).

142. [S. 94.] All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

Orders and notices to be in writing.

143. [S. 95.] Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Postage.

Provided that the Local Government, with the previous sanction of the Governor-General in Council, may remit such postage, or fee or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

(x) *Thakur Prasad v. Fakir-ullah* (1895) 17 All. 106, 111, 22 I. A. 44.
(y) *Amdoo Miyan v. Muhammad* (1901) 24 Mad. 685, 689.
(z) *Bombay Burmah Trading Corporation v. Dorabji* (1903) 27 Bom. 415, 418.
(a) *Asadali v. Mahomed* (1916) 43 Cal. 986. But

O. 40, r. 1, is not confined to "suits."
(b) *In the matter of Janak Kishore* (1917) 1 Pat. L. J. 576.
(c) *Dreyfus & Co. v. Guraditta Mal* (1911) Pu. j. Rec., No. 35, p. 123.
(d) *Parasurama v. Seshier* (1903) 27 Mad. 504.
(e) *Damodara v. Kittappa* (1911) 36 Mad. 16.

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144. [S. 583.] (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of

Application for restitution.

restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

The old section.—S. 583 of the Code of 1882 ran as follows:—

“When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits.”

The new section.—Sub-sec. (1) of the present section is s. 583 so recast as to give legislative recognition to the practice founded on that section.

Sub-sec. (2) is new See notes below under the head “Sub-section (2): bar of suit,” and under the head “Where a decree is varied or reversed.”

Restitution.—The word “restitution” in this section means restoring to a party what he has lost in execution of a decree passed against him on the decree being varied or reversed in appeal. The granting of restitution is *not discretionary*. The principle of the doctrine of restitution is that on the reversal of a decree in appeal the law raises an obligation in the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost (*f*). The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree; and the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from it (*g*).

The doctrine of restitution contemplates the case where property has been received by a decree-holder in execution of a decree, and the decree or part thereof is subsequently varied or reversed on appeal by the judgment-debtor. In such a case, the procedure to be adopted by the judgment-debtor is to apply under this section to the Court of first instance for restitution of the property and for consequential relief. On such application being made, the Court *shall* cause restitution to be made to the judgment-debtor (the successful appellant). The restitution to be made must be such as will, so far as may be, place the parties in the position which they would have occupied

but for the decree appealed from or such part thereof as has been varied or reversed (*h*). This principle applies with equal force whether restitution has or has not been directed in the appellate decree (*i*). For the purpose of making such restitution as aforesaid, the Court may make any orders, including orders for the refund of costs (*j*), and for the payment of interest (*k*), damages (*l*), compensation and mesne profits (*m*), which are properly consequential on such variation or reversal. In directing restitution it is to be noted that the parties must be placed in the same position as they were previously in irrespective of any other rights accruing to any of them during the litigation (*n*). Where an order is made against a party for restitution, but restitution is not made the order may be enforced by sale of his property (*o*).

Illustrations.

(1) *A* obtains a decree against *B* for possession of immoveable property [or a decree for the recovery of moveable property, say timber, or a decree for a sum of money], and in execution of the decree obtains possession of the property [or obtains the timber or recovers the money]. The decree is subsequently reversed in appeal. *B* is entitled on an application under this section to restitution of the property [or of the timber or of the money], though there may be no direction for restitution in the decree of the appellate Court: *Munshi Dinesh Proshad v. Shanker* (1904) 9 Cal. W. N. 381; *Balvantrav v. Sadrudin* (1889) 13 Bom. 45; *Bhagwan v. Ummat-ul-Hasnain* (1896) 18 All. 262.

(2) *A* obtains a decree against *B* for Rs. 5,000, and recovers the amount in execution. The decree is subsequently reversed in appeal. *B* is entitled on an application under this section to a refund of the money together with interest up to the date of repayment, though the appellate decree may be silent as to interest: see the cases cited in foot-note (*k*) below. In *Rodger v. Comptoir d'Escompte de Paris* (*p*), which is the leading case on the subject, Lord Cairns, in delivering the judgment of the Privy Council, observed as follows: "It is contended on the part of the respondents here [that is, *A* in the present illustration], that the principal sum being restored to the present petitioners [that is *B* in the present illustration], they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will, by reason of an act of the Court, have paid a sum which, it is now ascertained, was ordered to be paid by mistake and wrongfully. They will recover that sum after a lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, these fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners and

(*h*) (1868) 9 W. R. 402, *supra*.

(*i*) *Balvantrav v. Sadrudin* (1899) 13 Bom. 485; *Raja Singh v. Koolidip* (1894) 21 Cal. 989; *Bhagvan v. Ummat-ul-Hasnain* (1896) 18 All. 262, 263; *Munshi Dinesh Proshad v. Shankar* (1904) 9 Cal. W. N. 381; *Parbhu Dayal v. Ali Ahmad* (1909) 32 All. 79.

(*j*) *Watkins v. Mahomed* (1897) 1 Cal. N. W. cxvii.

(*k*) *Rodger v. Comptoir d'Escompte de Paris* (1871) L. R. 3 P. C. 465; *Forester v. Secretary of State* (1878) 3 Cal. 161, 173, 4 I. A. 137; *Phul Chand v. Shanker* (1896) 20 All. 430; *Bhagwan v. Ummat-ul-Hasnain* (1896) 18 All. 262; *Ayyavayyar v. Shastram* (1886) 9 Mad. 506; *Collector of Ahmedabad v. Lavji* (1911) 35 Bom. 255 [Land Acquisition Act].

(*l*) *Balvantrav v. Sadrudin* (1889) 13 Bom. 485.

(*m*) *Raja Singh v. Koolidip* (1894) 21 Cal. 989; *Mookoond v. Mahomed* (1887) 14 Cal. 484; *Kalidasundaram v. Egnavedenwara* (1888) 11 Mad. 261; *Vasudeva v. Narayana* (1901) 24 Mad. 341; *Hardat v. Izzat-un-nissa* (1899) 21 All. 1; *Prag Narain v. Kamakhia Singh* (1909) 31 All. 551; *Parbhu Dayal v. Ali Ahmad* (1909) 32 All. 79; *Parbhu Dyal v. Kalyan Das* (1916) 43 I. A. 43, 38 All. 163.

(*n*) *Gunga Prosad v. Brojo Nath Das* (1908) 12 Cal. W. N. 642.

(*o*) *Parbhu Dyal v. Kalyan Das* (1916) 43 I. A. 43, 38 All. 163; *Mahadeo v. Rama* (1916) 40 Bom. 194.

(*p*) L. R. 3. P. C. 465.

S. 144. that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them *with interest* during the time that the money has been withheld." These observations apply equally to mesne profits which form the subject of the next illustration.

(3) *A* obtains a decree against *B* for possession of certain immoveable property and in execution of the decree obtains possession of the property. The decree is subsequently reversed in appeal. *B* is entitled to possession of the property together with mesne profits during the period of dispossession: see the cases cited in foot-note (*m*) on p. 311. If the property has in the meantime been let out by *A* to tenants, *B* is entitled to remove any tenant who refuses to vacate: *Rohni Singh v. Hodding* (1894) 21 Cal. 340. And it would seem that even if the property was sold by *A*, *B* would be entitled to possession against the purchaser: *Dorasami v. Annasami* (1900) 23 Mad. 306.

Splitting of claim for restitution.—*A* obtains a decree against *B* for possession of an immoveable property, and recovers possession of the property pursuant to the decree. *B* appeals from the decree, and the decree is reversed in appeal. *B* then applies for restitution of the property, and the property is restored to him. Subsequently *B* applies for mesne profits during which *A* was in possession of the property. Is *B* debarred from claiming mesne profits on the ground that he ought to have included the claim for mesne profits in the application for restitution of the property? No; the provision of O. 2, r. 2, do not apply to applications for restitution (*q*). Similarly, a judgment-debtor who applies for and obtains restitution of a sum of money on reversal by the appellate Court of the decree pursuant to which he had paid the sum to the decree-holder is not precluded from making a fresh application for recovery of interest for the period during which the decree-holder had the use of the money (*r*).

Inherent power to grant restitution.—The power of a Court to grant restitution is not confined to the cases covered by the provisions of this section. It extends also to cases which do not come strictly within this section. The reason is that a Court has an inherent right irrespective of this section to order restitution (*s*).

In the exercise of their inherent power the Courts have applied the principle of this section to cases which were not strictly within the terms of the section. Thus where *A* sued *B* to establish his right to a fund in Court, and *B* was allowed to draw the money on giving an undertaking to the Court to repay it if *A* succeeded in the suit, and *A* succeeded in establishing his title, it was held that though the undertaking given by *B* did not provide for the payment of interest, the Court had inherent power to order *B* to repay the money with interest (*t*). See notes below under the head "Where a decree is varied or reversed."

Who may apply for restitution.—"Any party entitled to any benefit by way of restitution or otherwise" may apply under this section.

(1) The expression "any party" is not confined to parties to the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person (*u*). This would especially be the case where the decree appealed from proceeds on a ground common to all the

(q) *Krupasindhu v. Mahanta* (1918) 3 Pat. L. J. 367.

(r) *Somasundaram v. Chokkalingam* (1917) 40 Mad. 780.

(s) *Mookond v. Mahomed* (1887) 14 Cal. 484; *Raja Singh v. Koolidip Singh* (1894) 21 Cal. 989; *Collector of Meerut v. Kalka Prasad* (1906) 28 All. 665; *Shlam Sundar*

Lal v. Kaiser Zamani Begam (1907) 29 All. 143; *Jagan Nath v. Fateh Chand* (1917) Punj. Rec. no. 61, p. 218.

(t) *Alagappa v. Muthukumara* (1918) 41 Mad. 316; *Indra Chand v. Forbes* (1917) 2 Pat. L. J. 149.

(u) *Gunga Prasad v. Brojo Nath Das* (1908) 13 Cal. W. N. 642.

plaintiffs or to all the defendants (*v*): see :O. 41, r. 4. *A* obtains a decree against *B* and *C*. The decree proceeds on a ground common to both *B* and *C*. *B* alone appeals from the decree. The decree is reversed in appeal. *C* is entitled to claim restitution under this section, though he was not a party to the appeal.

(2) Further, the expression "any party" includes the transferee of a decree passed in appeal. *A* obtains a decree against *B* for Rs. 5,000. *B* appeals from the decree. Pending the appeal *A* realizes from *B* Rs. 5,000 in execution. The decree is subsequently reversed in appeal. *B* assigns the decree passed in appeal (in his favour) to *C*. *C* is entitled, as transferee of *B*'s decree, to the benefit of that decree and he may apply under this section for an order directing *A* to pay to him what *B* would be entitled to, namely, Rs. 5,000 and interest (*w*).

Against whom restitution may be claimed.—

(1) *Transferee of decree reversed in appeal*.—In two Allahabad cases decided under the old section it was held that restitution could not be claimed by *application* under that section against the transferee of a decree reversed in appeal, though the transferee had obtained the full benefit of the decree by execution, unless he was joined as a party to the appeal (*x*). The point of the decision may be explained by an illustration. *A* obtains a decree against *B*, and assigns the decree to *C*. *C* applies for execution of the decree against *B*, and obtains payment of the decretal amount. *B* appeals from the decree, and the decree is reversed in appeal. It was held under the old section that *B* could not claim restitution against *C* by *summary process* under that section unless *C* was joined as a party to the appeal (*y*). Those decisions might perhaps be supported on the ground that where a party sought restitution under the old section, he had to proceed by an application to *execute* the decree passed on appeal, and that a decree could not be executed against persons not parties to the appeal. The language of the present section is much wider, and it is submitted that the Court has power under this section to order *C* to make restitution to *B* on an application by the latter in that behalf. See also s. 146. [It is worth noting that according to the same High Court, *B* could not claim restitution against *C* even by way of *suit*, the reason given being that *B* could have no cause of action in such a case against *C*. But this decision has been dissented from by the High Court of Madras (*z*)].

(2) *Auction-purchaser*.—Restitution cannot be obtained under this section against a *bonâ fide* purchaser for value at an auction sale held by a Court which had jurisdiction to sell the same (*a*). It is otherwise, however, where the decree-holder himself is the purchaser. See notes to s. 65, "Effect of reversal of decree upon sale," p. 182 above.

(3) *Surety*.—This section applies only to the parties or their representatives and does not apply to sureties. Hence restitution cannot be claimed under this section against a surety (*aa*).

Sub-section (2): bar of suit.—This sub-section is new. It provides in express terms that where restitution could be obtained by *application* under this section no separate suit shall be brought in respect of it. The decisions under the Code of 1882 were not uniform, it having been held in some cases that a separate suit for restitution was barred, and in others that it was not (*b*).

(v) *Erat Madhavan v. Venganat Swarapa* (1908) 18 Mad. L. J. 39.

(w) See *Jamini Nath v. Dharma Das* (1906) 33 Cal. 357 [a case under s. 583 of the Code of 1882].

(x) *Sadiq Husain v. Lalla Prasad* (1898) 20 All. 139; *Bhagwati v. Jamna Prasad* (1897) 19 All. 136, commented on and distinguished in *Garudhuj Prasad v. Baiju Mal* (1906) 28 All. 337.

(y) *Lalla Prasad v. Sadiq Husen* (1902) 24 All. 288. But see *Shiam Sundar Lal v. Kaiser*

Zamani Begam (1907) 29 All. 143.

(z) *Govindappa v. Hanumanthappa* (1912) 38 Mad. 36. See *Subbarayudu v. Yerram* (1917) 40 Mad. 299.

(a) *Piari Lal v. Hanif-un-Nissa* (1916) 38 All. 240; *Shivdat v. Yesoo* (1919) 43 Bom. 235, 238.

(aa) *Raghuraj Singh v. Jai Indra Bahadur Singh* (1919) 46 I. A. 228, 236.

(b) See *Shoodhal v. Bhawani* (1907) 29 Al. 348; *Matiram v. Ramkumar* (1908) 35 Cal. 265.

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Under s. 583 of the Code of 1882, proceedings for restitution had to be commenced by an application for *execution* of the appellate decree. This was required by the language of that section. The section further directed that the appellate decree should be executed "according to the rules prescribed for the execution of decrees in suits." That gave rise to the question whether the rule contained in s. 244 [now s. 47] which provided that all questions relating to execution should be determined by the Court executing the decree *and not by a separate suit*, was one of the rules referred to in s. 583. It was held in some cases that it was, and that a separate suit for restitution was therefore barred. In other cases it was held that it was not, and that a separate suit could be maintained for restitution. The present section simplifies matters by omitting all reference to *execution*. The position of the section has also been changed, it being transferred from the chapter headed "Of appeals from original decrees" to Part IX headed "Miscellaneous." A separate suit is *now barred* by the express terms of the section, and the application for restitution is no longer one for *execution* of the appellate decree. The Court is empowered to make such order as it deems proper for restitution, and the order if not obeyed, may be enforced as a decree (bb) [see s. 36].

Where a decree is varied or reversed.—The old section applied only where the decree of reversal was a decree *passed in first appeal*, or where, by virtue of s. 587 [now s. 108], it was one *passed in second appeal*. It was held not to apply where restitution was claimed on the reversal of a decree in appeal to the Privy Council (c), or in review (d). This was because the words of that section were, "When a party entitled to any benefit by way of restitution or otherwise *under a decree passed in an appeal under this chapter*," that is, chapter 41 relating to appeals from original decrees.

As regards the present section there is a difference of opinion. According to one view, the section applies in all cases where a decree is varied or reversed, regardless of the Court by which it is varied or reversed (e). According to another view, the section does not apply unless the decree is varied or reversed by a Court *superior* to the one that passed it. This view is based on the ground that the words "Court of first instance" in this section are used to distinguish the Court which is to grant the restitution from some other Court which has varied or reversed the decree (f). According to the former view, restitution may be ordered under this section when an ex-parte decree is set aside under O. 9, r. 13, though it be by the Court that passed it (g). According to the latter view, restitution cannot be ordered under this section (h), though it may be granted by the court in the exercise of its inherent jurisdiction under s. 151 (hh). The former view, it is submitted, is correct. The words "Court of first instance" do not control the operation of the general words "when a decree is varied or reversed." But however that may be, there is no doubt that to attract the application of this section there must be a "decree" which is varied or reversed. Thus where A obtained a decree against B, and in execution of the decree purchased certain property belonging to B and took possession of it, and the sale was subsequently set aside and possession restored to B, it was held in an application by B for mesne profits that there being no "decree" that was set aside, this section did not apply, but that the Court may in the exercise of its inherent power direct A to pay mesne profits to B during the period A was in possession of the property (i).

See notes above, "Inherent power to grant restitution."

(bb) (1916) 43 I. A. 43. 38 All. 163; (1910) 40 Bom. 1914.

(c) *Sadiq Husain v. Lalta Prasad* (1898) 20 All. 139, 142.

(d) *Collector of Meerut v. Kalka Prasad* (1906) 28 All. 665.

(e) *Subbarayudu v. Yerram* (1917) 40 Mad. 299, 300.

(f) *Chintaman v. Chuni Sahu* (1916) 1 Pat. L.J. 43, 45.

(g) *Shivbat v. Yesoo* (1919) 43 Bom. 235.

(h) (1916) 1 Pat. L. J. 43 *supra*.

(hh) (1919) 43 Bom. 235, 239 *supra*.

(i) *Jagdish v. Holloway* (1917) 2 Pat. L. J. 206; *Subbamma v. Chennayya* (1918) 41 Mad. 467.

Jurisdiction of Court under this section.—Suppose the damages claimed in lieu of restitution exceed the pecuniary limits of the jurisdiction of the Court to which an application is made under this section. Has the Court power to award those damages? Yes (*j*).

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144, 145.

Limitation.—An application for restitution under s. 583 of the Code of 1882 was held to be one by way of execution (*k*). It has been held by the High Court of Bombay that an application for restitution under the present section is an application in execution of a decree and that it is governed by art. 182 of sch. I of the Limitation Act [applications for execution of decrees of Civil Courts]. For the same reason it has been held by that Court that s. 6 of the Limitation Act [exclusion of period of minority] applies to applications under this section (*l*). On the other hand, it has been held by the High Court of Patna that a proceeding under this section is not an execution proceeding, but a miscellaneous proceeding to which the rules applicable to execution proceedings in substance apply, and that it is therefore governed by art. 181 of sch. I of the Limitation Act [applications for which no period of limitation is prescribed] (*m*). A similar view has been taken by the Chief Court of the Punjab (*n*). This view, it is submitted, is the correct view. See notes above “Sub-sec. (2): bar of suit.”

Appeal.—The determination of a question under this section is a decree and appealable as such (*o*): see s. 2, cl. (2), definition of “decree.” But the question must be one directly covered by the section, and not one incidentally connected with or collateral to the decision of any such question. Thus a decision that an application under this section is time-barred is a decision on a question merely collateral to the question of limitation and hence it is not a decree and not appealable as such (*p*).

Enforcement
of surety.

liability

145. [S. 253.] Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :

(*j*) *Balvantrav v. Sadrudin* (1889) 13 Bom. 485.
(*k*) *Prag Narain v. Kamakhia* (1909) 31 All. 551 [P. C.].

(*l*) *Kurgodigouda v. Ningangouda* (1917) 41 Bom. 825. See also *Somasundaram v. Chokkalingam* (1916) 40 Mad. 780, 782. But see *Shivbat v. Yesoo* (1919) 43 Bom. 235.

(*m*) *Krupasindhu v. Mahanta* (1918) 8 Pat L. J.

387.
(*n*) *Ram Singh v. Sham Parshad* (1918) Punj. Rec. no. 67, p. 224.

(*o*) *Dino Nath v. Jogendra* (1914) 19 C. W. N. 1167. See *Sham Parshad v. Ram Chand* (1914) Punj. Rec. No. 10, p. 27.

(*p*) *Ram Chand v. Sham Parshad* (1913) Punj. Rec. No. 110, p. 409.

S, 145. Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

The old section.—The corresponding s. 253 of the Code of 1882 ran as follows :—

“Whenever a person has before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant:

“Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.”

The new section.—The present section differs from the old section in the following respects :—

1. The old section applied only to surety-bonds for the performance of a *decree*. It did not apply to surety-bonds for the fulfilment of a condition imposed upon a person under an order of the Court [see cl. (c) of the present section]. It was also doubtful whether the old section applied to suretyships for the restitution of property taken in execution of a decree [see cl. (b) of the present section]. The present section applies not only to surety-bonds for the performances of a decree, but also to surety-bonds referred to above, as also to bonds for the payment of money under an order of the Court. See notes below.
2. The present section applies to suretyships for the performance of *any decree* whether original or appellate [see cl. (a)]. As to the old section it was doubtful whether it applied to original decrees only or applied also to appellate decrees.

Object of the section.—This section provides that where a person has become liable as surety for the performance of a decree or for any of the purposes specified in cls. (b) and (c), the party for whose benefit security has been given may enforce the security by *executing* the decree or order against the surety in the same manner as if the surety was a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. It is no longer necessary to institute a *regular suit* to enforce the security as it was in some cases under the old section. The present section provides a summary remedy in *execution*, and dispenses with the necessity of a separate suit to the extent to which the surety has rendered himself *personally* liable.

Security for the performance of “any” decree :—

1. *Ex parte decree.*—A obtains an *ex parte* decree against B. The decree is set aside under O. 9, r. 13 [Code of 1882, s. 108] on C standing security for the performance of any decree that may be passed against B on a re-hearing. The suit is reheard and a decree is passed against B, A may enforce the security by *executing* the decree against C (q). A separate *suit* is not necessary.

2. *Appellate decree.*—The summary procedure contemplated by this section applies to suretyships for the performance of *any* decree, whether it be an original or an appellate decree. Under the old section there was a conflict of decisions as to whether the summary remedy provided by that section applied at all to suretyships for the performance of *appellate* decrees it being held by the High Court of Calcutta that it did

not (r) and by the other High Courts that it did (s). The present section makes it clear that the summary procedure contemplated by this section applies to security given for the performance of *appellate* decrees as well. The rules providing for security for the performance of appellate decrees are rules 5 and 6 of Order 41, corresponding to ss. 545 and 546 of the Code of 1882. An illustration will make the point clear. *A* obtains a decree against *B* and applies for execution. *B* appeals from the decree and applies for stay of execution under O. 41, r. 5. Execution is stayed on *C* standing security for the due performance of any decree that may be passed against *B* in appeal. A decree is eventually passed by the appellate Court against *B*. *A* may enforce the security against *C* by executing the appellate decree against him as if *C* was a party to the decree. According to the Calcutta decisions under the old section, *A*'s remedy was by way of *suit* only against *C*.

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Security for restitution of property taken in execution of a decree.—

A obtains a decree against *B* for possession of certain lands. *B* appeals from the decree. Pending the appeal *A* applies for execution of the decree. The Court allows execution on *C* standing surety for the restitution of the lands to *B* in the event of the decree being reversed in appeal, or for payment to *B* of the value of the property [O. 41, r. 6, Code of 1882, s. 546]. The decree is eventually reversed in appeal. *B* may enforce the security by executing the appellate decree against *C*. According to the Calcutta decisions under the old section, *B* could only enforce the security by a separate suit (t).

Security for the payment of money.—The following are some of the sections and rules providing for security for the payment of money:—

S. 55, sub-s. (4) security on behalf of a judgment-debtor who is arrested in execution of a decree and who expresses his intention to apply to be declared an insolvent].

O. 25, r. 1 [security for costs].

O. 38, r. 2 [security in cases of arrest before judgment].

O. 38, r. 5 [security in cases of attachment before judgment].

O. 41, r. 10 [security for costs of respondent in first appeal].

O. 45, r. 7 [security for costs of respondent in appeal to the King in Council].

Security for fulfilment of any condition imposed on any person.—

The summary remedy provided by the old section applied only where the security given was for the performance of a decree and for no other purpose. Thus where a defendant produced certain promissory notes in Court, and the plaintiff objected to their return to the defendant, but they were returned to him on *C* standing surety for their production when required, it was held that the plaintiff could not, on non-production of the notes, proceed against *C* by execution, the reason given being that the security was not given for the performance of a decree, and that his remedy was by way of *suit* against *C* (u). Under the present section the security may be enforced by execution against *C*.

Though the language of this section is considerably wider than that of the old section, the section applies only when the Court passes an order or decree which is intended to be an order or decree enforceable through execution by one or some of the parties to a suit or other proceeding against another party or other parties

(r) *Tokhan v. Udwant* (1895) 22 Cal. 25; *Subjoo Das v. Balmakund* (1896) 23 Cal. 212 (s. 546).

(s) *Venkapa v. Baslingapa* (1888) 12 Bom. 411; *Jamsedji v. Bawabhai* (1901) 25 Bom. 409.

Janki v. Sarup (1895) 17 All. 99; *Thirumalai v. Ramayyar* (1890) 13 Mad. 1. But see *Lakshman v. Gopal* (1906) 30 Bom. 506.

(t) *Subjoo v. Balmakund* (1896) 23 Cal. 212.

(u) *Narayanamma v. Ramayya* (1899) 22 Mad. 268.

S. 145. thereto. A bond, therefore, passed by a surety under O. 32, r. 6 (2), cannot be enforced by summary process under this section; it can only be enforced by a suit (v).

A is committed to jail in execution of a decree obtained against him by B. A applies to be released from jail to enable him to make an application in insolvency with a view to his protection from arrest. A is released from jail on C standing surety for the production of A on a particular day. The insolvency application fails, and it thereupon becomes incumbent upon C to produce A before the Court. If C fails to do so, it is B that is entitled to the security money, for his rights were interfered with, and not the Government (w).

"To the extent to which he has rendered himself personally liable."

This section does not apply where a surety has not rendered himself personally liable, but has given only a charge upon his property (ww). A obtains a decree against B for Rs. 2,500. C executes a surety bond by which he renders himself personally liable for the amount of the decree, and by way of further security hypothecates certain property. B fails to pay the amount of the decree. The decree against B may be executed as if it was a personal decree by attachment and sale of C's equity of redemption in the hypothecated property (x). But if prior to A's application for execution the equity of redemption was sold by C, the decree could not be executed by attachment and sale of the hypothecated property. If A wants to realize the amount of his decree by sale of the hypothecated property, he should proceed by a regular suit to enforce the charge as provided by s. 90 of the Transfer of Property Act. This result follows from the word "personally" in this section (y). The point is that where a surety, besides giving his personal undertaking, mortgages his property for the due performance of the decree, the decree-holder is not entitled to bring the property to sale under this section as mortgaged property. There is nothing, however, to preclude the decree-holder from giving up the mortgage and attaching and selling the property under this section as if it was not mortgaged at all (z).

Notice to surety.—When a decree is sent by the Court which passed the decree to another Court for execution, the notice required by this section may be given by the latter Court (a). For form of notice, see App. H., form No. 13.

This section does not bar a regular suit against a surety.—As to the old section it was held that it gave an additional, not an exclusive, remedy against a surety, and that it did not prevent the decree-holder from bringing a regular suit on the surety-bond to enforce the security (b). Nor is the present section any bar to a regular suit (c). It simply enables a party for whose benefit security has been given to enforce the surety-bond against the surety by way of execution to the extent to which the surety has rendered himself personally liable, and no more. If the party for whose benefit security has been given proceeds against the surety in execution, the surety is to be deemed for the purposes of appeal a party within the meaning of s. 47. That is to say, if an order is made in execution enforcing a claim against the surety, the surety may appeal from the order as if he was a party to the suit in which the decree or order sought to be executed was passed (d). In this respect the section gives effect to certain rulings under the old section (e). But the reference to s. 47 does not import into this section the provision therein contained which bars a separate suit.

(v) *Kurugodappa v. Soogamma* (1918) 41 Mad. 40.

(w) *Basanti Lal v. Chhedo Singh* (1912) 39 Cal. 1048.

(ww) *Raghubar Singh v. Jai Indra Bahadur Singh* (1919) 46 I. A. 228, 236.

(x) *Mukta Prasad v. Mahadeo* (1916) 38 All. 327, explained in *Amir v. Mahadeo* (1917) 39 All. 225, 229.

(y) *Amir v. Mahadeo* (1917) 39 All. 225.

(z) See *Ganga Deo v. Joti Lal* (1917) 2 Pat. L. J. 197.

(a) *Lakshmishanker v. Raghumal* (1905) 29 Bom. 29.

(b) *Abdul Kadir v. Huree* (1874) 6 All. H. C. 261.

(c) *Motilal v. Thakore* (1911) 36 Bom. 42; Contrast s. 144, sub-s. (2).

(d) *Srinivash Prasad v. Kesho Prasad* (1911) 38 Cal. 754, 776.

(e) *Shek Suleman v. Shivram* (1888) 12 Bom. 71; *Akhoot v. Ahmed* (1871) 15 W. R. 538.

Appeal.—An order under this section is appealable as a decree (f). See the penultimate paragraph of the section.

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146. [New.] Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Proceedings by or
against representatives.

Proceeding by or against representatives.—The proceeding contemplated by the section includes an appeal. The expression “claiming under” is wide enough to cover cases of devolution, etc., mentioned in O. 20, r. 10. *A* sues *B* to establish his right to certain property. Pending the suit *B* mortgages the property to *C*. The suit is decided in *A*’s favour. *B* does not appeal from the decree. *C*, as a person claiming under *B*, may appeal from the decree (g).

See notes to O. 9, r. 13, under the head “Application by legal representative of deceased defendant.” Other cases to which the section applies have been considered in their proper place.

147. [New.] R. S. C., O. 16, r. 21.] In all suits to which any person under disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

Consent or agreement
by persons under disability.

Rules of the Supreme Court, O. 16, r. 21.—This section is new. It is taken bodily from O. 16, r. 21, of the Rules of the Supreme Court with slight alterations.

“Any person under disability.”—The section applies to consent given on behalf of persons under disability, such as minors and lunatics. See O. 32 below.

“As to any proceeding.”—These words do not refer to the *conduct* of a suit or appeal. A next friend or guardian *ad litem* has undoubtedly the conduct of a suit or appeal in his hands. But if he does anything in the action beyond the mere conduct of it, e.g., consents not to appeal, the person under disability is not bound by it unless it is done with the express leave of the Court (h).

“Express leave.”—The leave must be *express*. In this respect the present section differs from the English rule.

148. [New.] R. S. C., O. 64, r. 7.] Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time,

Enlargement of time.

(f) See *Adhar v. Pulin* (1914) 19 C. W. N. 1085.

(g) *Sitaramaswami v. Lakshmi* (1918) 41 Mad.

510.

(h) *Rhodes v. Swithenbank* (1889) 22 Q.B.D. 577.

- S. 148. enlarge such period, even though the period originally fixed or granted may have expired.

“Act prescribed or allowed by this Code.”—The present section empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed. It is legislative recognition of the rule laid down in the Bombay case of *Bhagwan Das v. Haji Abu Ahmed* (i), and the cases on which the same was based (j). In the Bombay case it was held that it was competent to the Court to extend the time fixed under s. 54 of the Code of 1882 [now O. 7, r. 11] even after the expiry of the time originally granted. It must, however, be noted that the section applies only where time is fixed for the doing of an act *prescribed or allowed by this Code*. “Code” includes rules, and prescribed means “prescribed” by the rules [see s. 2, cls. (1) and (16)]. See, for instance, the following rules:—

1. O. 6, r. 18 (amendment of pleadings).
2. O. 7, r. 11 (b) [requiring plaintiff to correct valuation of suit].
3. O. 7, r. 11 (requiring plaintiff to supply requisite stamp paper, where the plaint is written upon paper insufficiently stamped).
4. O. 8, r. 9 (requiring written statement or additional written statement from a party).
5. O. 21, r. 17 (amendment of application for execution).
6. O. 25, r. 2 (security for costs of suit).
7. O. 41, r. 10 (security for costs of appeal).

Act directed or allowed by a decree of Court.—This section does not apply where time is allowed [for doing an act by a decree of Court (k)]. It was accordingly held by the Allahabad High Court in *Saranjan v. Ram Behal* (l), that a Court has no power under this section to extend the time fixed by its decree under O. 20, r. 14, for payment of purchase money in a suit for pre-emption. The Allahabad decision has been approved by the Madras High Court (m). The High Court of Patna has, however, held that the Court has power under this section to extend the time fixed by a decree passed under O. 20, r. 14 (n). The attention of the Patna Court was not drawn to the Allahabad decision. In a later case, however, the Allahabad High Court held that where an ex parte decree is set aside on condition that the defendant should pay a certain sum of money to the plaintiff within a certain time, and such payment is not made, the Court has power under this section to enlarge the time for payment. As to *Saranjan's* case the Court observed that it related to a decree in a suit for pre-emption (o). In a recent case, however, where a decree was passed in favour of the plaintiff conditional upon her paying an extra court-fee of Rs. 20 within a week, but the amount was not paid within that period, the High Court of Allahabad held that the Court had no power under this section to extend the time, but that the plaintiff might proceed by an application for a review under s. 114 read with O. 47, r. 1. The Court said: “There is no distinction between a pre-emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those

(i) (1891) 16 Bom. 263.

(j) *Amir Hossain v. Nanackchand* (1910) 14 C. W. N. 882, 884.

(k) *Dharmaraja v. Srinivasa* (1916) 39 Mad. 876; *Bibi Sharafan v. Mahomed* (1911) 15 Cal. W. N. 685, 690; *Hukam Chand v. Hayat* (1912) Punj. Rec. no. 99, p. 343.

(l) (1913) 35 All. 582.

(m) (1916) 39 Mad. 476, *supra*.

(n) *Abu Muhammad v. Mukut Perlasp* (1916) 1 Pat. L. J. 92.

(o) *Jagarnath v. Kamla Prasad* (1913) 36 All. 77.

conditions are not complied with" (g). However that may be, it is beyond all doubt that the section does not give any Court power to interfere with or modify its decree after there has been an appeal filed from the decree (r). See notes below, "Court to which, etc."

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An application for extension of time fixed by the decree in a *redemption suit* for payment of the mortgage-debt does not fall under this section, but under O. 34, r. 8 (s).

Period of limitation.—This section does not empower a Court to extend the period prescribed by the law of limitation (t).

Consent order.—Where the time for doing an act has been fixed by a consent order, it cannot be enlarged except by consent (u).

Court to which application should be made for extension of time.—

Where a decree is passed against a defendant requiring him to execute a *kabuliat* in favour of the plaintiff within two months, and an appeal is preferred from the decree, the only Court that has power to extend the time, assuming the case is one under this section, is the Appellate Court, and not the Court which passed the decree (v).

Appeal.—No appeal lies from an order under this section. The order is not a decree, nor is it one of the appealable orders mentioned in s. 104 (w).

149. [New.] Where the whole or any part of any fee prescribed for any document by the law for

Power to make up
deficiency of court-fees.

the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

Scope of the section.—This section is new. It is an enabling section. It empowers the Court to allow a party to make up the deficiency of court-fees payable on plaints, memoranda of appeal, applications for review of judgment, etc., even after the expiration of the period of limitation prescribed for the filing of these documents. The section enables a defective document to be *retrospectively* validated if the insufficiency of the stamp is subsequently made up with the leave of the Court. It must, however, be noted that the power to make up the deficiency of court-fees is *subject to the discretion of the Court* and is *not claimable as of right by a party* (x). See notes below "Appeals and applications for review of judgment."

Plaints.—As to the case where a plaint is written upon paper insufficiently stamped, see notes to O. 7, r. 11, under the head "Clause (c)."

(g) *Sajjadi v. Dilawar* (1918) 40 All. 579.

(f) *Parmanand v. Kripasindhu* (1909) 37 Cal. 548.

(h) *Het Singh v. Tika Ram* (1912) 34 All. 388.

(i) *Dukhno v. Munshi Sahu* (1919) 4 Pat. L. J. 428.

(u) *Australasian Automatic Weighing Machines*

Co. v. Walter (1891) W. N. [Eng.]. 170.

(v) *Parmanand Das v. Kripasindhu* (1909) 37 Cal. 548.

(w) *Suranjan v. Ram Bahal* (1913) 35 All. 582.

(x) See *Valli v. Mahmud* (1914) 16 Bom. L. R. 763, 766.

S. 149. Appeals and applications for review of judgment.—As to these it was provided by s. 582A of the Code of 1882 as follows :—

“If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation, but is written upon paper insufficiently stamped, and the insufficiency of the stamp was caused by *mistake on the part of the appellant or applicant as to the amount of the requisite stamp*, the memorandum of appeal or application shall have the same effect and be as valid as if it had been properly stamped : provided that such appeal or application shall be rejected unless the appellant or applicant supplies the requisite stamp within a reasonable time after the discovery of the mistake to be fixed by the Court.”

The above section was introduced into the Code of 1882 by Act 4 of 1892 to supersede a Full Bench ruling of the Allahabad High Court. That ruling was to the effect that if a memorandum of appeal is not, when tendered, properly stamped, it is not at that time a memorandum of appeal and the subsequent affixing of the proper stamp cannot have a retrospective effect so as to validate the original presentation unless it has been done by order of the Court, and such order can only be made where the defective memorandum has been received through a *mistake on the part of the Court or its officers*, and not where the insufficiency of the stamp was caused by a *mistake on the part of the appellant (y)*.

“S. 582A applied only to appeals and applications for a review. S. 582A has been omitted in this Code, and the present section has been enacted which is quite general in its terms. It applies to *all documents chargeable with court-fees* under the Court-fees Act, such as *plaints, memoranda of appeal or of cross-objections, applications for review of judgment, and written statements pleading a set-off or counter-claim*. At the same time the words “and the insufficiency of the stamp was caused by mistake on the part of the appellant or applicant as to the amount of the requisite stamp,” which occurred in s. 582A, have been omitted in the present section. There is therefore no reason to restrict the concession provided for by this section to cases where there is a *bond fide* misunderstanding of the law as to valuation as it was under s. 582A. It has accordingly been held by the High Court of Bombay that the fact that an appellant has no funds with which to pay the requisite stamp is a good ground for admitting the memorandum of appeal, though presented on the last day of limitation, and for extending the time under this section to pay the requisite stamp (z). According to the Patna High Court, the Court should not give time to make good the deficiency if a litigant has deliberately and to suit his own convenience paid an insufficient court-fee. Time, according to that Court, may be given when the amount of the court-fee payable is open to doubt, or the amount of the court-fee cannot be ascertained by the Court till the record is received, or it appears that he has made an honest attempt to comply with the law (a). The Lahore High Court has taken a similar view (aa).

The present section, as stated above, applies to all documents chargeable with court-fees, such as *plaints, memoranda of appeal, applications for review, etc.* As regards *plaints*, it is well settled that in the case of a *plaint insufficiently stamped* the Court is *bound* under O. 7, r. 11 (c) [s. 54 of the Code of 1882] to give time to the plaintiff to make good the deficiency, even if the plaintiff has deliberately and without any excuse paid an insufficient court-fee, provided the *plaint* is presented within the period of limitation. As regards *appeals*, however there is a difference of opinion.

(y) *Balkaran Rai v. Gobind Nath* (1890) 12 All. 129.

(z) *Achut v. Nagappa* (1913) 38 Bom. 41.

(a) *Ramsahay v. Kumar Lachmi* (1918) 3 Pat. L. J. 74.

(aa) *Satto v. Amar Singh* (1919) 1 Lah. L. J. 69; *Dalip Singh v. Umrao Singh* (1913) Punj. Rec. no. 55, p. 213 [unreasonable delay]; *Sahib Ji v. Piru* (1919) Punj. Rec. no. 10, p. 19 [mistake of pleader].

The High Court of Bombay (*b*) has held that a memorandum of appeal stands on the same footing as a plaint, and that just as in the case of a plaint insufficiently stamped the Court is bound to give time to the plaintiff to make good the deficiency, so in the case of a memorandum of appeal insufficiently stamped the Court is bound to give time to the appellant to make good the deficiency, the reason given being that O. 7, r. 11, cl. (c), is made applicable to appeals by s. 107 (2) [s. 582 of the Code of 1882]. As to the present section, the Court said in effect that it should be read subject to the provisions, in the case of plaints, of O. 7, r. 11 (c), and in the case of appeals, of O. 7, r. 11 (c) coupled with s. 107 (2). On the other hand, it has been held by the High Court of Patna (*c*), that the Court is *not bound* in the case of a memorandum of appeal insufficiently stamped to give the appellant time to make good the deficiency, that it *may* allow time if the amount of the court-fee payable is open to doubt, or the amount of the fee cannot be ascertained by the Court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, but that it should not allow time if the appellant has deliberately and to suit his own convenience paid on his appeal insufficient court-fee. According to that Court, the present section should not be construed in such a way as to nullify the express provisions of s. 4 or s. 6 of the Court Fees Act 7 of 1870 (*d*). A similar view has been taken by the Lahore High Court (*dd*). The view taken by the High Court of Bombay has also been dissented from by the Madras High Court (*e*).

150. [*New.*] Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the

Transfer of business.

business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

See notes to s. 37 above. See also the undermentioned case (*f*).

151. [*New.*] Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Saving of
powers of Court. Inherent

Inherent powers of Court.—The Code of Civil Procedure is not exhaustive (*g*). The Court has therefore in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiæ* and to do that real and substantial justice for the administration, for which alone it exists (*h*). The law cannot make express provisions against all inconveniences so that their dispositions shall express all the cases that may possibly happen, and it is therefore the duty of a Judge to apply them not only to what appears to be regulated by their express provisions, but to all the cases to which a just application of them may be made and

(*b*) *Achut v. Nagappa* (1913) 38 Bom. 41.

(*c*) *Ramabai v. Kumar Laohmi* (1918) 3 Pat. L. J. 74.

(*d*) S. 4 of the Court Fees Act forbids a High Court to receive a memorandum of appeal unless the proper court-fee is paid. S. 6 contains a similar provision with regard to other Courts.

(*dd*) See cases cited in f. n. (*aa*) on p. 322.

(*e*) *Narayana v. Venkatakrishna* (1914) 27 Mad. L. J. 677.

(*f*) *Seeni Nandan v. Muthusamy* (1919) 42 Mad. 821, 838.

(*g*) *Durga Dihal Das v. Anoraji* (1895) 17 All. 29, 31; *Jogendra Chandra Sen v. Wazidunnissa Khatun* (1907) 34 Cal. 880.

(*h*) *Hukum Chand v. Kamalanand* (1906) 33 Cal. 927, 931-32.

S. 151. which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it (i). At the same time it is to be remembered that this section does not invest the Court with jurisdiction over matters which are excluded from its cognizance. Thus a Court cannot under this section entertain a suit relating purely to caste questions, such a suit not being one of a civil nature (j): see s. 9 above. Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked (k). And, further, no order should be made under this section unless it is necessary for the ends of justice or to prevent abuse of the process of the Court (l). But where the ends of justice do require it, the Court has an inherent power to make such order as it may deem proper. It has thus been held that although the Code contains no express provision on the matters hereinafter mentioned the Court has an inherent power—

- (a) to consolidate suits and appeals (m) including appeals to His Majesty in Council (n);
- (b) to postpone the hearing of suits pending the decision of a selected action (o);
- (c) to stay on the ground of convenience cross-suits (o);
- (d) to ascertain whether the proper parties are before it (o);
- (e) to enquire whether a plaintiff is entitled to sue as an adult (o);
- (f) to entertain the application of a third person to be made a party (o);
- (g) to allow a defence in *forma pauperis* (o);
- (h) to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties (o);
- (i) to remand in a case to which neither O. 41, r. 23, nor O. 41, r. 25 applies (o); see notes to O. 41, r. 23, under the head "Remand in case of error, omission or irregularity," and notes to O. 42, r. 1, under the head "Inherent power of High Courts to remand in second appeal";
- (j) to stay the drawing up of the Court's own orders or to suspend their operation, if the necessities of justice so require (o);
- (k) to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay (o);
- (l) to apply the principles of *res judicata* to cases not falling within section 11 of the Code (o); see notes to s. 11 under the head "Orders in execution proceedings", p. 64 above;
- (m) to add a party (p);

(i) *Hurro Chunder Roy v. Shoorodhones Debia* (1868) 9 W. R. 402, 408.

(j) *Jethabhai v. Chapsey* (1909) 34 Bom. 487.

(k) *Ghuznavi v. The Allahabad Bank, Ltd.* (1917) 44 Cal. 929, 936-937.

(l) *Ganesh v. Purushottam* (1909) 34 Bom. 135.

(m) *Hukum Chand v. Kamalanand* (1906) 33 Cal. 927, 932; *Nanda Kishore v. Ram Golam* (1912) 40 Cal. 954, 959-960.

(n) *Chaudhry Har Prasad v. Brij Kishor Das*

(1918) 3 Pat. L. J. 446.

(o) *Hukum Chand v. Kamalanand* (1906) 33 Cal. 927, 932; *Nanda Kishore v. Ram Golam* (1912) 40 Cal. 954, 959-960.

(p) *Lakshmichand v. Kachubai* (1911) 13 Bom. L. R. 517, s. c. 35 Bom. 393; *Sri Mati Hemanigini v. Haridas* (1918) 3 Pat. L. J. 409 [adding a respondent in an appeal].

- (n) to punish summarily by imprisonment contempts of Court by the publication of a libel out of Court, when the Court is not sitting (q). [Note that the High Courts only have this power];
- (o) to decide questions of jurisdiction though, as a result of its inquiry, it may turn out that the Court has no jurisdiction over the suit (r);
- (p) to stay proceedings pursuant to its own order in view of an intended appeal (s);
- (q) to direct a party that has applied for leave to appeal to the King in Council to pay costs on the dismissal of his application (t);
- (r) to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties, e.g., whether a deed of mortgage is attested as required by s. 59 of the Transfer of Property Act (u);
- (s) to amend decrees and orders in cases not covered by s. 152 (v); see notes to s. 152 under the head "Inherent power to amend decrees and orders;"
- (t) to set aside an order obtained by fraud practised upon the Court, e.g., when a pleader not engaged by the defendant at all, consents to a decree on behalf of the defendant (w);
- (u) to restore a suit dismissed for default in cases not provided for by O. 9, r. 9 see notes to O. 9, r. 9, under the head "Inherent power of Court to restore suits on other grounds;"
- (v) to cause restitution to be made on reversal of decrees: see notes to s. 144 under the head "Inherent power to grant restitution," p. 312 above;
- (w) to restrain by injunction a person from proceeding with a suit in another Court: see O. 39, r. 1, notes "Powers of a Chartered High Court to restrain a party from proceeding with a suit pending in another Court;"
- (x) to re-hear a matter before the order passed by the Court at a previous hearing is drawn up and sealed (x);
- (y) to order a stay of execution in view of an application by a judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (y);
- (z) to set aside an order of dismissal made under O. 9, r. 8, for non-appearance of the plaintiff, when the non-appearance was owing to the plaintiff's death, and the fact of the plaintiff's death was not brought to the notice of the Court dismissing the suit (z).
- (aa) to vacate an order obtained by fraud, as where an order is made recording the adjustment of a decree [O. 21, r. 2], and the adjustment has been brought about by fraud practised by one party upon another (a);

(q) *Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court of Bengal* (1884) 10 Cal. 109, 10 I. A. 171.
 (r) *Hurree Persad v. Koonjo Behary* (1862) Marshall, 99.
 (s) *Luchmi Narain, in the goods of* (1901) 5 C. W. N. 781.
 (t) *Jogendra Chandra v. Wazidunnissa Khatun* (1907) 34 Cal. 880.
 (u) *Shamu Patter v. Abdul Kadir* (1912) 35 Mad. 607, 39 I. A. 218.
 (v) *Mohabir v. Chandra* (1914) 19 C. W. N. 1021.

(w) *Basangowda v. Churchigirigowda* (1910) 34 Bom. 408; *Peary Choudhury v. Sonoo Dass* (1914) 19 C. W. N. 419.
 (x) *Padmabati v. Rasik Lal* (1909) 37 Cal. 259.
 (y) *Nanda Kishore v. Ram Golam* (1912) 40 Cal. 955.
 (z) *Debi Baksh v. Habib Shah* (1913) 35 All. 331, 40 I. A. 151.
 (a) *Paranjpe v. Subbaji* (1882) 6 Bom. 148; *Vilakathala v. Vayattu* (1914) 27 Mad. L. J. 172.

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(bb) to direct an auction-purchaser in a case where he has paid the purchase-money and subsequently withdrawn it from the Court on the sale to him being set aside under O. 21, r. 91, to pay back the money into Court on the sale being confirmed in appeal (b);

(cc) to restore a suit, where the decree passed in the suit is set aside on the ground that the minor against whom the suit was filed was not properly represented by a guardian *ad litem*, and to proceed with the appointment of a fit and proper person as guardian *ad litem* of the minor defendant (c);

(dd) to interfere where its decree is being executed in a manner manifestly at variance with the purport and intent of that decree (d);

(ee) to stay execution of a decree obtained by A against B pending not only the decision of a suit by B against A, but the decision of an appeal by B against A from a decree passed against B in B's suit (e). See O. 21, r. 29.

Prevent abuse of process of Court.—A Court has inherent jurisdiction to stay any suit which is an abuse of the process of the Court (f). See notes to O. 16, r. 1, "Whether witness summons may be refused." See also the undermentioned case (g).

Where the Court is bound to grant an application and has no discretion to refuse it, it has no power to dismiss it on "so treacherous a ground of decision as an 'abuse of the process of the Court' " (h).

Appeal.—No appeal lies from an order made under this section (i). But though no appeal lies, the High Court has power under s. 107 of the Government of India Act, 1915, to correct subordinate Courts if they have wrongly exercised their inherent powers (j). *

152. [New. R. S. C., O. 28, r. 11. Cf. S. 206.] Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

Amendments of judgments, decrees or orders.

Amendment of decrees and orders.—This section has been taken from O. 28, r. 11, of the Rules of the Supreme Court.

There are two and only two cases in which the Court can amend or vary a decree or order after it is drawn up and signed, namely:—

- (i) under its inherent powers, when the decree or order does not correctly state what the Court actually decided and intended; and
- (ii) under this section, where there has been a clerical or arithmetical mistake, or an error arising from an accidental slip or omission.

(b) *Sukhdeo Dass v. Rito Singh* (1917) 2 Pat. L. J. 361.

(c) *Bhagwan v. Parum Sukh Das* (1917) 39 All. 8.

(d) *Kulada Prasad v. Sadhu Charan* (1918) 8 Pat. L. J. 485.

(e) *Sardani v. Rani Harnam* (1910) Punj. Rec. no. 82, p. 239.

(f) *Hindustan Assurance, Ltd. v. Rial Mulraj* (1914) 27 Mad. L. J. 646, 652.

(g) *Shah Velchand v. Lieut. Liston* (1914) 38 Bom. 638.

(h) *Chhatrapat Singh v. Kharag Singh* (1917) 44 I. A. 11, 14, 44 Cal. 535, 540-541.

(i) *Sukhdeo Dass v. Rito Singh* (1917) 2 Pat. L. J. 361; *Raghunandan v. Jadunandan* (1918) 3 Pat. L. J. 253, 254.

(j) *Braya Bhusan v. Sri Chandra* (1919) 4 Pat. L. J. 20.

If a decree or order is sought to be amended or varied in any other case, it can only be done by a review of judgment under O. 47, r. 1, or by an appeal under s. 96 (k). It is doubtful whether a decree or order can be varied by consent of parties after it is drawn up and signed (l).

Inherent power to amend decrees and orders.—Every Court has an inherent power to vary or amend its own decree or order *so as to carry out its own meaning*. In so doing it does nothing but exercise a power to correct a mistake of its ministerial officer by whom the decree or order was drawn up (m). It only insists that the decree drawn up in the office of the Court should correctly express the judgment given by the Court (n). "It would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister" (o). "I cannot doubt," said Lord Penzance in *Laurie v. Lees* (p) "that under the original powers of the Court independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the office of the Court—to vary them in such a way as to carry out its own meaning; and where, language has been used which is doubtful, to make it plain. I think that power is inherent in every Court." In *Hatton v. Harris* (q), Lord Watson said: "When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce".

It will be seen from the above that the Court has no power to vary or amend its decree where it is in conformity with the judgment (r), not even if the judgment is erroneous in law (s) though the error be apparent on the face of the judgment (t).

The power of a Court to set right its own decree and to bring it into conformity with the judgment [see O. 20, r. 6] has also been recognized in Indian decisions (u).

Illustrations.

(1) *A* sues *B* for Rs. 5,000 and interest. The judgment is for Rs. 4,500 with-out more. The decree is drawn up in accordance with the judgment. *A* then applies to amend the decree by adding an order for payment of interest. The application must be refused, for the decree is not at variance with the judgment. If *A* is aggrieved by the decree, the proper course for him is to apply for a review of judgment or to appeal from the decree: *Hasan v. Sheo Prasad* (1893) 15 All. 121; *Abdul v. Chunia* (1886) 8 All. 377.

(2) *A* and *B* enter into an agreement for partition of certain properties. *B* fails to convey to *A* the properties come to *A*'s share. *A* sues *B* for specific performance of the agreement and a decree is passed declaring only that "*A* is entitled to specific performance of the agreement." The usual form is to declare that "the agreement ought to be specifically performed, and the Court doth order and decree that the same be specifically performed [i.e., both by *A* and *B*]." The decree may be amended so as to put it in the usual form: *Karim Mahomed v. Rajooma* (1888) 12 Bom. 174. [In the above case the amendment was necessary, for the decree as drawn up did not contain

(k) *Lachman v. Mohan* (1880) 2 All. 505.

(l) *Ainsworth v. Wilding* [1896] 1 Ch. 673, 677.

(m) *Mellor v. Swire* (1885) 30 C. D. 239, 246.

(n) *In re St. Nazaire Co.* (1879) 12 C. D. 88; *Preston Banking Co. v. Allsup* [1896] 1 Ch. 141.

(o) *Mellor v. Swire* (1885) 30 C. D. 239, 247.

(p) (1881) 7 App. Cas. 19, 34, 35.

(q) [1892] A. C. 547, 560.

(r) *Parameshwara v. Seshagiriappa* (1889) 22

Mad. 364; *Shahab Din v. Siraj-ud-Din*

(1913) Punj. Rec., no. 47, p. 185.

(s) *Lakho v. Salamat* (1898) 20 All. 337.

(t) *Charles Bright & Co., Ltd. v. Sellar* [1904] 1 K. B. 6.

(u) *Karim Mahomed v. Rajooma* (1888) 12 Bom.

174; *Irappa v. Bhimappa* (1902) 4 Bom.

L. R. 909; *Brigratan v. Jaynarain* (1910)

37 Cal. 649.

S. 152. any direction to *A* to convey to *B* the properties come to *B*'s share, but declared only that *A* was entitled to specific performance.]

(3) *A* sues *B* and *C* for Rs. 5,000. The judgment awards Rs. 5,000 to *A* "as prayed" (i.e., as against *B* and *C*). The decree is drawn up so as to render the amount payable by *B* alone. The decree may be amended and brought into conformity with the judgment: *Chathappan v. Pydel* (1892) 15 Mad. 403; *Pherozsha v. Sun Mills, Ltd.* (1898) 22 Bombay 370.

"Accidental omission."—This section enables the Court to correct errors arising from an accidental omission. Thus where directions as to costs were *inadvertently* omitted, the decree was set right by adding the directions (*v*). Similarly where the date from which payments ordered to be made were to run was *inadvertently* omitted, the decree was perfected by adding the date (*w*).

"Accidental slip."—A *bonâ fide* error as to the amount of interest due to the defendant may be corrected under this section (*x*). And so also an error as to the period for which an injunction is to continue (*y*).

At any time.—A decree may be amended under this section *at any time*, although the time for appealing from the decree has expired (*z*). Under the corresponding English rule, an error in a decree was in one case amended after 39 years (*a*), and in another case after 19 years (*b*). In a Bombay case, an application was made to the High Court to rectify a decree in the exercise of its inherent powers 10 years after the date of the decree, and the application was allowed (*c*). But no amendment should be allowed by the Court either under this section or in the exercise of its inherent powers if it is inexpedient or inequitable to do so, as where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous (*d*).

Effect of amendment.—An amendment under this section does not revive the decree nor furnish a fresh starting point of limitation for executing the decree (*e*).

Amendment of appellate decree.—The Court to amend a decree is the Court that passed it. Where an appeal is preferred from a decree of a Court of first instance the appellate Court may—

(1) dismiss the appeal under O. 41, r. 11, sub-r. (1) [Code of 1882, s. 551] without issuing any notice to the respondent, or it may

(2) confirm, reverse or vary the decree of the Court of first instance [O. 41, r. 32, Code of 1882, s. 577].

In case (1), it has been held by the High Courts of Calcutta, Madras and Allahabad that it is the appellate Court alone that can amend the decree (*f*). On the other hand it has been held by the Bombay High Court that it is the Court of the first instance, and not the appellate Court, that can amend the decree (*g*). See notes to s. 36 above.

In case (2), it is the appellate Court alone that can amend the decree (*h*).

(v) *Re Rudd*, W. N. (1887) 251; *Re Roper* (1890) 45 C. D. 126; *Chessum and Sons v. Gordon* [1901] 1 K. B. 694.

(w) *E. v. E.* [1903] P. 88.

(x) *Barker v. Purvis* (1886) 56 L. T. 131.

(y) *Shipwright v. Clements* (1890) 38 W. R. (Eng) 746.

(z) *Barker v. Purvis* (1886) 56 L. T. 131.

(a) *Halton v. Harris* [1892] A. C. 547, 564.

(b) *Shipwright v. Clements* (1890) 38 W. R. (Eng.) 746.

(c) *Karim Mahomed v. Rajoona* (1888) 12 Bom. 174, 183.

(d) *Halton v. Harris* [1892] A. C. 547, 568; *Stewart v. Rhodes* [1900] 1 Ch. 386, 394-395.

(e) *Tarsi Ram v. Man Singh* (1886) 8 All. 492.

(f) *Umasundari v. Bindu* (1897) 24 Cal. 750; *Munisami v. Munisami* (1899) 22 Mad. 293; *Asmabibi v. Ahmad Husain* (1908) 30 All. 290.

(g) *Bapu v. Vajir* (1897) 21 Bom. 548.

(h) *Muhammad v. Muhammad* (1889) 11 All. 287; *Shival v. Jumaklal* (1894) 18 Bom. 542; *Tichuvayyangan v. Seshayyan-gar* (1895) 18 Mad. 214.

The same principles apply to decrees passed in second appeal.

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Revision.—A decision under this section granting an application for amendment is an order and not a decree. The decision may therefore be the subject of revision under s. 115, but it cannot be the subject of an appeal (i). It has been so held by the High Courts of Calcutta, Allahabad and Bombay in cases under the corresponding s. 206 of the Code of 1882. A different view has been taken by the High Court of Madras. According to that Court, where a decree is amended, the aggrieved party has the right to appeal from the decree as amended. Hence if no appeal is preferred within the period of limitation, he cannot afterwards apply for a revision of the order allowing the amendment (j).

Where a case is one of “accidental slip” within the meaning of this section, but the Court which passed the decree refuses to amend it on the ground that the case does not fall under this section, the refusal amounts to a failure to exercise a jurisdiction vested in the Court within the meaning of s. 115, and the High Court has power to interfere in revision (k).

Does not apply.—Where the order as drawn up represents the real decision of the Court, the Court has no jurisdiction to rehear or alter it (l). “Even when the order has been obtained by fraud, the Court has no jurisdiction to rehear it. If such a jurisdiction existed it would be most mischievous” (m).

Consent-decree.—Where a decree founded on a compromise is inaccurate or does not embody the true terms of the compromise, the only remedy is by an independent suit to set aside the decree either on the ground of mistake or fraud or some other ground *ejusdem generis* with it (n).

Successive applications for amendment.—Res judicata.—See notes to s. 11, under the head “Applications for amendment of decree,” on p. 65 above.

Code of 1882, s. 206.—The third paragraph of s. 206 of the Code of 1882 ran as follows:—

“If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error: Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment.”

The above paragraph enabled the Court to amend its decree in the following two cases, namely:—

- (1) Where the decree was at variance with the judgment; and
- (2) Where any clerical or arithmetical error was found in the decree.

The present section corresponds with the second part of the above paragraph. The first part of the paragraph which empowers the Court to amend its decree so as to bring it into conformity with the judgment has been omitted. An application to amend a decree so as to bring it into conformity with the judgment must now be made to the Court in the exercise of its *inherent power*. This power has been saved by s. 151.

(i) *Nalinakshya v. Mafakshar* (1901) 28 Cal. 177; *Surtia v. Ganga* (1885) 7 All. 875; *Hasan v. Sheo Prasad* (1893) 15 All. 121; *Bai Shri Yaktuba v. Agarsangji* (1907) 31 Bom. 447.
(j) *Visvanathan v. Ramanathan* (1901) 24 Mad. 646.

(k) *Sahadeo v. Deo Dutt* (1915) 37 All. 323.
(l) *Preston Banking Co. v. William Allsup and Sons* [1895] 1 Ch. 141.
(m) [1895] 1 Ch. 141, 143, *supra*.
(n) *Ram Lagan v. Ram Birick* (1919) 4 Pat. L. J. 205.

Ss. 153, 154. **153.** [*New.* **R. S. C., O. 28, r. 12.**] The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

R. S. C., O. 28, r. 12.—This section is new. It is taken from the Rules of the Supreme Court, O. 28, r. 12. The words "in a suit" after the word "proceeding" do not occur in the English rule.

Scope of the section.—O. 6, r. 17, is confined to amendments of "pleadings;" and s. 152 to correcting errors in "judgments, decrees or orders." The present section confers a *general* power on the Court to amend defects and errors in "any proceeding in a suit" and to make "all necessary amendments" for the purpose of determining the real question at issue between the parties to the suit. This power is vested in the original as well as the appellate Court (o). In *Australian Steam Navigation Co. v. Smith and Sons* (p), their Lordships of the Privy Council said: "Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way, it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties."

"Any proceeding in a suit."—The following are some of the cases in which the corresponding English rule has been applied:—

Answers to interrogatories.—Where it was admitted by the defendant, a solicitor, in answer to interrogatories, that his partner has paid into the banking account of the firm money received by the latter for investment, the defendant was allowed to *amend* the answer it being shown that the admission had been made by mistake (q). In another case where the defendant charged the plaintiff (his manager) with misconduct, and the plaintiff exhibited interrogatories of which the substance was to ask the defendant to specify the acts of misconduct on which he relied, it was said by Thesiger, L.J., that if the defendant answered the interrogatories, and it was subsequently discovered by him that there were other acts of misconduct on which he could rely, there was nothing to prevent his being *allowed to amend* his answers to the interrogatories (r). See as to interrogatories, O. 11, rr. 1-11, below.

Notice of motion.—A notice of motion in an action for the rescission of an agreement for the sale of land was allowed to be amended at the hearing by asking for the appointment of a receiver (s).

154. [**S. 3, third para.**] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

Saving of present right of appeal.

(o) *Mukunda Lal v. Jogesh Chandra* (1916) 1 Pat. L. J. 393, 397.
(p) (1889) 14 App. Cas. 318, 320.
(q) *Hollis v. Burton* [1892] 3 Ch. 226.
(r) *Saunders v. Jones* (1877) C. D. 435, 452.
(s) *Cook v. Andrews* [1897] 1 Ch. 266.

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"Any present right of appeal."—There is a conflict of decisions as to the meaning of the words "any *present* right of appeal" which occur in this section. According to the Chief Court of the Punjab, the words "any present right of appeal" refer to a right which had actually come into existence at the commencement of this Code by virtue of the decree or order sought to be appealed from having been passed before this Code came into force (*t*). According to the Madras High Court, those words refer to a right which had become vested in a litigant before this Code came into force (*u*). Thus there are cases in which a second appeal lay under the old Code from certain orders made in execution (the orders being treated as decrees), while no such appeal lies under the present Code. According to the Chief Court of the Punjab, no second appeal would lie in such a case from the order made in first appeal unless the *latter* order was made while the old Code was in force. According to the Madras High Court, a second appeal would lie if the *first appeal* from the order made by the Court of first instance was preferred when the old Code was in force, though the order made in first appeal was not made until after the new Code came into force (*v*). Similarly there are cases in which an appeal was allowed from certain orders under the old Code from which no appeal is allowed under the present Code. According to the Chief Court of the Punjab, no appeal would lie from the order in such a case unless the *order* was made when the old Code was in force (*w*). According to the Madras High Court, it would seem that an appeal would lie if the *suit* in which the order was made was instituted when the old Code was in force. See s. 96, sub-s. (3), and ss. 97 and 104. See also notes to s. 1.

155. [New.] The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

Amendment of certain Acts.

156. [S. 3, first sentence.] *The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof.*

Repeals.

This section and the Fifth Schedule to the Code have been repealed by the Second Repealing and Amending Act 17 of 1914, s. 3.

157. [S. 3, second sentence.] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under

Continuance of orders under repealed enactments.

(*t*) *Ganda Mal v. Piranditta* (1913) Punj. Rec. no. 1, p. 1. 631.
(*u*) *Kalinga v. Narasimha* (1911) 21 Mad. L. J. (v) (1911) 21 Mad. L. J. 631, *supra*.
(w) (1913) Punj. Rec. no. 1, p. 1, *supra*.

Ss. this Code and by the authority empowered thereby in such
157, 158. behalf.

158. [S. 3, second para.] In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

Reference to Code of Civil
Procedure and other
repealed enactments.

THE FIRST SCHEDULE.

ORDER I.

Parties to Suits.

1. [S. 26, R. S. C., O. 16, r. 1.] All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly severally or in the alternative, where, if such persons brought separate suits any common question of law or fact would arise. O. 1, r. 1.

Who may be joined as plaintiffs.

Scope of the Order.—This order deals with joinder of parties, and, to a certain extent, with joinder of causes of action (x). O. 2, r. 3, deals exclusively with joinder of causes of action. Rule 4 of this Order is to be read with rule 1.

General rules.—Before considering the present rule it may be as well to note the general rules relating to the joinder of parties and of causes of action. According to the Code the essentials of a suit are—(1) opposing parties, (2) a subject in dispute, (3) a cause of action, and (4) a demand of relief (y) [see O. 7, r. 1]. All these essentials must concur in every suit properly framed. Order 1 deals with the joinder of parties. Order 2 deals with the frame of suits. In framing a suit the following three kinds of “misjoinder” must be guarded against:—

(i) *Misjoinder of plaintiffs.*—Where there are more plaintiffs than one, the provisions of the present rule should be followed. This rule relates to the joinder of plaintiffs. It provides in effect that two or more persons may be joined as plaintiffs, in one suit if the right to relief alleged to exist in each plaintiff arises from the *same act or transaction* and there is a *common question of law or of fact*. If not, they cannot be joined as plaintiffs in one suit, and they must bring *separate suits*. If two or more persons are joined as plaintiffs in one suit in a case not contemplated by O. 1, r. 1, the result is a *misjoinder of plaintiffs*. The objection on the ground of misjoinder of plaintiffs should be taken at the earliest possible opportunity; if not, it will be deemed to have been waived [O. 1, r. 13]. Where such objection is taken, and the Court finds that it is valid, the Court should not dismiss the suit [O. 1, r. 9], but the plaint may be amended [O. 6 r. 17] by striking out the name of such persons as have been improperly joined as plaintiffs [O. 1, r. 10, sub-r. (2)], and the suit should then be proceeded with [O. 1, r. 9]. In other words, an objection on the ground of misjoinder of plaintiffs is not fatal to the suit (z).

(ii) *Misjoinder of defendants.*—Where there are more defendants than one the provisions of rule 3 of this Order should be followed. That rule relates to the joinder of defendants. It provides in effect that two or more persons may be joined as defendants in one suit if the right to relief alleged to exist against each of them arises from the *same act or transaction* and there is a *common question of law or of fact*. If not, they cannot be joined as defendants in one suit and *separate suits* must be brought against them. If two or more persons are joined as defendants in one suit in a case not covered

(x) *Bullock v. London General Omnibus Co.* [1907] 1 K. B. 264, 272; *Compania Sane- sinena v. Houlder Brothers & Co.* [1910] 2 K. B. 354, 365, 367.

(y) *Krishnappa v. Shivappa* (1907) 31 Bom. 393, 398.

(z) *Janokinath v. Ramrunjun* (1879) 4 Cal 949.

O. 1, r. 1. by O. 1, r. 3, the result is a *misjoinder of defendants*. As in the case of plaintiffs, so in the case of defendants, the objection on the ground of misjoinder should be taken at the earliest possible opportunity; if not, it will be deemed to have been waived (O. 1, r. 13). Where such objection is taken, and the Court finds that it is valid, the Court should not dismiss the suit (O. 1, r. 9), but the plaint may be amended (O. 6, r. 17) by striking out the names of such persons as have been improperly joined as defendants [O. 1, r. 10, sub-r. (2)], and the suit should then be proceeded with (O. 1, r. 9). In other words, an objection on the ground of misjoinder of defendants is not fatal to the suit.

(iii) *Misjoinder of causes of action*.—As to the meaning of “cause of action,” see notes to s. 20 under the head “cause of action,” p. 86 above. A misjoinder of causes of action may be coupled with a misjoinder of plaintiffs or it may be coupled with a misjoinder of defendants. There may again be a misjoinder of claims founded on several causes of action. Accordingly, this subject may be considered under the following three heads:—

(a) *Misjoinder of plaintiffs and causes of action*.—Where in a suit there are *two or more plaintiffs and two or more causes of action*, the plaintiffs should be *jointly interested* in all the causes of action. If the plaintiffs are not *jointly interested* in all the causes of action, the case is one of *misjoinder of plaintiffs and causes of action*. O. 2, r. 3, read with O. 1, r. 1, forbids such a misjoinder. The objection on the ground of misjoinder of plaintiffs and causes of action should be taken at the earliest possible opportunity (O. 2, r. 7). As to the procedure to be followed in the case of misjoinder of plaintiffs and causes of action, see notes to O. 2, r. 3, “Procedure in case of misjoinder of plaintiffs and causes of action.” See also s. 99 above.

(b) *Misjoinder of defendants and causes of action: Multifariousness*.—Where in a suit there are *two or more defendants and two or more causes of action*, the suit will be bad for misjoinder of defendants and causes of action, if different causes of action are joined against different defendants separately (O. 2, r. 3 and O. 1, r. 3). Such a misjoinder is technically called *multifariousness*. The objection on the ground of multifariousness should be taken at the earliest possible opportunity (O. 2, r. 7). As to the procedure to be followed in the case of multifariousness, see notes to O. 2, r. 3, under the head “Procedure in case of multifariousness.” See also s. 99 above.

(c) *Misjoinder of claims founded on several causes of action*.—See O. 2, rr. 4-5.

Non-joinder of parties.—Where a person who is a necessary party to a suit is not joined as a party to the suit, the case is one of *non-joinder*. A suit should not be dismissed on the ground of non-joinder (a). The objection for non-joinder should be taken before the first hearing (O. 1, r. 13), and the plaint may be amended by adding the omitted party either as plaintiff or as defendant, bearing in mind that no person can be added as a *plaintiff*, though he may be added as a defendant, without his consent (a). See O. 1, rr. 9 and 10 (2).

Relation of this rule to O. 2, r. 3.—O. 2, r. 3, is to be read subject to the provisions of this rule (b).

Changes effected in the law.—We now turn to rule 1 of Order 1. Before considering it in detail, we may observe that under the corresponding s. 26 of the Code of 1882, all persons could be joined in one suit as plaintiffs, provided that the right to relief, alleged to exist in each plaintiff, arose from the *same cause of action*. The present rule is much wider. It is a reproduction, almost verbatim, of O. 16, r. 1 of the

(a) *Mahabala v. Kunhanna* (1898) 21 Mad. 373.

(b) *Ramendra Nath v. Brajendra Nath* (1918) 45 Cal. 111.

English rules. It enables several plaintiffs, though they have *separate causes of action*, to join in *one* suit, if—

- (1) the right to relief, alleged to exist in each plaintiff, arises out of the *same act or transaction*; and
- (2) there is a *common question of law or fact*.

The expression “act or transaction” used in this rule is more comprehensive than the expression “cause of action” used in the old section; for the same act or transaction may give rise to different causes of action, as when several persons are injured by the same act of negligence on the part of a railway company. Under the old section such persons could not join as plaintiffs in one suit, the *causes of action* being different. Under the present rule, it seems, they can, as the right to relief arises out of the *same act*.

The old section.—The corresponding s. 26 of the Code of 1882 ran as follows:—

“All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, *in respect of the same cause of action*.”

The decisions on the meaning of “cause of action” in the old section were not uniform. In some cases it was held that the expression “cause of action” meant facts constituting the infringement of a right *plus* facts constituting the right itself (c), while in others it was held that it referred to facts constituting the *infringement of the right*, but not necessarily also those *constituting the right* itself (d).

The following are some of the cases decided under the old section. It was held in those cases that the plaintiffs could not all join in one suit and that they should bring separate suits. Under the present rule, it is submitted, the plaintiffs may in each one of the following cases all join in one suit:—

1. In *Aldridge v. Barrow* (e), the defendant, the editor and proprietor of a newspaper, published articles which referred to the “Calcutta Police,” without naming individuals. The plaintiffs, six of the members of the Calcutta Police Force, jointly sued the editor for damages, alleging that the articles were directed against them, and that they constituted a libel. Here the libel was in the same words, and in the same documents, but of different persons. It was held that the plaintiffs could not all be joined in one suit. The Court said: “It is true that the injury may have been caused by *one* act of the defendant, as, for instance, in the case of a railway accident causing injury to several passengers, or, as is here alleged, of a collective libel on several individuals. The cause of action of the persons injured will none the less remain separate and distinct. There cannot in such cases be said to be *one or the same cause of action*.”

2. In *Rajjo Kuar v. Debi Dial* (f), several creditors, to each of whom separate debts were owing by the same debtor, jointly sued the debtor to avoid a deed of gift executed by the debtor in favour of his daughter, on the ground that it was made fraudulently with intent to defeat their claims. The Court held that they could not join as plaintiffs in one suit, on the ground that the causes of action were *separate and distinct*.

(c) *Nusserwanji v. Gordon* (1882) 6 Bom. 266, 275; *Ramanuja v. Devanayaka* (1885) 8 Mad. 361; *Lingammal v. Venkatammal* (1883) 6 Mad. 239; *Salima Bibi v. Sheik Muhammad* (1896) 18 All. 131; *Rahim Baksh v. Amiran Bibi* (1896) 18 All. 219; *Rajjo Kuar v. Debi Dial* (1896) 18 All. 432.

(d) *Haramoni v. Hari-Churn* 1895) 32 Cal. 833, 839; *Aldridge v. Barrow* (1907) 34 Cal. 662, 663; *Fakirapa v. Rudrapa* (1892) 16 Bom. 119; *Varajlal v. Ramdat* (1902) 26 Bom. 259, 265; *Pinapati v. Pinapati* (1903) 26 Mad. 647, 649.

(e) (1907) 34 Cal. 662.
(f) (1896) 18 All. 432.

O. 1, r. 1. 3. In *Varajlal v. Ramdat (g)*, *A* and *B* were assaulted by *C* at an interview in *C*'s house. *A* and *B* jointly sued *C* for damages for assault. It was held that the assault on *A* and that on *B* constituted *two distinct causes of action*, and the suit was therefore bad for misjoinder of plaintiffs. The Court said, "We may go further and say that as the blows on each plaintiff were inflicted *at the same time and place* and must be proved by *the same evidence*, it would be more convenient if the law permitted the trial of the two suits together than that it should be necessary to try them separately. *But this is a matter for the consideration of the Legislature.*"

4. In *Ali Serang v. Beadon (h)*, thirteen firemen, who were engaged on board a steamer, were all arrested under one warrant on a charge of desertion, and they were all tried together and sentenced to one month's imprisonment. The term of imprisonment expired on 5th May, but they were not released on that date. Thereupon all the thirteen brought a suit against the superintendent of the jail for damages for wrongful detention. It was held that the causes of action were *distinct and separate* and could not be joined in one suit.

5. In *Ramanuja v. Devanayaka (i)*, several trustees of a temple were removed from the office of trustee by the District Temple Committee. A suit by the trustees for a declaration that their removal was without just cause was held to be bad for misjoinder, on the ground that the dismissal of each trustee gave rise to a *distinct cause of action*.

New Rule.—In all the cases cited above, it was held that the plaintiffs having *distinct causes of action*, they could not join in one suit, and that the proper course for them was to bring separate suits. The present rule is intended to meet those cases. In such cases, therefore, as the above, the plaintiffs may now all join in *one suit*. The present rule enables several persons to join as plaintiffs in *one suit*, though their causes of action may be *separate and distinct, provided that*—

- (1) the right to relief, alleged to exist in them, arises out of the *same act or transaction or series of acts or transactions*: and
- (2) the case is of such a character that, if such persons brought separate suits, any *common question of law or fact* would arise.

Both these conditions should be fulfilled to enable two or more persons to join as plaintiffs in one suit. The two conditions are *not alternative (j)*.

Illustrations.

(1) *A* publishes a series of books under the title of "The Oxford and Cambridge Publications" so as to induce the belief that the books are publications of the Oxford and Cambridge Universities or either of them. The Universities may join as plaintiffs in one suit to restrain *A* from using the title, because the publication and the belief induced are *common questions of fact* arising out of the *same series of transactions (k)*.

(2) *A*, a shareholder in a company, sues *B*, *C* and *D*, the directors, to recover damages *on his own behalf* for fraudulently inducing him to purchase shares by declaring an illegal dividend; and he joins in the same suit a claim *on behalf of himself and all other shareholders* (see r. 8 below) for repayment by the defendants to the company of the amount of the dividend paid out by them. *A* is not entitled to join both causes of action in one suit, because the right to relief claimed in his personal capacity and the right to

(g) (1902) 26 Bom. 259.
 (h) (1885) 11 Cal. 524.
 (i) (1885) 8 Mad. 361.

(j) *Strond v. Lawson* [1898] 2 Q. B. 44, 52, 51
 (k) *The Universities of Oxford and Cambridge v. George Gill & Sons* [1899] 1 Ch. 55.

relief claimed by him as representing the shareholders *do not arise out of the same transaction or series of transactions* (l).

(3) Four persons, each of whom separately took debentures on the faith of certain statements in a prospectus issued by the directors of a company, joined as co-plaintiffs in one suit against the directors, claiming damages for misrepresentations contained in the prospectus. *Held* that as the several causes of action arose out of the *same transaction*, and the case would involve *common questions of fact*, the suit was properly framed (m).

(4) In a suit instituted by A, B and C jointly for an injunction against D, E and F, it is alleged that all three defendants, as officers of several associations of workmen, conspired to prevent all persons, not belonging to the associations, from obtaining employment in place of the members of the associations. To constitute the overt acts alleged to have been committed in furtherance of the conspiracy, it is averred that D, E and F caused A, B and C to be molested, that E used threatening language to A, and that F assaulted C. It is proved that D was not a party to the conspiracy. As the claim arises out of the *same series of transactions*, and involves the *common question of fact and law* whether the overt acts were committed in furtherance of the conspiracy, A, B and C may join in the suit, notwithstanding that an injunction is granted against D and F only (n). See r. 4 (a) below.

The illustrations given above are all English cases decided under the new English rule 1 of Order 16. That rule came into operation on the 26th of October, 1896. The present rule is in the main a reproduction of the English rule. The old English rule corresponded with s. 26 of the Code of 1882, except that the words "in respect of the same cause of action" did not occur in that rule. But though these words did not occur in that rule, it was held that two or more persons could not join as plaintiffs in one suit unless the *cause of action was the same*. Thus it was held that several shippers of different shipments of cotton on the same ship for the same voyage could not jointly sue the shipowner for damages for short delivery, the causes of action being *distinct and separate* (o). For the same reason it was held that persons injured by the same act of negligence could not join in one action as plaintiffs for damages against the wrong-doer (p). But since the test under the new English rule as well as the present Indian rule is no longer the identity of the *cause of action*, but the identity of the *act or transaction*, such a joinder of plaintiffs as that in the above cases would now be perfectly legitimate both in England and India (q).

Plaintiffs having different interests.—Under the old section there was a conflict of decisions as to whether, where the plaintiffs were entitled to *different interests* in a property, they could join in one suit to recover possession of the property from a third party if the *ground* on which the relief was claimed was *common* to all the plaintiffs. According to the Allahabad decisions, they could not (r); according to the Madras and Calcutta decisions, they could (s). Under the present rule, there is no doubt that such persons may be joined in one suit as plaintiffs.

(l) *Stroud v. Lawson* [1898] 2 Q. B. 44.
 (m) *Dringbier v. Wood* [1899] 1 Ch. 393; and see *Frankenburg v. Great Horseless Carriage Co.* [1900] 1 Q. B. 504.
 (n) *Walters v. Green* [1890] 2 Ch. 696.
 (o) *Smurthwaite v. Hannay* [1894] A. C. 494.
 (p) *P. & O. Steam Navigation Co. v. Trane Kijima* [1895] A. C. 661; *Carter v. Rigby* [1896] 2 Q. B. 113 (action by representatives of fifty miners drowned by the

flooding of a mine).
 (q) *Markt & Co. v. Knight Steamship Co.* [1910] 2 K. B. 1021, 1037.
 (r) *Salsima Bibi v. Sheikh Muhammad* (1896) 18 All. 131; *Rahim Dakhsh v. Amiran Bibi* (1896) 18 All. 219.
 (s) *Muthuvijaya v. Chockalingam* (1896) 19 Mad. 335; *Sundar Jha v. Bansman Jha* (1906) 33 Cal. 367.

O 1, r. 1.

Illustrations.

A succeeds to *B*'s estate by inheritance, and assigns a portion thereof to *C*. *D* is in possession of the estate, and disputes *A*'s right of succession to it. *A* and *C* may under the present rule jointly sue *D* for recovery of possession of the portions of the estate to which they are entitled, as their claims in respect thereof are based on a *common ground*. It does not matter that *A* claims by right of *inheritance* and *C* under an *assignment* from *A*. Both the conditions required by the rule are present in the case.

Further, having regard to the comprehensive language of this rule, there is no objection to plaintiffs suing in a double capacity, if the conditions prescribed by this rule are complied with. Thus where plaintiffs were trustees of a house part of which was lot out by them and the rest occupied by them as tenants, and they sued both as trustees and tenants for an injunction to restrain the defendant from committing a nuisance, it was held that there was no objection to their suing as trustees to protect the reversion and as tenants to enjoy the property free from the nuisance (*t*).

"Any right to relief."—The words "any right to relief" are wider than the words "*the right to any relief*" which occurred in the old section (*u*).

"Severally."—Where a right to relief in respect of the same act or transaction is alleged to exist in two or more persons *severally*, they may join as plaintiffs in one suit or they may at their option bring separate suits. The rule does not require that they should join as plaintiffs in one suit. A Hindu priest raises a masonry structure upon a certain platform round a sacred tree, on which *every* member of the community has an *individual* right to perform religious rites. Here every member of the community has *individually* a cause of action, and any one member may therefore sue the priest for the removal of the structure. But it is not necessary that all the members should join as plaintiffs in one suit. They *may* so join if they choose, but the law does not say that they *should* all so join (*v*). The same rule applies when two or more persons are entitled to the same relief *in the alternative*: see notes below, under the head "*in the alternative*." The rule, however, is different when two or more persons are *jointly* entitled to the same relief in respect of a transaction. In that case all persons so entitled must join as plaintiffs in one suit. Thus if *A*, *B* and *C*, are *joint-owners* of a property, they must all be joined as plaintiffs in a suit to recover the property (*w*). So in a suit to recover ancestral property, all the members of the joint family should sue together (*x*). If any one of them does not consent to join as plaintiff, he may be joined as defendant [r. 10, sub-r. (2)]. The proper course is first to ask him to join as plaintiff, and if he refuses, to join him as defendant. But the suit should not be dismissed merely because he is joined as a defendant without being first called upon to join as plaintiff (*y*).

"Jointly."—A Hindu dies leaving a widow, an adopted son, and a separate brother. A dispute arises between the widow and the adopted son on the one hand and the brother on the other as regards certain lands. The widow and the adopted son allege that the lands form part of the estate of the deceased. The brother, on the other hand, alleges that the lands belong to him. *If the widow does not dispute the adoption*, a suit may be brought by her and the adopted son as *co-plaintiffs* against the brother to recover the property from him, for the plaintiffs are *jointly* interested in disproving

(*t*) *Bai Bhicatls v. Perojshaw* (1916) 40 Bom. 401, 408.

(*u*) *Bee Hannay & Co. v. Smurthwaite* (1893) 2 Q. B. 412; *Viscount Gort. v. Rowney* (1886) 17 Q. B. D. 625, 635.

(*v*) *Bajulal v. Bulakial* (1897) 24 Cal. 385.

(*w*) *Kattusheri v. Vallotil* (1881) 3 Mad. 234.

(*x*) *Collector of Monghyr v. Hurdai Narain* (1880) 5 Cal. 425.

(*y*) *Pyari v. Kedarnath* (1899) 26 Cal. 409; *Birisingh v. Nauai* (1902) 24 All. 206.

the defendant's title (z). But what if the adoption is not admitted by the widow, and she asks the Court to decide the question of adoption as between her and the adopted son, and prays that if the adoption is proved, the property may be delivered to the adopted son, or that it may be delivered to her, if the adoption is not proved? In such a case, it has been held by the High Court of Madras, that a suit by the widow and the adopted son as co-plaintiffs to recover the property from the brother is defective on the ground of misjoinder of plaintiffs, for the plaintiffs having antagonistic claims, it cannot be said that the right to relief exists jointly in them (a). See notes above, "Severally." As to joint Hindu families, see Mayne's Hindu Law, 8th ed., para. 298.

"In the alternative."—If in the case put above, the adoption is disputed, not by the widow, but by the brother, a suit may be brought by the widow and the adopted son as co-plaintiffs against the brother, claiming in the alternative to recover the property for the widow, if the adoption is not valid, or for the adopted son, if the adoption is valid (b). Here there is no misjoinder of plaintiffs, for the validity of the adoption is not disputed by a co-plaintiff as in the preceding case, but by the defendant. See O. 1, r. 4. (a) below.

Appeal.—See notes to O. 1, r. 3, "Appeal."

2. [New. R. S. C. O. 16, r. 1.] Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

This rule contemplates the case where a suit has been brought by several plaintiffs, in respect of the same act or transaction, but where the causes of action are so distinct that it may not be convenient to dispose of them at one trial (c). In such a case the Court may put the plaintiffs to their election as to which of them should proceed with the suit or order separate trials or make such other order as may be expedient. A suit by several creditors joining as co-plaintiffs in a creditor's action, or a suit by several market gardeners claiming certain preferential rights as to stands in the market, is not a suit where the joinder could embarrass or delay the trial (d).

3. [S. 28, Cf. R. S. C., O. 16, r. 4.] All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

Who may be joined as defendants.

(z) *Fakirapa v. Rudrapa* (1892) 16 Bom. 119; *Ningawa v. Ramnappa* (1904) 28 Bom. 94.
(a) *Lingammal v. Venkatammal* (1883) 6 Mad. 239; *Baij Nath v. Chhokrao* (1904) 26 All. 218.
(b) See *Pinapati v. Pinapati* (1903) 26 Mad. 647; *Haramoni Dass v. Hari Churn* (1896) 22

Cal. 833; *Lakshmakka v. Nagi* (1905) 23 Mad. 500; *Rukman Devi v. Shih Devi* (1910) Punj. Rec. no. 10, p. 27.
(c) See for an example *Arnison v. Smith* (1889) 41 C.D. 98, 102, per Lindley, L. J.; *Arnison v. Smith* (1889) 41 C.D. 848.
(d) *Bedford v. Ellis* [1901] A.C. 1, 12.

- O. 1, r. 3.** This rule is the converse of rule 1. It deals with joinder of defendants. See notes to O. 1, r. 1, "Misjoinder of defendants," on p. 333 above. Rule 4 of this Order is to be read with this rule.

Relation of this rule to O. 2, r. 3.—O. 2, r. 3, is to be read subject to the provisions of this rule (e).

The old section.—The corresponding s. 28 of the Code of 1882 ran as follows :—

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of *the same matter*."

In some cases under that section it was said that the expression "same matter" was equivalent to "same cause of action." In other cases it was observed that it was equivalent "to same act or transaction."

New Rule.—Under the present rule all persons may be joined as defendants against whom *any* right to relief in respect of the *same act or transaction* is alleged to exist, where if separate suits were brought against such persons, any *common question of law or fact* would arise. See notes to O. 2, r. 3, "Joinder of defendants and causes of action."

Illustrations.

1. *A*, riding in an omnibus belonging to *B*, is injured by a collision between the omnibus and a cart belonging to *C*. *A* sues *B* and *C* for damages for personal injury charging the defendants *jointly* with joint negligence, and, alternatively charging *separate* negligence against each defendant. The suit is not bad for misjoinder of defendants, because the injury to the plaintiff arose from the *same transaction or series of transactions* and the case involves *common questions of fact* (f). It is otherwise, if the injury arises from *distinct* acts as in the next illustration.

2. *A* sued *B* for damage done to his house by *B*'s negligence. *B* denied negligence, and alleged that the damage was caused by the negligence of *C*. Thereupon *A* applied for an order to join *C* as defendant. *Held* that the order could not be made. Collins, L.J., said: "When we analyse this case, we find we are dealing with it upon the assumption that the *two acts* which were done, the one by [*B*] and the other by [*C*], are entirely disconnected torts, each of them a separate injury—if it be injury at all—*quite distinct one from the other*. The one was done recently by [*B*] by excavation, and the other at a much earlier date by [*C*, a water company] by allowing water from its main to weaken the soil in front of the plaintiff's property" (g).

3. *M* mortgages certain property to *X*. After *X*'s death, *A* claiming to be the adopted son of *X* sues *M* on the mortgage, and a consent decree is passed in the suit. Subsequently *B*, alleging that she is the sister and heir of *X*, sues *A* and *M* (1) for a declaration that the adoption of *A* was not validly made, and (2) that the consent-decree (to which she was not a party) is not binding on her. *Held* by the High Court of Bombay that the suit is bad for misjoinder (h). This decision, it is submitted, is wrong, and it has been dissented from by the Calcutta High Court (i).

(e) *Ramendra Nath v. Brajendra Nath* (1918) 45 Cal. 111.

(f) *Bullock v. London General Omnibus Co.* [1907] 1 K. B. 264; *Frankenburg v. Great Horseless Carriage Co.* [1900] 1 Q. B. 504.

(g) *Thompson v. London County Council* [1899] 1 Q. B. 840; *Sadler v. Great Western Railway Co.* [1895] 2 Q. B. 688, affirmed

[1896] A. C. 450 (where two defendants had *independently* though simultaneously obstructed the access to the plaintiff's house).

(h) *Umbhai v. Bhaw Balvant* (1908) 34 Bom. 358.

(i) *Ramendra Nath v. Brajendra Nath* (1918) 45 Cal. 111, 134-135.

4. The mere fact that the relief claimed against the several defendants differs in detail is no ground for objection that the suit is bad for misjoinder of defendants, provided that the suit against the defendants is in respect of the same act or transaction. A applies for shares in a Company on the faith of a prospectus. The shares are allotted to him, and he pays up Rs. 5,000 thereon. A then sues the Company and the directors alleging that the prospectus was false and calculated to mislead, claiming as against the Company cancellation of the allotment to him of his shares and the return of Rs. 5,000 with interest, and as against the directors Rs. 5,000 by way of damages. Here the relief claimed against the Company is *rescission and repayment of the purchase-money with interest*, and that claimed against the directors is *damages*. The fact that the relief claimed against the two sets of defendants differs in detail does not render the suit bad for misjoinder of defendants, for the suit is in respect of *one transaction*, namely, the issue of a false and fraudulent prospectus. "In substance the shareholder has *one grievance*, call it a cause of action or what you like; and in substance he has *one complaint*, and all the persons he sues have, according to him, been guilty of conduct which gives him a right to relief in respect of *that one thing* which they have done, namely, the issuing of a prospectus." "The remedy . . . is different as against the several defendants, but not so much in substance as in form" (j). See r. 5 below.

5. A is an exporter of frozen meat. B is the owner of a line of steamers. By a contract between A and B, B agrees to carry from Argentine to Europe frozen meat in steamers belonging to him or in other suitable steamers. It is subsequently agreed that frozen meat should be shipped by A on a steamer called the *Devon* procured by B and belonging to C. Meat is accordingly shipped on the *Devon*, and the master of the *Devon* signs a bill of lading in respect of it and hands it to A. A sues B and C in respect of damage to the meat alleged to have been caused by the unseaworthiness of the *Devon* claiming against B on the terms of the before-mentioned contract and against C upon the bill of lading. The suit is not bad for misjoinder of defendants (k).

6. A sues B, C, D, E and F, for the recovery of certain documents of title and the goods covered thereby and in the alternative for damages. It is alleged in the plaint that the goods belonged to A, that B obtained from A the documents of title relating thereto by fraud and made them over to C; that C, knowing that B had no title either to the documents or to the goods, wrongfully dealt with them and sold the goods to D and E; that D and E wrongfully claimed to retain the goods and the documents of title; and, lastly, that one of the documents of title, namely, a railway receipt, was pledged by B to F, though the goods covered by it were in the possession of D. The suit is not bad for misjoinder of defendants and causes of action (l). "The foundation of the case, on which the rest of it depends, is the alleged fraud of B. If such fraud is proved, the question is, did the defendants who all claim under B obtain any title? If the plaintiff fails to prove fraud on the part of B, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence; but that does not make the case any the less one of a common question of law and fact. The same act or transaction which concerns all the parties is the alleged fraud of B, and this involves a common question of law or fact. All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud. By reason of this the possession of all is alleged to be wrongful . . . should it, however, be convenient, the Court may [Umabai v. Vithal (m)] direct the successive trial of the

(j) *Frankenburg v. Great Horseless Carriage Co.* [1900] 1 Q. B. 504.

(k) *Compania Sanseina v. Houlder Brothers & Co.* [1910] 2 K. B. 354.

(l) *Ramepura Nath v. Brajendra Nath* (1918) 45 Cal. 111.

(m) (1908) 33 Bom. 293, 306.

O. 1, r. 3. issues separately affecting different defendants. The question of the alleged fraud of *B* touching all the defendants may be tried first. If it fails, there is an end of the case" (n).

No misjoinder where some reliefs merely ancillary.—Where the relief claimed against some of the defendants is *merely ancillary* to the relief claimed against others, the suit is not bad for misjoinder, provided the suit is not in respect of distinct causes of action. *A* and *B* are co-sharers of certain land in the occupation of *C* and *D*, *A* is entitled to two-thirds of the land and *B* to one-third. *A* sues *B*, *C* and *D*, asking, as against *C* and *D* that they may be ejected from his share of the land, and as against *B* that the land may, if necessary, be partitioned between him and *B*. The suit is not bad for misjoinder, for though the relief claimed as against *C* and *D* is for possession, and that claimed as against *B* is for partition, the latter relief is auxiliary to the principal relief which is for possession. The inclusion of *B* in this suit is merely as that of a person properly a party to the proceeding in the circumstances of the case, and not as a litigant against whom a separate claim having no necessary connection with the ejectment of *C* and *D* is made. *B*, in fact, is a necessary party to the suit, for an actual division between *A* and *B* is essential to the ejectment of *C* and *D* (o). See r. 5 below.

"All persons."—A ship is a "person" within the meaning of this rule, so that a suit may be instituted against a ship as a defendant (p). The secretary of a club could not, unless he has specially accepted a *personal* liability, be sued *personally* on a contract entered into on behalf of the members of the club, nor could the members of a club collectively be sued *through* their secretary (q).

"Any right to relief."—The words "any right to relief" are wider than the words *the right to any relief* which occurred in the old section (r).

"Jointly."—(1) *B* and *C* simultaneously assault *A* in pursuance of a conspiracy *A* may sue *B* and *C* in one suit for damages: see *Varajlal v. Ramdat* (1902) 26 Bom. 259, 264. Cf. *O'Keefe v. Walsh* [1903] 2 I. R. 681.

(2) *A* obtains a lease of certain lands from *B* (landlord), and enters into possession of the lands. *B* then lets the land in separate portions to *C*, *D* and *E*. Subsequently *B*, *C*, *D* and *E* forcibly dispossess *A* of the land. *A* may sue *B*, *C*, *D* and *E* in one suit for ejectment. The plaintiff being entitled to claim possession of the land *as a whole*, the mere fact that *C*, *D* and *E* hold *specific and distinct* portions of the land under *different* demises from *B*, does not make the suit bad for misjoinder of defendants: *Nundo v. Banomali* (1912) 29 Cal. 871; *Raghunath v. Sarosh* (1899) 23 Bom. 266.

(3) *Walters v. Green* [1899] 2 Ch. 696, given as ill. (4) in the notes to O. 1, r. 1, under the head "New Rule," p. 337 above, is also an illustration under this head.

Joint wrong-doers.—Joint tort-feasors may be sued jointly or severally. Thus where more persons than one are concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his option. But if the person wronged elects to sue only one of several joint tort-feasors, he cannot afterwards bring a suit against the rest even though the judgment may remain unsatisfied (s).

(n) (1918) 45 Cal. 111, 124-125 *supra*.
(o) *Sri Raja Simhadri v. Prattipati* (1906) 29 Mad. 29.

(p) *The Bombay-Persia Steam Company v. Shephard* (1888) 12 Bom. 237.

(q) *North W. P. Club v. Sadullah* (1898) 20 All. 497.

(r) See *Hannay & Co. v. Smurthwaite* [1893]

2 Q. B. 412; *Viscount Gort v. Rowney* (1886) 17 Q. B. D. 625, 635; *Universities of Oxford and Cambridge v. George Gill and Sons* [1899] 1 Ch. 5.

(s) *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 551; *Rahimubhoy v. Turner* (1890) 14 Bom. 416.

"Severally."—(1) Certain property held by *A* is sold under the Madras Rent-Recovery Act in separate lots for arrears of rent, and purchased by *B*, *C* and *D* respectively. *A* sues *B*, *C* and *D* to set aside the sale on the ground that proper notice of sale was not given. The suit is not bad for misjoinder of defendants, merely because the property was sold to *different purchasers*. "The proceeding under which the various items [of the property] were sold was *one*, and the *ground* upon which the validity of the sale was impugned is the *same* in each case" (*t*). To use the words of the present rule, the right to relief claimed is in respect of *the same act or series of acts*, and there is a *common question of fact and law*. O. 1, r. 3.

(2) A suit is brought by a reversionary heir, on the death of a Hindu widow, to recover from *A*, *B* and *C* three separate properties sold by the widow to *A*, *B* and *C* respectively by three separate deeds of sale, on the ground that the sales were made without legal necessity. According to the Madras decisions the suit is not bad for misjoinder (*u*); according to the Bombay and Allahabad decisions, it is (*v*). These were decisions under the old section. The question under the present rule would be whether if separate suits were brought against *A*, *B* and *C*, any *common question* of law or fact would arise. In a recent case under the old Code similar to the one above their Lordships of the Privy Council said: "Their Lordships think it is at least very doubtful whether, upon the strictest construction to be placed upon the Procedure Code, it can properly be said that there was any misjoinder in this case" (*w*). In a case under the new Code, where the suit was brought by a reversioner claiming a third share of the estate against another reversioner who was in possession of some of the property, and against three other persons two of whom were purchasers and one a mortgagee from the widow, it was held by the Allahabad High Court that under the new Code in any event it was not a case of misjoinder of defendants (*x*).

"In the alternative."—(1) *A* executes a lease of his land to *B* for a period of two years. At the end of the first year *A* sells the land to *C*. *C* demands rent for the second year from *B*. *B* alleges payment of the whole rent for two years to *A* in advance. *C* may sue *A* and *B*, praying for a decree against *A*, if it be found that *B* paid the rent to *A* as alleged, or, in the alternative, against *B*, if it be found that *B* did not pay the rent to *A*: *Madan Mohun v. Holloway* (1886) 12 Cal. 555; *Mowji v. Kuverji* (1907) 31 Bom. 516.

(2) *A* purchases certain land from *B*, and enters into possession. Subsequently *ho* is dispossessed by *C* who claims to be the owner of the land. *A* may sue *B* and *C*, praying for a decree against *B* for a refund of the purchase-money if it is found that *C* is the owner, or a decree, in the alternative, against *C* for possession if it is found that *C* is not the owner: *Serajul Huq v. Abdul Rahman* (1902) 29 Cal. 257.

(3) *A*, alleging that his agent *B* lent Rs. 1,000 to *C*, and that *C* had denied receipt of the money from *B*, sues *B* and *C*, praying for a decree against *B*, if it is found that the amount was not paid to *C*, or, in the alternative, against *C* if it is found that the amount was paid to him. The suit is properly framed, for the "transaction" in respect of which the relief is claimed is the same: *Meyappa v. Periannan* (1906) 29 Mad. 50; *Arnnabhella v. Venkataswami* (1884) 7 Mad. 123.

(4) *A* mortgages his property to *B*. *B* assigns the mortgage to *C* who gives notice of the assignment to *A*, and demands payment from *A* of the amount secured by the mortgage. *A* says he paid Rs. 200, part of the mortgage-debt, to *B*, before the

(*t*) *Dorasami v. Mutusamy* (1904) 27 Mad. 94.
 (*u*) *Vasudeva v. Kuleadi* (1874) 7 M. H. C. 290;
Mahomed v. Krishnan (1888) 11 Mad. 106.
 (*v*) *Kaemar v. Bai Rathore* (1883) 7 Bom. 289;
Ganeshi v. Khairati (1894) 16 All. 279.

(*w*) *Lala Rup Narian v. Gopal Devi* (1909) 36 Cal. 780, at p. 798, 36 I. A. 103.
 (*x*) *Bal Krishna Das v. Hira Lal* (1914) 36 Al. 406.

O. 1, r. 3. assignment of the mortgage, and that he is not therefore liable for more than the balance. *B* denies the alleged payment. *C* sues *A* and *B* praying for a mortgage-decree in the first instance against *A* for the whole of the mortgage-debt if the Rs. 200 has not been paid, and in the alternative, if the Rs. 200 have been paid, for a mortgage-decree against *A* for the amount of the mortgage-debt less the Rs. 200 and for a decree against *B* for Rs. 200 by way of damages. The suit is not bad for misjoinder of defendants, for the right to the relief claimed is in respect of the same transaction : *Aiyathurai v. Muhamad Meera* (1908) 31 Mad. 252; *Kovvuri v. Tallapragadha* (1910) 35 Mad. 39. See notes, "New Rule," ill. (4), p. 337 above.

Costs where relief is claimed against defendants in the alternative.—

Where a suit is brought by *A* against *B* and *C* in the alternative, and a decree is passed against *B* with costs, but the suit as against *C* is dismissed, the Court has jurisdiction in a proper case to order *B* (the unsuccessful defendant) to pay in addition to the costs payable by him to *A* (the plaintiff) the costs of *C* (the successful defendant). The rule has thus been stated by Vaughan Williams, L.J. : "The proper way is—do not join any defendant unreasonably; if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame" (*y*). In *Child v. Stenning* (*z*), Jessel, M.R., dealing with a similar question said : "It appears to me on principle that he who was the person who caused the litigation, or whose error or representation caused it, ought to be the person to pay the costs of it."

A, representing that he is *B*'s agent, enters into a contract with *C* on *B*'s behalf. *C* demands performance of the contract from *B*. *B* denies that he employed *A* as his agent and refuses to perform the contract. *C* sues *A* and *B* for damages and claims relief against them in the alternative. The Court finds that *A* untruly represented himself to be *B*'s agent. A decree is passed against *A* for damages, but the suit against *B* is dismissed with costs. If the Court is of opinion that *C* reasonably (*a*) took proceedings against *B*, the Court may direct the costs payable by *C* to *B* to be included in the damages payable by *A* to *C* (*b*).

Appeal.—An appeal lies under cl. 15 of the Letters Patent from an order refusing to allow the plaintiff to proceed in one suit against several defendants on the ground of misjoinder and giving time to the plaintiff to elect against which of the defendants he would proceed. Such an order is a "judgment" within the meaning of cl. 15, for it is in substance a decision that the suit will not lie as framed, with the result that if the plaintiff insists on his alleged rights, the suit will be dismissed (*c*).

Court may give judgment for or against one or more of joint parties.

4. [Ss. 26, 28.] Judgment may be given without any amendment—

(*a*) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to ;

(*y*) *Besterman v. British Motor Cab Co. Ltd.* [1914] 3 K. B. 181, 187; *Bullock v. The London General Omnibus Co.* [1907] 1 K. B. 264; *Sanderson v. Blyth Theatre Co.* [1903] 2 K. B. 533.
(*z*) (1879) 11 Ch. D. 82, 86.
(*a*) See *Pow v. Davis* (1861) 1 B. & S. 220; 124

R. R. 530.
(*b*) *Spedding v. Nevell* (1869) L. R. 4 C. P. 12; *Hughes v. Greame* (1864) 33 L. J. Q. B. 335. See Contract Act, 1872, s. 235.
(*c*) *Ramendra Nath v. Brajendra Nath* (1918) 45 Cal. 111.

- (b) against such one or more of the defendants, as may be found to be liable, according to their respective liabilities. O. 1, rr. 4-6.

Cl. (a) of this rule is to be read with rule 1 above, and cl. (b) with rule 3 above.

5. [New. R. S.C., O. 16, r. 5.] It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

Defendant need not be interested in all the relief claimed.

This rule is to be read with rule 3 above. It provides in effect that where a suit is brought against several defendants, the mere fact that every defendant is not interested in all the relief claimed in the suit is no ground for objection that the suit is bad for misjoinder of defendants. See notes to rule 3 above, and cases under the head "In the alternative," on p. 343 above.

6. [S. 29, R. S., C. O. 16, r. 6.] The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract.

Several liability on a contract.—This rule is confined to suits on contracts. The liability on a contract may be either (1) several, or (2) joint and several, or (3) joint. *A and B, each for himself, agrees to pay Rs. 5,000 to C. Here A and B are severally liable on the contract. C may therefore bring one suit against A and B, or he may bring a separate suit against A and a separate suit against B. These suits may be brought simultaneously, or they may be brought successively one after the other. But if the suit is brought against A, and a decree is obtained against him, and the decree is satisfied, C cannot subsequently sue B on the bond. But if the decree remains unsatisfied, he (C) is not precluded from suing B.*

Joint and several liability on a contract.—The legal consequences of a joint and several liability on a contract are the same as those of several liability. Thus if A and B pass a bond to C for Rs. 5,000, and the bond provides that A and B should jointly and severally pay the amount to C, C may sue A and B jointly, or he may sue them separately, as in the case where the liability is several.

Joint liability on a contract.—The present rule does not provide for the case of a joint liability arising on a contract or negotiable instrument. The reason is that so far as liability on a contract is concerned, s. 43 of the Indian Contract Act, 1872, makes all joint contracts joint and several. It allows a promisee to sue one or more of several joint promisors as he chooses, and excludes the right of a joint promisor to be sued along with his co-promisors (d). A partnership firm consisting of two persons, A and B, purchases from C goods worth Rs. 5,000. The liability of partners is joint,

d) *Hemendro v. Rajendrolall* (1878) 8 Cal. 353, 360; *Lakmidas v. Purshotamdas* (1882) 6 Bom. 700, 701; *Dick v. Dhunji* (1901) 25 Bom. 378, 386; *Motilal v. Ghellabhai* (1892)

17 Bom. 6, 11; *Muhammad v. Radha Ram* (1900) 22 All. 307, 315; *Narayana v. Lakshmana* (1897) 21 Mad. 256.

O. 1,
rr. 6, 7.

and *A* and *B* are therefore jointly liable to pay the price to *C*. But under s. 43 of the Contract Act *C* may sue either *A* or *B* at his option. It is not incumbent upon *C* to make both *A* and *B* defendants. If *C* sues *A* alone, and a decree is passed against *A*, he cannot, according to English law, afterwards sue *B*, though the decree against *A* may remain unsatisfied. The reason is that there is in the case of a joint contract a single cause of action which can only be once sued on. The same view has been taken by the High Courts of Calcutta, Madras and Bombay. On the other hand, it has been held by the High Court of Allahabad, that the effect of s. 43 of the Indian Contract Act, 1872, is to make all joint contracts joint and several. Therefore, where *C* obtained a judgment against *A* upon a joint bond executed by *A* and *B*, and the judgment remaining unsatisfied, he sued *B* for the same money, it was held by the Allahabad Court that the suit against *B* was not barred. See Pollock and Mulla's Indian Contract Act, notes to s. 43, under the head "Effect of decree against some only of joint promisors."

It may be added here that if in the case put above *C* sues *A* alone, *A* may apply under O. 1, r. 10 (2), to have *B* joined as a defendant, and the Court may make such order as it thinks proper. In England it has been held that in an action on a joint contract against one only of the joint contractors the Court has jurisdiction, without obtaining the consent of the plaintiff, to make an order requiring the plaintiff to add the other joint contractor as a co-defendant, and that where the defendant has set up a reasonable case of joint contract, he has, in the absence of special circumstances showing that it should not be made, a *prima facie* right to an order requiring the plaintiff to add that person as a co-defendant (e).

"Parties to bills of exchange."—*A* draws a bill of exchange upon *B* payable to *C* or order. The bill is accepted by *B*. *C* then endorses the bill to *D*, *D* endorses it to *E*, and *E* to *F*. If the bill, while in the hands of *F*, is dishonoured, *F* may at his option sue *A* (the drawer), or *B* (the acceptor), or *C* (the endorser), or *D* (the endorser), or *E* (the endorser), or *F* may bring one action against all or any of them (f).

7. [New. R. S. C., O. 16, r. 7.] Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

When plaintiff in doubt
from whom redress is to be
sought.

Scope of the rule.—This rule applies only where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress. It does not enable a plaintiff to join separate causes of action against different defendants in one action in a case where he could not do so under r. 3 above (g). Thus if damage is caused to *A*'s house, and he is in doubt as to whether it was caused by excavation works carried on by a County Council or by a Water Company allowing water from its mains to weaken the soil in front of the house, *A* cannot join the Council and the Company in one action, for these are two distinct torts. It does not matter that the resulting damage is the same in each case; for it is not the damage that constitutes the cause of action, but the *injuria* or the wrong done by a tort-feasor (h). In such a case the present rule does not apply. The

(e) *Norbury Natio & Co. v. Griffiths* [1918] 2 K. B. 369.

(f) *Pestonjee v. Mirza* (1878) 3 Cal. 541.

(g) *Thompson v. London County Council* [1899] 1 Q. B. 840, 844.

(h) *Frankenburg v. Great Horseless Carriage Co.* [1900] 1 Q. B. 504, 510, explaining *Thompson v. London County Council* [1899] 1 Q. B. 840.

following, however, is a case to which the rule has been held to apply. *M*, purporting to act as agent for *C*, enters into a charter-party with *B* for loading *B*'s vessel with a cargo. The cargo is not loaded, and *B* sues *M* for damages, alleging that *M* had no authority to enter into the charter-party as agent for *C*. Subsequently *B* finds, upon discovery of documents, that it is probable that *C* did give authority to *M* to bind him [*C*] with the charter-party, and applies to add *C* as a defendant. The case is one within this rule and *C* may be added as a defendant (*i*).

O. 1,
rr 7, 8.

Costs where relief is claimed against defendants in the alternative.—

See notes to O. 1, r. 3, under the same head on p. 344 above.

8. [S. 30 ; S. 32, fourth para. Cf. R. S. C., O. 16, r. 9.]

One person may sue or defend on behalf of all in same interest.

(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defend under sub-rule (1) may apply to the Court to be made a party to such suit.

Object of the rule.—This rule is an exception to the general rule that *all* persons interested in a suit ought to be made parties thereto (*j*). Convenience requires that, in suits where there is a community of interest amongst a large number of persons, a few should be allowed to represent the whole (*k*), so that trouble and expense may be saved (*l*).

Application of the rule.—The provisions of this rule apply only if (1) the parties are *numerous*, (2) they have the *same interest*, and (3) the necessary *permission* is obtained and notice given.

“Numerous parties.”—Where the number of defendants was thirty it was held to be numerous (*m*). It has been held by the High Court of Madras that a suit cannot be brought under this rule on behalf of the *general public* (*n*). Following this decision the High Court of Calcutta held in an earlier case that this rule did not apply unless the parties were capable of being *ascertained*, and a suit could not therefore be brought under this rule on behalf of the *Hindu community*, as “the whole Hindu community is *incapable of ascertainment*” (*o*). This decision was dissented from by the same

(i) *Bennetts & Co., v. McLivraith & Co.* [1896] 2 Q. B. 464.

(j) *Chudaseema v. Partasang* (1904) 28 Bom. 214.

(k) *Srikhandi v. Indupuram* (1866) 3 Mad. H. C. 226.

Hirelal v. Bhairon (1883) 5 All. 602; *Srinivasa v. Raghava* (1900) 23 Mad. 28.

(m) *Andrews v. Salmon* (1888) W. N. 102. [Eng.]

(n) *Adamson v. Arumugam* (1886) 9 Mad. 463.

(o) *Sajedur Raja v. Baidyanath* (1893) 20 Cal. 397.

- O. 1, r. 8. Court in a later case, where it was held that it was not necessary to the application of this rule that the parties should be capable of being ascertained (p).

"Same interest."—It is essential that the parties should have the *same* interest in the suit. Thus where there are numerous legatees under a will, any one legatee may sue the executors on behalf of himself and the other legatees for a discovery of the estate of the deceased come into their hands, as they have all the same interest in having the will proved (q). Similarly, where a person dies leaving numerous creditors, any one creditor may sue on behalf of himself and the other creditors, as they all have the same interest in making out the estate of the deceased as large as possible (r). On the same principle of the community of interest, any one *rayat* of a village may sue the proprietor of the village for himself and the other *rayats* for a declaration as against the proprietor of their general rights (s). Likewise, any one tax-payer may bring a suit against a Municipality on behalf of himself and the other tax-payers to restrain the Municipality from misapplying its funds (t).

In *Templeton v. Russell* (u), a case under the corresponding English rule, it was held that the rule *only* applies to persons who have or claim *some beneficial proprietary right* which they are asserting or defending in the suit. But this meaning of the word "interest" was disapproved by the House of Lords in *Bedford (Duke of) v. Ellis* (v). In the last-mentioned case Lord Macnaghten said: "It seems to me that there is no reason whatever for so restricting the rule. . . . Given a common interest and a common grievance a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a *beneficial proprietary interest* would be opposed to precedent, and not, I think, in accordance with common sense. Take the case of a creditors' suit which perhaps was the earliest instance of plaintiffs being allowed to sue in a representative character. It can hardly be suggested that a creditor has a *proprietary interest* in the real or personal estate of his deceased debtor." Thus the disciples of a mutt have sufficient "interest" within the meaning of this rule to maintain a representative suit to declare alienations made by the mahant invalid and have the property alienated handed over to the Mahant (w).

The expression "same interest" should be distinguished from the expression "same transaction." What is required under this rule is that the parties should have the *same interest*; it is not sufficient that their interests arise from the *same transaction*. Therefore, where goods of several persons are shipped under separate bills of lading, the mere fact that the goods of all the persons are lost by the same cause does not entitle any one or more of them to bring a representative suit on behalf of themselves and others against the owner of the ship (x). But they may all join in one suit under O. 1, r. 1.

When a caste is divided into two parties, one party being in favour of instituting a suit [e. g., a suit for accounts against the treasurer], and the other consisting of a fairly good number being against it, it is not permissible to any member of the party favouring the suit to institute a suit under this rule *on behalf of himself and all other members of the caste*. The reason is that it cannot be said in such a case that all the members have the *same interest* (y).

(p) *Monmotho Nath v. Harish Chandra* (1906) 33 Cal. 905, 910-912.

(q) *Geesebaila v. Chunder Kunt* (1885) 11 Cal. 213.

(r) *The Oriental Bank Corporation v. Gobind* (1883) 9 Cal. 604; *Ebrahimhai v. Fulbai* (1902) 26 Bom. 577.

(s) *Ahmedbhai v. Balkrishna* (1895) 19 Bom. 391.

(t) *Vaman v. Municipality of Sholapur* (1898) 22 Bom. 646.

(u) [1893] 1. Q. B. 435.

(v) [1901] A. C. 1, 8.

(w) *Chidambaranatha v. Nallasiva* (1918) 41 Mad. 124.

(x) *Markt & Co. v. Knight Steamship Co.* [1910] 2 K. B. 1021.

(y) *Harkisandas v. Chhaganlal* (1916) 40 Bom. 158.

Different interests.—Where, however, the parties have not a common interest, they must all be on the record; thus it is a recognized principle that in a partition suit all co-parceners must be brought before the Court (z). Similarly in a suit for contribution brought by a promisor, all the promisors bound to contribute must be brought before the Court (a).

Where the plaintiff represents an association or group of persons.—Where the plaintiff fills a representative character, the provisions of this rule may be availed of. Thus the secretary of an association cannot sue alone in respect of a matter in which the association is interested even if he is authorised so to do by a resolution of the members of the association. The suit must be brought by all the members of the association, or by the secretary on his own behalf *and on behalf of the other members* under this rule (b). So, if the treasurer of an association misappropriates the funds of the association, no one member can sue alone to recover the amount misappropriated, though he may be authorised so to do by a resolution of the association. The suit must be brought by all the members, or by any one member on his own behalf *and on behalf of the other members* (c). But no suit can be brought under this rule if the association is divided into two parties, one party being for the suit and the other against it. In such a case it cannot be said that the two parties have the same interest in the suit "within the meaning of this rule (d).

Fraudulent transfer.—A suit to set aside a deed of gift or of trust on the ground that it is in fraud of creditors must be brought by or on behalf of all the creditors. Such a suit cannot be entertained if it is brought by only some of the creditors (e).

Suit by a member of a community in his own right.—This rule is an enabling rule. It does not debar a member of a community from maintaining a suit in his own right, though the act complained of is injurious to the whole community. Thus, if Mahomedans belonging to a particular sect are not allowed to use a mosque for prayer, any member of the sect entitled to use the mosque may sue as plaintiff to enforce the right. It is not necessary that the suit should be brought by him on behalf of himself and *all other members* of the sect entitled to use the mosque. Similarly, any member of a community may bring a suit to set aside unauthorized alienations of endowed property or of property belonging to the community, or for the removal of encroachments upon such property (f), or for maladministration of property belonging to the community (g).

At what stage of the suit leave should be obtained.—The proper course is to obtain permission before the suit is instituted, but there is nothing in the rule that if it is not so done, it cannot be granted afterwards. Permission under this rule may therefore be granted even *after* the institution of the suit (h).

Whether the leave should be express.—It has been held by the High Court of Calcutta that the leave to sue need not be express: it is enough if it can be

(z) *Kalikanta v. Gouri* (1890) 17 Cal. 906; *Sadu v. Ram* (1892) 16 Bom. 608.
(a) *Ibn Husain v. Ramdas* (1890) 12 All. 110.
(b) *Muhammadian Association v. Bakshi* (1884) 6 All. 284.
(c) *Mahomed v. Husen* (1898) 22 Bom. 729.
(d) *Harkisandas v. Chhaganlal* (1916) 40 Bom. 158, 163.
(e) *Burfoji v. Dhunbat* (1892) 16 Bom. 1; *Ishwar v. Datar* (1903) 27 Bom. 140; *Chatterput v. Maharaj Bahadur* (1905) 32 Cal. 198; *Hakim Lal v. Mooshahar Sahu* (1907) 34 Cal. 999.
(f) *Zafaryab Ali v. Bakhtawar Singh* (1888) 5 All. 497; *Jawahra v. Akbar Hussain* (1886)

7 All. 178; *Gulba v. Basanta* (1910) 32 All. 284; *Dasodhay v. Muhammad* (1914), 33 All. 600; *Ram Chandra v. Ak* (1913) 35 All. 197; *Baiju Lal v. Balak Lal* (1897) 24 Cal. 385; *Mohiuddin v. Sayiduddin* (1893) 20 Cal. 810.
(g) *Thackersey v. Hurbhum* (1884) 8 Bom. 432, 450.
(h) *Fernandez v. Rodrigues* (1897) 21 Bom. 784; *Srimvasa v. Raghava* (1900) 23 Mad. 28; *Chennu v. Krishnan* (1902) 25 Mad. 399; *Baldeo v. Bir Gir* (1900) 22 All. 269. *Ahmed Ali v. Abdul Majid* (1916) 44 Cal. 258, dissenting from *Oriental Bank v. Gobind* (1888) 9 Cal. 604.

O. 1, r. 8. gathered from the proceedings (i). On the other hand, there is a *dictum* of Stuart, C.J., in the Allahabad case of *Hiralal v Bhairon* (j), that the leave to sue must be express.

Leave must be granted to definitely named persons.—Where this was not done, the suit was dismissed by the High Court of Calcutta (k). The other Courts would probably grant fresh leave in such a case. See notes above, "At what stage, of the suit, etc."

"May be sued."—This rule applies not only to the case of numerous plaintiffs having the same interest, but also to the case of numerous defendants having the same interest. Thus where the inhabitants of a village assert a right of way over land belonging to the plaintiff, the plaintiff may, with the permission of the Court, sue any one or more of the inhabitants on behalf of them all (l). The consent of the defendants on the record is not necessary for this purpose (m).

"May defend."—When there are numerous defendants having the same interest, any one of them "may be sued" on his behalf and on behalf of others. But where this is not done, and all the defendants are on the record, any one defendant "may defend" the suit on behalf of himself and the rest with the permission of the Court.

Who should apply for permission.—(1) Where a plaintiff intends to sue on behalf of himself and others, it is the plaintiff that should apply for the permission. (2) Similarly where a plaintiff intends to sue one defendant for himself and others, it is the plaintiff that should apply for the permission. (3) Where numerous defendants having the same interest are all sued, and they are all on the record, and if any one defendant is appointed by the other defendants to defend the suit on behalf of all, it is that defendant that has to apply for the permission.

Notice and the object of it.—Where a person sues, or is sued, or defends, a suit, on behalf of himself and others, any decree that may be passed in the suit is binding upon them all (s. 11, Explanation VI), unless the decree has been obtained by fraud or collusion (Evidence Act, 1872, s. 44). It is therefore necessary that notice of the suit should be given to all the parties who would be bound by the decree, for otherwise a person might be concluded by a suit of which he never may have heard. It is, however, open to any one of the parties, whose name does not stand on the record and who would be bound by the decree under the provisions of this rule and sec. 11, to apply to the Court under sub-rule (2) to be made a party to the suit, and the Court will add him as a party, *provided* he satisfies the Court that his interest will be seriously prejudiced if he is not joined as a party (n).

Court shall give notice by personal service or by public advertisement.—These words show that it is the *duty of the Court* to cause service of the notice or cause an advertisement to be published. It is the duty of the plaintiff, however, to move the Court for that purpose. But if he omits to do so, his suit should not be dismissed on account of the failure of the Court to perform the duties imposed upon it by this rule (o).

Title of suit.—The title of the suit in such cases is as follows [see Appendix A, Pleadings, (1) Titles of suits]:—

A, B, on behalf of himself and all other creditors of X. Y. 	} Plaintiff.
vs.	
C. D. 	} Defendant.

(i) *Dhunput v. Pareesh* (1894) 21 Cal. 180; *Kalu v. Janmean* (1902) 29 Cal. 100.

(j) (1883) 5 All. 602.

(k) *Kali Kanta v. Gouri Prosad* (1890) 17 Cal. 906. But see (1916) 44 Cal. 268.

(l) *Chuni Lal v. Ramkisen* (1888) 15 Cal. 490.

(m) *Ambalam v. Bartle* (1911) 36 Mad. 418, 425.

(n) *Vasonji v. Bmailohai* (1909) 34 Bom. 420.

(o) *Mukh Lal Singh v. Jagdeo Tewari* (1908) 35 Cal. 1021.

Decree in a representative suit.—The general rule of law is that in suits where one person is allowed to represent others as defendants in a representative capacity, any decree passed can bind those others only with respect to the *property* of those others which he can in law represent, and no *personal* decree can be passed against them, although the party on record *eo nomine* may be made personally liable. This is the principle to be applied to suits to which O. 1, r. 8, is applicable (p). It has consequently been held that an injunction in a decree in this class of cases is not binding on those who are not actually parties on the record (q).

Costs in a representative suit.—As to costs in a representative suit, see the observations of Marton, J., in the undermentioned case (r).

Abatement of suit.—Where a suit is brought under this rule by A on behalf of himself and 29 others, two of whom are C and D who never applied to the Court to be made parties under sub-r. (2), the death of C or D does not cause the suit to abate (s).

9. [S. 31, R. S. C., O. 16, r. 11.] No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Misjoinder and non-joinder.

Misjoinder r non-joinder of parties.—A misjoinder or non-joinder of parties is not fatal to the suit (t). Where there is a *misjoinder* of parties, the name of the plaintiff or the defendant who has been improperly joined, may be struck out under r. 10, sub-r. (2) below, and where there is a non-joinder of persons who are necessary parties to the suit, they may be added as parties under the same rule.

As to the stage at which objections as to misjoinder or non-joinder of parties should be taken, see r. 13 below.

Limitation.—This rule should be read subject to the provisions of s. 22 of the Limitation Act, 1908 (u). It is provided by that section that where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards time, be deemed to have been instituted when he was so made a party.

10. [Ss. 27, 32, 33, R. S. C., O. 16, rr. 2, 11, 39.] (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

Suit in name of wrong plaintiff.

(p) *Sahib Thambi v. Hamid* (1911) 36 Mad. 414.

(q) *Sadagopa Chari v. Krishnamachari* (1889) 12 Mad. 358; *Srinivasa v. Araya* (1910) 33 Mad. 483.

(r) *Bhicoobai v. Hariba* (1918) 42 Bom. 556, 570-578.

(s) *Ram Dyal v. Mohammad* (1919) Punj. Rec.

no. 46, p. 115.

(t) *Janokinath v. Ramrunjun* (1879) 4 Cal. 949; *Diwan Shib Nath v. Alliance Bank of Simla, Ltd.* (1915) Punj. Rec. no. 3, p. 10.

(u) See *Girwar v. Mamt. Makbunessa* (1916) Pat. L. J. 468 [a case under O. 34, r. 1].

O. 1, r. 10. (2) The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary; and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

SUB-RULE (1).

Sub-rule (1) is the equivalent of s. 27 of the Code of 1882. It corresponds to R. S. C., O. 16, r. 2.

Scope of sub-rule (1).—Sub-rule (1) contemplates cases in which a suit is brought by a plaintiff, and he subsequently finds out that he cannot get the full relief he seeks without joining some other person as co-plaintiff (v), or, where it is found that some other person, and not the original plaintiff, is entitled to the relief claimed. In the former case, the application (which must be made by the original plaintiff) will be for *adding*, and in the latter for *substituting* that other person as plaintiff. But the Court must be satisfied before the application is granted that the amendment has become necessary through a *bona fide* mistake on the part of the original plaintiff. The mistake may be either one of fact (w) or of law (x). Where the Court of first instance takes one view of the law and the Court of Appeal takes another, that in itself is evidence of a *bona fide* mistake (y).

(v) *Ayscough v. Bullar* (1889) 41 C. D. 341.

(w) *Duckett v. Gover* (1877) 6 C. D. 82. See *Maharaja Kesho Prasad v. Lal Brij Mohan Lal* (1917) 2 Pat. 199, where there was no mistake

at all.

(x) *Hughes v. Pump House Hotel Co.* [1902] 2 K. B. 485.

(y) [1902] K. B. 485, at p. 486. *supra*.

Cases in which amendment has been allowed.—(1) The Official Assignee O. 1, r. 10. of Madras constitutes A. B., Official Assignee of Bombay, his attorney to institute a suit on his behalf in Bombay. * A. B., instead of suing as “constituted attorney of the Official Assignee of Madras,” sues by mistake as “Official Assignee of Bombay.” The plaint may be amended under sub-rule (1) by substituting the former description for the latter: *Sardarmal v. Arandayal* (1897) 21 Bom. 205.

(2) A Hindu appoints A guardian of the property of his minor son under his will. There is no executor appointed under the will. A, believing that his appointment as guardian has the effect of constituting him executor of the will by implication, sues B to recover certain property belonging to the estate of the deceased. The Court finds that A is not executor by implication. The plaint may be amended by substituting the son as plaintiff: *Seshamma v. Chennappa* (1897) 20 Mad. 467. [In this case the amendment was allowed in second appeal.]

(3) A sues B for work done under a contract. B contends that the contract has been assigned by A to C, and A therefore has no right to sue. A admits the assignment, but says that the assignment is not absolute but by way of charge only, and that he has therefore a right to sue. It is found that the assignment to C is absolute and that there was a *bona fide* mistake on the part of A in believing that the assignment was by way of charge only. The plaint may be amended by substituting C as plaintiff: *Hughes v. Pump House Hotel Co.* [1902] 2 K. B. 485.

In the last-mentioned case, B objected to the amendment on the ground that, it having been found that the assignment was an absolute one, A had *no cause of action* at the time the action was brought, but the objection was overruled. Cozens-Hardy, L.J., said: “It is said that the rule does not apply when it is shown that the plaintiff has *no right of action*, but there are abundant authorities to the contrary effect.” The cases cited in the judgment in that case clearly show that the plaint would have been allowed to be amended, if that was the application, by *adding C* as plaintiff. This interpretation of O. 16, r. 2, of the English Rules, which corresponds in wording with sub-rule (1) of this rule, would seem to be opposed to the view taken by the High Court of Bombay. It would seem that the Bombay Court would not allow an amendment if the original plaintiff had *no right of action* at the time the suit was brought (z). But this view, it is submitted, is not correct, and one of the cases cited by that Court in support of its view affirms the contrary (a). In a recent case, the High Court of Madras expressly held that the fact that the original plaintiff has *no cause of action* does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff (b).

Cases in which amendment not allowed.—It would seem that no amendment should be allowed under sub-rule (1), if the rights in dispute between the *new plaintiff* and the defendant would not be the same as those in dispute between the *original plaintiff* and the defendant. A suit is brought by an importer of “Roskopf Patent” watches for infringement of trade-mark, alleging that he has got the *exclusive right to use* the trade-mark in India. The trade-mark belongs to the manufacturer, and *not to the importer*. The importer is subsequently advised that he cannot sue on the *manufacturer's* trade-mark, and he thereupon applies that the manufacturer may be either added or substituted as plaintiff. If the manufacturer is made a party, his claim will raise questions as to how far he is entitled to the trade-mark in the *country of its origin*, and

(z) *Bhanu v. Kashinath* (1896) 20 Bom. 537; *Savaj Abdul v. Gulam* (1896) 20 Bom. 677. (b) *Krishna Bot v. The Collector and Government Agent, Tanjore* (1907) 30 Mad. 419.
(a) See *Chindhar v. Gocool* (1881) 6 Cal. 370, 373.

O. 1, r. 10. consequently in India. That would be a case wholly different from that of the importer. Can the manufacturer be made a party under these circumstances? The question arose in a Bombay case (c). Batty, J., said that the point was one on which there seemed to be considerable room for doubt. Eventually the application was refused on the ground that it was made too late.

Upon such terms as the Court thinks fit.—Liberty to amend may be given upon the terms that the plaintiff should pay to the defendant his costs of the suit upto and including the order of amendment, and that the new plaintiff should only be entitled to such relief as he could have claimed if the suit had been commenced at the date on which he was added as a party (d).

Consent.—No person can be added or substituted as plaintiff under sub-rule (1) without his consent. Thus a company cannot be made a plaintiff in a suit without its consent (e). See sub-rule (3).

Limitation.—Section 22 of the Limitation Act provides that when after the institution of a suit, a party is *substituted* or *added* as a plaintiff or defendant, the date of *substitution* or *addition* is to be deemed, as regards that party, as the date of institution. It has been held that this provision of the law relates only to the addition of parties under sub-rule (2), and not under sub-rule (1). The result is that a party may be substituted or added under sub-rule (1) even after the period of limitation. Thus where an agent sued in his own name, and subsequently, at a time when a new suit would have been barred by limitation, his principals were substituted as plaintiffs, it was held that the suit being the same, the change of parties did not affect the question of limitation (f).

SUB-RULES (2) to (5).

Sub-rules (2), (3) and (5) correspond to s. 32 of the Code of 1882 and to R. S. C., O 16, r. 11. Sub-rule (4) corresponds to s. 33 of the Code of 1882.

Old section.—Under the old section 32 there was a distinction between the power of the Court to *strike out* parties and the power to *add* parties. Under that section the power to *strike out* parties could only be exercised on the *application* of a party, and that too if the application was made *on or before the first hearing*. But the power to *add* parties could be exercised by the Court *at any time*, and *even without any application*. Under sub-rule (2), the power to *strike out* as well as to *add* parties may be exercised by the Court *at any stage of the proceedings*, and even without any application by a party.

“At any stage of the proceedings.”—The power to strike out or add parties may be exercised *at any stage of the proceedings*. Thus fresh parties were added in one case after a decree had been passed and a reference made to the Commissioner to take accounts and sell the property (g). In another case fresh parties were added *after* a suit had been reinstated under s. 108 of the Code of 1882 [now O. 9, r. 13] (h). In a Calcutta case a fresh party was added in a suit for partition after the preliminary decree had been passed and the Commissioner had made his report, but before the drawing up of the final decree (i). Under the corresponding English rule it has been held that the Court has jurisdiction to allow amendment even after final judgment, *so long as anything remains to be done in the action*, though it be only assessment of damages (j).

(c) *Heinger v. Droz* (1901) 25 Bom. 433, 463-66.
(d) *Ayacough v. Bullar* (1889) 41 Ch. D. 341, 346; *Attorney-General v. Pontypidd Water-works Co.* [1908] 1 Ch. 388.
(e) *Ram Narain v. Ram Kishen* (1911) Punj. Rec.No. 46, p. 165.

(f) *Ravji v. Mahadeo* (1898) 22 Bom. 672.
(g) *Vakatchand v. Advocates-General* (1871) 8. B. H. C. 96.
(h) *Tikam Singh v. Kishore* (1898) 20 All. 188.
(i) *Jotindra v. Bejoy* (1905) 82 Cal. 483.
(j) *The Duke of Buccleuch* [1892] P. 201.

Parties when added.—A person may be added as a party to a suit in the O. 1, r. 10. following two cases only :—

(1) when he *ought* to have been joined as plaintiff or defendant, and is not so joined, or

(2) when, without his presence, the questions in the suit cannot be completely decided.

There is no jurisdiction to add a party in any other case (*k*). Thus a person should not be added as a defendant merely because he would be *incidentally* affected by the judgment (*l*).

Parties cannot be added so as to introduce quite a new cause of action.—*A* purchased goods from *B* by sample. The bulk did not correspond with the sample, and *A* thereupon sued *B* for damages. *B* contended that he had purchased the goods in question from *X* by sample, and applied that *X* should be added as a party to the suit, as the question between him (*B*) and *X* was the same as the question between him (*B*) and *A* (*viz.*, whether the goods were according to the sample), so as to relieve him (*B*) from the necessity of bringing a fresh suit against *X* in the event of the Court holding that the goods were not according to the sample. *Held*, refusing *B*'s application, that *X* was not a person who "ought" to be joined as a party to the suit, nor was his presence necessary to decide "the questions involved in the suit." In this case *A* had nothing to do with *X*, and to add *X* as a party would be to introduce a new cause of action which existed only as between *B* and *X*. The Court would then have to inquire into the circumstances under which *B*'s agreement with *X* was entered into, an inquiry with which *A* had nothing to do (*m*).

Parties cannot be added so as to alter the nature of the suit.—*A* sued for his share of the estate of a deceased relative. On an application to have other persons interested in the said estate added as parties to the suit, it was held that the Court could not add them as parties, as to do so would be to alter the nature of the suit by converting it into a general administration suit (*n*).

A defendant may be made a plaintiff.—*A* brought a partnership suit for accounts against 12 defendants. He then settled with most of the defendants, and applied to the Court for leave to withdraw the suit or that the suit might be dismissed. Two of the defendants objected to the dismissal of the suit, and applied that they might be made plaintiffs, and that the plaintiff might be made a defendant and the suit proceeded with. The Court granted the application (*o*).

Striking out name of party "improperly joined."—The impropriety referred to in this rule is in introducing a party who has no connection with the relief claimed in the plaint (*p*).

"Who ought to have been joined."—Sub-r. (2) provides for the addition of (1) necessary parties and (2) of proper parties. Necessary parties are parties "who ought to have been joined," that is, parties necessary to the constitution of the suit without whom no decree at all can be passed (*q*). Proper parties are those whose presence enables the Court to adjudicate more "effectually and completely" (*r*) see next paragraph].

(*k*) *McCleane v. Gyles* (No. 2) [1902] 1 Ch. 911, 918.

(*l*) *Moore v. Marsden* [1892] 1 Ch. 487.

(*m*) *Mahomed Badsha v. Nicol* (1879) 4 Cal. 355; *Raleigh v. Goschen* [1898] 1 Ch. 73, 81.

(*n*) *Oh Ling Tee v. Awkinifoo* (1868) 10 W. R. 86; *Hingu Lal v. Baldeo Ram* (1902) 24 All. 553, 555.

(*o*) *Edujee v. Vullebhoy* (1883) 7 Bom. 187.

(*p*) *Rama Rao v. The Raja of Piltapur* (1918) 42 Mad. 219, 225.

(*q*) *Kishan Prasad v. Har Narain Singh* (1911) 33 All. 272, 276 [P. C.]; *Shahasaheb v. Sadashiv* (1919) 43 Bom. 575, 581.

(*r*) (1919) 43 Bom. 575, 581, *supra*; *Guruvayya v. Anant* (1904) 28 Bom. 11, 17.

O. 1, r. 10. Thus all co-sharers are necessary parties to a suit for partition and they should all be joined as parties to the suit. Similarly, in a suit to recover trust property, all the trustees must be joined as parties [O. 31, r. 2]. But the Official Assignee is not a necessary party in a suit against an insolvent (s) [see O. 22, r. 10, notes "Assignment of interest," ills. (3) and (4)]. In a suit to set aside an order for rateable distribution all persons interested in the distribution must be parties to the suit (t); see s. 73. See notes below, "Limitation Act."

"Whose presence before the Court may be necessary."—A person may be added as a defendant to a suit, though no relief may be claimed against him, provided his presence is necessary for a complete and final decision of the questions involved in the suit (u). Such a person is called a *proper* party as distinguished from a *necessary* party. Thus if a suit is brought by a legatee against an executor for a legacy, but the estate is not sufficient to pay all the legacies in full, the executor may apply under sub-rule (2) that the other legatees may be made parties, so that if any rateable abatement is requisite, the extent of such abatement may be ascertained in a manner binding on all the legatees (v). See notes above, "Who ought to have been joined."

"Questions involved in the suit."—This refers to questions as between plaintiffs and defendants, and not to questions which may arise between co-plaintiffs or between co-defendants *inter se* (w).

Improper addition of plaintiff or defendant.—Sub-rule (2) does not enable a Court to override the effect of O. 2, r. 3. Hence if the joinder of a person as plaintiff would result in a *misjoinder of plaintiffs and causes of action*, or the joinder of a person as defendant would result in a *misjoinder of defendants and causes of action*, the application should be refused (x).

Joint contractors.—See notes to O. 1, r. 6, "Joint liability on a contract."

Consent of person added as plaintiffs.—If any person who ought to have been joined as plaintiff does not consent to join as plaintiff, he may be made a defendant in the suit. The proper course is first to require him to join as plaintiff, and if he refuses to join as plaintiff, then to join him as defendant. But the suit should not be dismissed merely because he is joined as defendant without being first called upon to join as plaintiff (y).

Limitation Act, sec. 22, provides amongst other things that when, after the institution of a suit, a party is added as a plaintiff or defendant, the date of addition is to be considered as regards that party as the date of the institution of the suit. It has been held under this section that where necessary parties are not joined within the period of limitation, the suit must be dismissed. Necessary parties mean parties necessary to the constitution of the suit (z), that is, persons whose joinder is necessary to enable the court to award such relief as may be given in the suit as framed (a). Thus in a suit by one of several joint promisees the other promisees are necessary parties for no relief can be given to one of them. The suit is not perfectly constituted unless all the co-promisees join, for the plaintiff can only enforce his claim in conjunction with them. If in such a suit the other promisees are not joined within the period of limitation, the

(s) *Chandmull v. Ranees* (1895) 22 Cal. 259.
 (t) *Gowri Prasad v. Ram Ratan* (1886) 13 Cal. 155.
 (u) *Kashi v. Sudashiv* (1897) 21 Bom. 229.
 (v) *Purehottam v. Kala* (1902) 26 Bom. 301.
 (w) *Har Narain v. Kharag* (1887) 9 All. 447; *Vithu v. Bhima* (1891) 15 Bom. 145.

(x) *Kalkan v. Ram Ratan* (1896) 18 All. 306.
 (y) *Payri v. Kedarnath* (1899) 26 Cal. 409; *Bir Singh v. Nawal* (1902) 24 All. 226.
 (z) *Kishan Prasad v. Har Narain Singh* (1911) 33 All. 272, 276 [P. C.].
 (a) *Guruvayya v. Anant* (1904) 28 Bom. 11, 17.

O. 1,
rr. 10, 11.

suit must be dismissed (b). Similarly where A, B and C were three partners, and A sued B only for a partnership account, and C was added as a *defendant* after the period of limitation, the suit was dismissed (c). On the same ground, where a member of a joint Hindu family sued in his own name for a *joint* debt without making the other members parties to the suit, and the defendant raised an objection on the ground of non-joinder, and the period of limitation had by that time expired, it was held that it was too late to join the other members as *co-plaintiffs*, as the claim was at that date time-barred, and the suit was accordingly dismissed (d). And the suit must likewise be dismissed, even if the Court of its own motion adds the other members as plaintiffs in circumstances such as those mentioned above. The mere fact that the Court of its own motion orders that the name of any person be added as a party does not render the provisions of s. 22 inapplicable to the case (e). There is nothing in sub-rule (2) which frees the Court, when acting of its own motion, from the restrictions of the Limitation Act; in other words, a Court, acting under sub-rule (2), is bound by the provisions of s. 22 of the Limitation Act (f). On the other hand, when a suit can be, and is, constituted without joining certain persons as parties, and they are subsequently added as parties for the benefit of the defendants to ensure them against further litigation, the suit should proceed though they are added as parties after the expiry of the period of limitation and the Court should award such relief as may be given in the suit as framed: to such a case the provisions of s. 22 do not apply (g). It has similarly been held that that section does not apply when a person is added as a party merely to enable the Court effectually and completely to adjudicate upon the questions involved in the suit without any relief being claimed against him (h). It has also been held that that section does not apply where a person is joined as a defendant in a suit, and the Court subsequently orders that he may be added as a plaintiff (i). In a case before the Privy Council, where relief was claimed against a *debtor's* estate, but no one of the defendants was impleaded as representing the estate, and subsequently, though after the expiration of the period of limitation prescribed for the suit, one of the defendants [*i.e.*, a person *already* a party to the suit] was impleaded as *sebit* and as representing the estate, it was held that s. 22 of the Limitation Act did not apply to the case (j).

Appeal.—No appeal lies under this Code from any order made under this rule. But where the name of a defendant is struck out under this rule on the ground that the plaint does not disclose any cause of action against him, the order operates as a decree and is appealable as such (jj).

11. [S. 32, 6th para. Cf. R. S. C., O. 16, r. 39.] The Court may give the conduct of the suit to such person as it deems proper.

Conduct of suit.

- (b) *Ramesbux v. Ramlall* (1881) 6 Cal. 815.
 (c) *Ramdogal v. Junmejoy* (1887) 14 Cal. 701.
 (d) *Kalidas v. Nathu* (1888) 7 Bom. 217; *Fat-mabai v. Firbhai* (1897) 21 Bom. 580; *Seshan v. Veera* (1909) 32 Mad. 284.
 (e) *Imani-ud-Din v. Liladhar* (1892) 14 All. 524.
 (f) *Ramkinkar v. Akhil Chandra* (1908) 35 Cal. 519.
 (g) *Gurusayya v. Anant* (1904) 28 Bom. 11; *Faleehri Partap v. Rudra Narain* (1904) 26 All. 528, affirmed on app. to P. C. (1910) 32 All. 241; *Hazari Mal v. Bhawani Ram* (1908) 30 All. 538; *Thakur Mant v. Dai Rani Koeri* (1906) 33 Cal. 1079; *Annamalal v. Murugappa* (1914) 38 Mad. 837, 842; *Virchand v. Kondu* (1914) 39 Bom.

- 729; *Shahasaheb v. Sadashiv* (1919) 43 Bom. 575, 580-581. Contra *Mathewson v. Ram Kanai* (1909) 36 Cal. 675, 687-689.
 (h) *Mahamed Ishaq v. Shaikh Akranul* (1908) 12 C. W. N. 84.
 (i) *Khadir Moideen v. Rama Naik* (1894) 17 Mad. 12; *Nagendrabala v. Tarapada* (1908) 35 Cal. 1065; *Narsinh v. Vaman* (1909) 34 Bom. 91. Limitation Act, 1908, s. 22 (2).
 (j) *Peary Mohan v. Narendra Nath* (1905) 32 Cal. 582, affirmed (1909) 37 Cal. 229, 87 I. A. 27.
 (jj) *Rama Rao v. The Raja of Pittapur* (1918) 42 Mad. 219.

O. 1
rr. 12, 13

12. [S. 35.] (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

Appearance of one of several plaintiffs or defendants for others.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

13. [S. 34.] All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objections as to non-joinder or misjoinder.

Scope of the rule.—This rule refers to two kinds of objections, the one for non-joinder of parties and the other for misjoinder of parties. These objections must be taken at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, otherwise the objection will be deemed to have been waived (*k*). It is for the plaintiff to join all necessary parties to the suit and to exclude unnecessary parties. Where the plaintiff fails in this, it is for the defendant to raise the necessary objection.

“Unless the ground of objection has subsequently arisen.”—These words are new. When the ground of objection has arisen subsequent to the settlement of issues, the objection may be taken even after the settlement of issues. In fact, it was so held under the old section though the words “unless the ground of objection has subsequently arisen” did not occur in that section. Thus if a co-parcener or a reversioner or a remainderman is born *after* the settlement of issues in a suit to which he is a necessary party, the defendant may object to his non-joinder, though it be *after* the settlement of issues, if the plaintiff does not take steps to join him as a party to the suit. Thus in a partition suit all co-parceners must be joined as parties, even though some of them may be born after the institution of the suit. Similarly, where a woman who is a party to a suit is married *after* the settlement of issues, and the nature of the suit is such that the husband is a necessary party to it, the plaintiff should take steps to have the husband made a party to the suit, otherwise the defendant may object for non-joinder of the husband, though it be *after* the settlement of issues (*l*).

As to misjoinder of causes of action, see O. 2, r. 7.

(*k*) *Obhoy v. Hury Churn* (1882) 8 Cal. 277. 301.
Paramasiva v. Krishna (1891) 14 Mad. 498; *Purshottam v. Kala* (1902) 26 Bom. 498. (*l*) *Modhe v. Dongre* (1881) 5 Bom. 400.

ORDER II.

Frame of Suit.

1. [S. 42.] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. O. 2,
rr. 1, 2.

Frame of suit.

From this rule read with rule (2) below, the intention of the Legislature appears to be that as far as possible all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit (*m*).

2. [S. 43.] (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Suit to include the whole claim.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Relinquishment of part of claim.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Omission to sue for one of several reliefs.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration.

A lets a house to *B* at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. *A* sues *B* in 1908 only for the rent due for 1906. *A* shall not afterwards sue *B* for the rent due for 1905 or 1907.

(*m*) *Sarat Chand v. Mohun Bibi* (1898) 25 Cal. 371. See also *Ramaswami v. Vythinatha* (1903) 28 Mad. 760, 764-766; *Marilamania*

v. Thiruvengadam (1908) 31 Mad. 385 394-396.

O. 2, r. 2. Changes in the section.—The words “obtained before the first hearing” after the words “the leave of the Court” [see sub-rule (3)] have been omitted. The words “and successive claims arising under the same obligation” have been added into the Explanation. The illustration has been expanded as so to comprise the case of rent due for a period *subsequent* to the one for which the suit is brought.

Cause of action.—For the definition of cause of action see notes to s. 20, “Cause of action,” p. 86 above.

Splitting of claim.—The object of the rule is, to use the language of r. 1, “to prevent further litigation.” For that purpose the rule provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. He shall not be entitled to split his cause of action into parts, and bring *separate* suits in respect thereof. If he *omits* to sue in respect of, or *intentionally relinquishes*, any portion of the entire claim arising from the same cause of action, he will be precluded from suing in respect of the portion so omitted or relinquished, though he may allege in his plaint that he intends bringing a second suit for the portion omitted (*n*). But a plaintiff will not be said to have *omitted* to sue in respect of a portion of his claim, within the meaning of this rule unless he was, at some time prior to the suit, *aware or informed* of the claim or of the facts which would give him a cause of action (*o*). If the plaintiff *was* aware of the claim, and omitted to sue in respect thereof, he could not afterwards sue in respect thereof, though the omission was accidental or involuntary (*p*). For the definition of cause of action, see notes to s. 20, “Cause of action,” p. 86 above.

Illustrations.

(1) *A* owes *B* Rs. 2,200. *B* may relinquish Rs. 200 to bring his suit within the jurisdiction of a Presidency Small Cause Court, and may sue *A* in that Court for Rs. 2,000. Here the relinquishment being *intentional*, *B* cannot afterwards sue *A* for Rs. 200, the portion relinquished. But if the suit is transferred, on *A*'s application, to the High Court, *B* may add Rs. 200 to his claim, the High Court having jurisdiction over the entire claim: *Ramlall v. Bhajahari* (1895) 1 C. W. N. 32.

(2) A Mahomedan wife sues her husband to recover property belonging to her including Government paper of the value of Rs. 10,000, and a decree is passed in her favour. She afterwards sues the husband to recover from him Government paper of the value of Rs. 500, alleging that she omitted to include the same in the previous suit by an *oversight*. The suit is barred, for she was *aware of her claim* when she brought the previous suit: *Buzloor Ruheem v. Shumsoonnissa* (1867) 11 M. I. A. 551.

(3) Where a promissory note is payable by instalments, and two or more instalments have become due, and the holder of the note sues only for one of the instalments and *omits* to sue for the other instalments, he cannot afterwards sue for those instalments: *Mackintosh v. Gill* (1874) 12 B. L. R. 37.

(4) *A* accompanies *B*, a pleader, to Hardwar, as *B*'s medical attendant, for which Rs. 1,300 become due to him as his fees. *B* passes a promissory note to *A* for Rs. 700, and agrees as for the balance of Rs. 600 to do certain legal work for *A*. *B* dies without doing the legal work undertaken by him. *A* sues *C*, *B*'s son, upon the promissory note, and a decree is passed for him. He then brings another suit against *C* to recover the Rs. 600, alleging that the legal work which *B* had agreed to do for him had not been done. The suit for the recovery of Rs. 600 is barred: *Preonath v. Bishnath* (1907) 29 All. 256. The above decision has been dissented from by the High Court of

(*n*) *Makund v. Nargis* (1898) 20 Cal 322.

(*o*) *Venkata v. Krishnasami* (1888) 6 Mad. 344;
Amanat v. Imdad Hosin (1898) 15 Cal. 800,
15 I. A. 106; *Sankaran v. Parvathi* (1896)

19 Mad. 145; *Batul Kunwar v. Munni Lal*
(1910) 23 All. 625.

(*p*) *Buzloor Ruheem v. Shumsoonnissa* (1876) 11.
M. I. A. 551, 604-605.

Madras, on the ground that if several promissory notes are executed for portions of the same debt, each promissory note creates a distinct cause of action on which a separate suit may be brought: *Anantanarayana v. Savithri* (1911) 36 Mad. 151, 158. **O, 2, r. 2.**

(5) *Set-off*.—*A* sues *B* for Rs. 200. As against the said claim, *B* claims to set off Rs. 200, being part of a sum of Rs. 1,200 alleged to be due to him by *A*, but omits to counterclaim from *A* the balance of Rs. 1,000. *B* cannot afterwards sue *A* to recover Rs. 1,000: *Nawbut v. Mahesh* (1905) 32 Cal. 654.

(6) *Continuous account*.—When a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided: *Bonsey v. Wordsworth* (1856) 18 C. B. 325, 334; *Kedar Nath v. Denobundhu* (1915) 42 Cal. 1043.

(7) *Omission of portion of a claim in a suit against one of several promisors*.—The omission of a portion of a claim in a suit against one of several promisors is no bar to a subsequent suit against another promisor in respect of the portion so omitted. *A* lets a house to *B* and *C* at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. *A* sues *B* in 1908 for the rent due for 1907. *A* cannot afterwards sue *B* for the rent due for 1905 or 1906, but he can sue *C* for the rent due for those two years (*g*). See the illustration to the present rule.

Explanation to the Rule :—

A. Obligation and collateral security for its performance.—The Explanation to the present rule is not intended to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the rule (*r*). See notes below, "Exceptions to the rule against splitting of reliefs."

B. Successive claims arising under the same obligation constitute a single cause of action.—The words "successive claims arising under the same obligation" have been added into the Explanation, and the illustration to the rule has been expanded, to give effect to a Calcutta decision where it was held that a claim in respect of all arrears of rent constitutes a single cause of action (*s*). The illustration shows that if rent has become due for the years 1905, 1906 and 1907, the landlord can bring only one suit for the whole of the rent in arrears, and that if he sues for the rent due for a particular year only, he will be precluded from suing for the rent due for the other years. It must, however, be noted that though this rule precludes the landlord from bringing a fresh suit for rent not included in the former suit, it does not prevent him from adopting any other remedy the law gives him to recover the rent. Thus though in the case put in the illustration the landlord cannot sue for the rent due for the year 1905 or 1907, he can distrain for the rent due for those years (*t*). See also ill. (7) above.

Interest due on a mortgage or on a promissory note, maintenance, *malikana*, &c., are other instances of "successive claims arising under the same obligation."

Distinct causes of action.—If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred (*u*). What the

(*g*) *Ramanjulu v. Aravamudu* (1909) 33 Mad. 317. (*t*) *Eswara Doss v. Venkataroy* (1898) 21 Mad. 236.
 (*r*) *Payana v. Pana Lana* (1913) 41 I.A. 142, (*u*) *Mullick v. Sheo Pershad* (1898) 23 Cal. 821, 148. 825.
 (*v*) *Taruck Chunder v. Panchu* (1881) 6 Cal. 791.

O. 2, r. 2. rule requires is that every suit shall include the *whole of the claim* arising from *one and the same cause of action*, and not that every suit shall include *every claim* or *every cause of action* which the plaintiff may have against the defendant (*v*). When the question is whether the cause of action in the subsequent suit is identical with that in the first suit, one great criterion is whether the same evidence will maintain both actions (*w*). For the definition of cause of action, see notes to s. 20, "Cause of action," p. 86 above.

Illustrations.

(1) *A*, claiming as his father's heir, sues *B* for possession of certain lands. He then sues *C*, also as his father's heir, for possession of another plot of land. The second suit is not barred, for the causes of action in the two suits are entirely distinct, and, moreover, the suits are against different individuals: *Dampanaboyina v. Addala* (1902) 25 Mad. 736; *Narayan v. Shamrao* (1903) 27 Bom. 379.

(2) A suit brought by some members of a joint Hindu family against other members of the same family for partition of joint family property does not bar a second suit by the same plaintiffs for partition of other property belonging jointly to the family and strangers: *Purshottam v. Atmaram* (1899) 23 Bom. 597.

(3) *A* sues *B* for specific performance of an agreement for the sale to him of *B*'s land, and obtains a decree. In execution of the decree *A* is put in possession of a portion only of the land as it is found that the rest of the land did not belong to *B*, but to *B*'s son. A subsequent suit by *A* against *B* for recovery of an aliquot portion of the price to the extent of the son's share is not barred under this rule, the cause of action being entirely distinct: *Venkatarama v. Venkata* (1901) 24 Mad. 27; *Parangodan v. Perumtoduka* (1904) 27 Mad. 380.

(4) A suit by a Mahomedan widow for dower is no bar to a subsequent suit by her for a declaration of her right to possess for life her husband's estate in accordance with a proved local custom: *Mahomed v. Hasin Banu* (1894) 21 Cal. 157, 20 I. A. 155.

(5) A suit to eject a tenant holding under a lease is no bar to a subsequent suit against him for rent under the same lease: *Subraya v. Rathnavelu* (1909) 32 Mad. 330.

(6) The dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession is no bar to a subsequent suit for possession: *Darbo v. Kesho Rai* (1879) 2 All. 356; *Sarsuti v. Kunj Behari Lal* (1883) 5 All. 345; *Jivunti Nath v. Shub Nath* (1882) 8 Cal. 819; *Mohan Lal v. Bilaso* (1892) 14 All. 512. Similarly the dismissal of a suit for an injunction to restrain the defendant from interfering with the plaintiff's possession of certain land on the ground that the plaintiff was not in possession is no bar to a subsequent suit for possession: *Bande Ali v. Gokul Misir* (1911) 34 All. 172.

(7) *A* sues *B* upon a promissory note, but the action fails owing to a material alteration in the note. *A* is not precluded from subsequently suing *B* on the original cause of action, i.e., from suing *B* to recover the consideration for which the note was given. The two causes of action are quite distinct: *Payana v. Pana Lana* (1913) 41 I. A. 142; *Beni Ram v. Ram Chandar* (1914) 36 All. 560. See also *Bhag Bhari v. Gujar Mal* (1917) Punj. Rec., no. 63, p. 230.

(8) *A*, alleging that he is entitled to one moiety of a piece of land and that *B* is entitled to the other moiety, and alleging further that *B*, falsely claiming the ownership of the whole land, demolished the structures standing on *A*'s moiety of the land and

(v) *Pittapur Raja v. Suriya Rau* (1884) 8 Mad. 520, 524, 12 I. A. 116, 119; *Amanat v. Imdad* (1888) 15 Cal. 800, 15 I. A. 106; *Hanuman v. Hanuman* (1892) 19 Cal. 123,

18 I. A. 158; *Payana v. Pana Lana* (1913) 41 I. A. 142, 148.
(w) *Sonu v. Bahinibai* (1916) 40 Bom. 351, 355.

dispossessed *A* of his moiety, sues *B* for damages for demolition of the structures and appropriation of the materials. A decree is passed in the suit for *A*. Subsequently *A*, alleging that after the demolition of the structures *B* had been occupying the entire property to the exclusion of *A* by denying *A*'s title thereto, sues *B* for a declaration of title to one moiety of the land and for separate possession thereof. Here the cause of action is the act of dispossession, and it being the same in both the suits, the second suit is barred under this rule: *Khardah Company Ltd. v. Durga Charan* (1919) 46 Cal. 640. O. 2, r. 2.

For other cases see foot-note (x).

First suit for possession, subsequent suit for mesne profits.—There is a conflict of decisions as to whether a suit for possession of land is a bar under this rule to a subsequent suit for mesne profits of such land accrued due prior to the institution of the suit for possession (y). The Courts that have held that a suit for possession is no bar to a subsequent suit for mesne profits proceed on the ground that the cause of action for possession is not the same as the cause of action for mesne profits. These Courts therefore have also held that a suit for mesne profits is no bar to a subsequent suit for possession (z). But a suit for possession, it has been held, is no bar to a suit for mesne profits accrued due subsequent to the suit for possession (a). See O. 20, r. 12.

First suit for interest due on a mortgage, second suit for principal.—Where the principal secured by a mortgage has become due, and the mortgagee sues for interest only, the suit for interest is a bar to a subsequent suit for principal (b), unless there is a separate covenant for the payment of interest secured in a separate manner, e. g., a covenant enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of principal (c).

First suit for produce payable under a mortgage, second suit for possession.—By a mortgage bond it is provided that the mortgagor should pay a share of the produce of the mortgaged land to the mortgagee every year, and that in default the mortgagee should have the right to take possession of the land. A suit by the mortgagee in 1897 for the value of the produce of the land for 1896 is a bar to a subsequent suit for possession on the mortgagor's failure to pay the produce for subsequent years. The mortgagee ought to have claimed possession in the first suit (d). The correctness of this decision is open to question.

Properties held under separate titles.—A plaintiff is not bound to include in the same suit separate properties held by different persons under different titles (e). But he is bound to do so if the properties are held by the same defendant though under different titles (f).

Different causes of action arising from the same transaction.—This rule does not require that when several causes of action arise from one transaction, the

- (x) *Hansraj v. Lalji* (1904) 28 Bom. 447; *Chaladom v. Kakkath* (1902) 25 Mad. 669; *Uma Begam v. Muhammad* (1910) 33 All. 291 [first suit for prompt dower, second suit for deferred dower]; *Sonu v. Bahinbai* (1916) 40 Bom. 351; *Ram Harakh v. Gagannath* (1916) 38 All. 217 [partition suits relating to properties in different districts]; *Sheobaran Singh v. Bhagwan Sahi* (1919) 41 All. 286; *Lakshmi Das v. Balak Ram* (1912) Punj. Rec. no. 104, p. 353; *Gulab Shah v. Haveli Shah* (1915) Punj. Rec. no. 87, p. 355.
- (y) *Lalassar v. Janki* (1891) 19 Cal. 615; *Poonnamal v. Ramamirda* (1915) 38 Mad. 829 [no bar]; *Mewa Kuar v. Banarsi Prasad* (1895) 17 All. 533 (bar.)
- (z) *Monohur Lall v. Gouri Sunkur* (1882) 9 Cal. 283; *Tirupati V. Narasimha* (1888) 11

- Mad. 210.
- (a) *Sheo Kumar v. Naraindas* (1902) 24 All. 501.
- (b) *Hikmatulla v. Imam Ali* (1890) 12 All. 203. See also *Muhammad Zakaria v. Muhammad* (1917) 39 All. 506.
- (c) *Yashwant v. Vithal* (1895) 21 Bom. 267; *Kishen Narain v. Pala Mal* (1918) Punj. Rec. no. 88, p. 291; *Natha Singh v. Chunilal* (1918) Punj. Rec. no. 69, p. 230 [when interest was made payable in the shape of rent under a separate writing in the nature of leave]. See also Davidson on Conveyancing, 3rd ed., Vol. II, Part II, p. 591.
- (d) *Chhabil Das v. Mason* (1914) P. R. no. 4.
- (e) *Biado Bibi v. Ram Chandra* (1919) 41 All. 583.
- (f) *Murti v. Bhola Ram* (1893) 16 All. 165 [F. B.].

O. 2, r. 2. plaintiff should sue for all of them in one suit. What the rule lays down is that where there is *one entire cause of action*, the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect of those parts. As observed by their Lordships of the Privy Council in *Payana v. Pana Lana* (g), the rule "is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, *even though they arise from the same transaction*." This may be illustrated by the English case of *Brunsdon v. Humphrey* (h). In that case A's cab came into collision with B's van. The collision caused (1) damage to A's cab, and (2) bodily injury to A. A sued B for damage done to his cab, and B paid into Court the amount claimed. Subsequently A brought another action against B for the bodily injury sustained by him. B pleaded that A was precluded from bringing a separate action for the bodily injury. The Court held that A was not so precluded. In this case the *transaction* that occasioned damage to the cab and bodily injury to A was the same, but the cause of action in respect of damage to the cab was distinct from that for injury to the person. A, therefore, had the option to join in one action the claim for damage to the cab and that for injury to the person, or to bring two distinct actions in respect of the two causes of action. So long as the causes of action are distinct, it is competent to a party to bring as many actions as there are causes of action even though all the causes of action may arise from the *same transaction*. But A cannot bring one action for damage to one part of the cab, and then another action for damage to another part of the cab, for this would be to split the cause of action. Nor can he for the same reason bring one action for damages for bodily injury to certain limbs of his body and subsequently another action for injury to other limbs. Upon the same principle, where A agreed to purchase 10 bales of yarn from B, and took delivery of 7 bales, but failed to pay the price of those bales, and as regards the remaining 3 bales refused to take delivery thereof, it was stated by Garth, C.J., in *Anderson v. Kalagarla* (i), that a suit by B against A to recover *damages* for failure to take delivery of the three bales was *not* a bar to a subsequent suit by B to recover from A the *price* of the 7 bales. The learned judge held that a claim for the *price* of goods sold was a cause of action of a different nature from a claim for *damages* for the non-acceptance of goods, and the fact that both the claims arose under the *same contract* did not constitute them *one and the same cause of action*. Wilson, J., expressed a different opinion, stating that the claims having arisen under the *same contract*, the cause of action was but *one*, and that the subsequent suit was therefore barred. The opinion of Wilson, J. was followed in *Duncan v. Jeetmull* (j), which also was a case of breach of *one and the same contract*. These two cases show that all existing breaches of the *same contract* must be joined in the same suit; but they have been held not to apply to the case where there are *two separate contracts*, though contained in the same instrument (k). Thus where it is expressly provided by an indent that each monthly shipment and item should be treated as a separate contract, the plaintiff is entitled to bring a separate suit for damages (l) in respect of each shipment. See notes below, "He shall not afterwards sue in respect of the portion so omitted."

In this connection we may mention a point which was left open by their Lordships of the Privy Council, namely, whether a mortgagee who holds *several mortgages on the same property* can treat them, with respect to the provisions of this rule, as separate causes of action, or whether he must bring one suit on all the mortgages (m). This

(g) (1913) 41 I. A. 142, 148.

(h) (1884) 14 Q. B. D. 141.

(i) (1886) 12 Cal. 339.

(j) (1892) 19 Cal. 372. See also *Raja Bahadur v. Rajeevappa* (1909) 11 Bom. L. R. 46.

(k) *Yashwant v. Yithal* (1905) 21 Bom. 267, 271.

See also *Umed v. Pir Saheb* (1883) 7 Bom. 134.

(l) *Volkart v. Subju* (1896) 19 Mad. 304; *Mandal & Co., v. Fazul* (1914) 41 Cal. 825.

(m) *Sri Gopal v. Pirthi Singh* (1902) 24 All. 429, 39, 29 I. A. 118.

question has since been decided by the Indian Courts, as to which see notes to s. 11 O. 2, r. 2. under the head, "Application of the above rules to suits on mortgage," p. 44 above.

"Where a plaintiff omits to sue in respect of any portion of his claim."

This rule refers to a case where a suit *has been filed* and the plaintiff omits in such suit to sue in respect of a portion of the claim (*n*). It does not apply where no suit has been filed at all, as where a plaint is returned to the plaintiff for presentation to the proper court and the plaintiff does nothing further in the matter (*o*), nor does it apply where a suit is filed and subsequently withdrawn without the leave of the Court under O. 23, r. 1, below (*p*).

"He shall not afterwards sue in respect of the portion so omitted."—It

has been held by the Calcutta High Court that the present rule refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim and a decree *has been passed* in that suit. So long as no decree is passed, a second suit in respect of the portion so omitted is not barred. It follows from this that where a suit brought in respect only of a portion of a cause of action has not been heard and decided, the Court may allow the plaint in the suit to be amended by adding the omitted portion of the claim (*q*). Similarly if such a suit is withdrawn under O. 23, r. (1) (2), with liberty to bring a fresh suit, the plaintiff may include in the fresh suit the portion that was omitted in the suit withdrawn by him (*r*).

A sues *B* in respect of a portion only of a cause of action. Pending this suit *A* brings another suit against *B* in respect of the remaining portion of the same cause of action. According to the Calcutta decision cited above neither suit is a bar to the other so long as no decree is passed in either suit. It is open, therefore, to *A* to rectify his error in bringing two suits in respect of the same cause of action by applying for leave to amend the plaint in either suit by adding the omitted portion which forms the subject-matter of the other suit, and then withdrawing the other suit under O. 23, r. 1 (1). The Courts however, have gone further and held that if in such a case *A* is allowed to withdraw from either suit with liberty to bring a fresh suit under s. 23, r. 1 (2), he is entitled to bring a fresh suit *by virtue of the leave* granted to him, though the other suit has been carried to a decision (*s*).

Omission to sue for one of several reliefs.—Where a person is entitled to *more than one relief* in respect of the *same cause of action*, he may sue for all the reliefs, or he may sue for one or more of them and reserve his right *with the leave of the Court* to sue for the rest (*t*). If no such leave is obtained, he will be precluded from afterwards suing for any relief so omitted (*u*). But if the right to the relief in respect of which a further suit is brought did not exist at the date of the institution of the former suit, the subsequent suit is not barred (*v*). The leave of the Court must be obtained at the time of the institution of the suit. The leave, if granted, is good even if the pecuniary value of the relief allowed to be omitted from the suit exceeds the pecuniary limits of the Court granting the leave (*w*).

Illustrations.

(1) *A* lets his land to *B* for a period of five years, on condition that if *B* fails to pay the rent every year, the lease should be void. *B* fails to pay the rent due for the second year. Here *A* is entitled to two reliefs, namely, to sue *B* (1) for recovery of the

(*n*) *Upendra v. Janaki* (1918) 45 Cal. 305, 315.

(*o*) *Subba v. Rama* (1917) 40 Mad. 291.

(*p*) *Venkata v. Ranga* (1887) 10 Mad. 180.

(*q*) (1918) 45 Cal. 305, 316, *supra*.

(*r*) *Bahari Lal v. Srimati Baran* (1894) 17 All. 53.

(*s*) *Ghulam Muhammad v. Nur Khan* (1917)

Punj. Rec. no. 65, p. 237.

(*t*) *Pestonji v. Abdool* (1881) 5 Bom. 463.

(*u*) *Abdul Hakim v. Karan Singh* (1915) 37 All. 646.

(*v*) *Piari v. Khiali Ram* (1881) 3 All. 857.

(*w*) *Muhammad Fayaz v. Kailu Singh* (1910) 33 All. 245.

O. 2, r. 2.

rent, and (2) also for possession of the land on the ground that the lease has become void, and he may sue for both these reliefs. If he sues for rent only, and does not reserve his right with the *leave* of the Court to sue for possession, he cannot afterwards sue for possession: *Subbaraya v. Krishna* (1883) 6 Mad. 159. Similarly if he sues for possession only, and does not reserve his right with the *leave* of the Court to sue for arrears of rent, he cannot afterwards sue for the rent: *Kashinath v. Nathoo* (1914) 38 Bom. 444.

(2) *A* agrees to sell his land to *B*. *B* sues *A* for *specific performance* of the agreement, and obtains a decree. *B* then sues *A* for *possession* of the land. Is the suit for possession barred under this rule? Yes, according to the decision in *Narayana v. Kandasami* (1899) 22 Mad. 24, the reason given being that the right to possession arises *coincidentally* with the right to the execution of conveyance. No, according to the decision in *Krishnammal v. Soundataraja* (1913) 38 Mad. 698, the reason given being that the right to possession accrues only on the execution of the deed of conveyance.

(3) On 1st March, 1905, *A* enters into an agreement with *B* for the sale of his lands to *B*, the sale to be completed on 1st August 1905. It is agreed that *B* should pay part of the purchase-money on the date of the agreement, and that *A* should, on such payment being made, put *B* in possession of the land. *B* pays part of the purchase-money and *A* puts him in possession. The sale is not completed on 1st August owing to certain differences between the parties. On 15th August, *A* forcibly removes *B* from the land, and enters into possession. Thereupon *B* sues *A* for *possession*, but omits to sue for *specific performance* of the agreement for sale. *B* cannot afterwards sue *A* for specific performance: *Rangayya v. Nanjappa* (1901) 24 Mad. 491, 28 I. A. 221, with facts slightly varied.

(4) The dismissal of a suit for a *declaration of title* under s. 42 of the Specific Relief Act, 1877, on the ground that the plaintiff not being in possession ought to have prayed for possession also, but had omitted to do so, is not a bar under the present rule to a subsequent suit for a *declaration of title* and for *possession*, though based on the same title; the reason given is that the cause of action in the second suit is not in such a case entirely the same as that in the first suit: *Jibunti v. Shile Nath* (1882) 8 Cal. 819; *Nonoo Singh v. Anand* (1885) 12 Cal. 291; *Mohan Lall v. Bilaso* (1892) 14 All. 512; *Sayed Suleman v. Bontala* (1913) 38 Mad. 247.

Exceptions to the rule against splitting of reliefs —

1. *Order 34, rule 14*.—Sub-rule (3) provides that where a person entitled to more than one relief in respect of the same cause of action omits, *except with the leave of the Court*, to sue for all such reliefs, he cannot afterwards sue for any relief so omitted. According to this sub-rule, if a mortgagee sues the mortgagor on the *personal* covenant to repay the mortgage-debt, and omits to sue for *sale of the mortgaged property*, he cannot afterwards sue for sale *unless he has reserved his right to do so with the leave of the Court*. To this, however, there is an exception, being that contained in O. 34, r. 14. The latter rule may be stated thus: a mortgagee sues the mortgagor to recover the mortgage-debt from the mortgagor *personally*, and obtains a decree. He then applies for the attachment and sale of the *mortgaged property* in execution of the decree. The mortgaged property may be attached, but it *cannot be sold in execution proceedings*. The only mode of bringing it to sale is by instituting a *fresh suit for sale*. O. 34, r. 14, says that the mortgagee may institute such a suit notwithstanding anything contained in O. 2, r. 2 (x). The suit will be one under s. 67 of the Transfer of Property Act, 1882. It must, however,

be noted that though O. 34, r. 14, allows a mortgagee to split his *remedies*, it does not allow him to split his *claim* (y).

O. 2,
rr. 2, 3.

2. *Order 34, rule 6.*—The effect of this rule is that where a mortgagee has obtained a *decree for sale* of the mortgaged property, and the property is sold, but the net sale proceeds are not sufficient to pay the mortgage-debt, he may subsequently *apply* for a *decree for the balance*, notwithstanding anything contained in O. 2, r. 2, although a claim to such relief has not been included in his suit (z). This, however, is not strictly an exception, for *no separate suit* has to be brought for a decree for the balance.

3. *Deccan Agriculturists' Relief Act, 1879 (as amended by Act XXII of 1882), s. 15 A.*—The effect of the said section is to allow a *mortgagor* to split his *remedies* by providing in effect that if he sues the mortgagee for an *account*, he will not be precluded from suing him subsequently for *redemption* (a).

Summary of the above notes:—

- (a) *One and the same transaction* may give rise to several distinct *causes of action*, and a plaintiff may bring as many suits as there are causes of action.
- (b) *One and the same cause of action* may give rise to several *reliefs*, but a plaintiff may not bring separate suits in respect of those reliefs except with the leave of the Court.
- (c) Not more than one suit can be brought in respect of a *single cause of action*, in other words, a plaintiff cannot split a cause of action.

Amendment of plaint.—See notes above, “He shall not afterwards sue in respect of the portion so omitted.”

Withdrawal of one of two pending suits.—See notes above, “He shall not afterwards sue in respect of the portion so omitted.”

Minors.—The provisions of this rule apply to adults as well as minors. Thus a suit by a minor by his guardian and next friend for rent due for 1903 and 1904 will bar a subsequent suit by the minor, on attaining majority, for the rent due for 1901 and 1902. The acts of a guardian in the conduct of a suit must be upheld, unless it is shown that they were unreasonable or improper (b).

Execution proceedings.—The present rule does not apply to proceedings in execution of a decree. A decree-holder may therefore present successive applications for realizing different portions of his decree. Thus if a decree gives reliefs for *possession* and *costs*, there is nothing in the Code which prevents separate and successive applications for execution as regards either of them (c).

3. [S. 45, Cf. R.S.C., O. 18, r. 1.] (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant

Joinder of causes of
action.

(y) *Govind v. Parashtam* (1901) 25 Bom. 161;
 Keshavram v. Ranchhod (1906) 30 Bom.
 156.
(z) *Musaheb v. Inayatullah* (1892) 14 All. 513;
 Hamiduddin v. Kedar Nath (1898) 20 All. 386.

(a) See *Bhau v. Hari* (1883) 7 Bom. 377.
(b) *Gopal v. Narasinga* (1899) 22 Mad. 309.
(c) *Rudha Kishen v. Rudha Persad* (1891) 18
 Cal. 515; *Balasubramania v. Swarnammal*
 (1913) 38 Mad. 199.

O. 2, r. 3. or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Scope of the rule.—O. 1, r. 1, deals, as the marginal note to that rule indicates, with joinder of plaintiffs, O. 1, r. 3, deals with joinder of defendants. The present rule deals with joinder of causes of action. It is to be read subject to the provisions of rr. 4 and 5 below, as is shown by the words "save as otherwise provided" (d). It is also to be read subject to the provisions of O. 1, r. 1, and O. 1, r. 3. The frame of a suit may not be supported by this rule, and yet it may be justified by O. 1, r. 1, or O. 1, r. 3 (e). Rules 6 and 7 of this Order are to be read with this rule.

Cause of action.—See notes to s. 20 under the head "Cause of action," on p. 86 above.

One plaintiff, one defendant, and two or more causes of action.—Where there is only one plaintiff, and only one defendant, the rule says that the "plaintiff may unite in the same suit several causes of action against the same defendant," provided, of course, that the provisions of rr. 4 and 5 of this Order, are not contravened. If the causes of action are so disconnected that they cannot be conveniently tried together, the Court may order separate trials under r. 6 below. Those trials, however, will not be distinct suits, but they will be in the nature of sub-suits under the title and number of the principal suit from which they spring (f). In *Saccharin Corporation, Ltd. v. Wild* (g), the plaintiff corporation, the owners of twenty-three patents for saccharin, sued the defendant for alleged infringement of all the trade-marks. There were thus twenty-three causes of action united in one suit. It was ordered that the suit should be confined in the first instance to any three of the patents which the plaintiffs might select. Collins, M.R., said: "Now, we start here with a writ launched covering twenty three causes of action. *Prima facie*, in old days, one cause of action was thought to be enough. That was gradually more or less relaxed, and one cause of action was allowed to be coupled with one or two subordinate or necessarily connected causes of action. Then came, by the Rules under the Judicature Acts, a still further relaxation, but always subject to the one underlying principle, namely, that the burden lay on the plaintiff to prove his case, and that no extra burden should be imposed on the defendant through the plaintiff needlessly enlarging the area of dispute. *Prima facie*, a dozen causes of action cannot be combined in one writ: they must be so intimately connected as to justify their being included in one writ; but when one finds no less than twenty-three, that seems to me to be an outrageous extension of the latitude given by the rules to the plaintiff" (h). Cozens-Hardy, L.J., said: "The action strikes me as almost an abuse of the process of the Court" (i).

Misjoinder of plaintiffs and causes of action.—Where there are two or more plaintiffs and two or more causes of action, the rule says that "any plaintiffs having causes of action in which they are jointly interested against the same defendant

(d) See *Jivraj v. Purushotam* (1884) 7 Mad. 171.

(e) *Ramendra Nath v. Brajendra Nath* (1915) 45 Cal. 111, 122-123.

(f) *Khadarsaheb v. Chotibibi* (1884) 8 Bom. 616.

(g) [1903] 1 Ch. 410.

(h) [1903] 1 Ch. 410, p. 422, *supra*.

(i) *Ib.*, p. 427.

. . . may unite such causes of action in the same suit." But the rule is to be read subject to the provisions of O. 1, r. 1. The result is that where there are two or more plaintiffs and two or more causes of action, they may be joined in one suit if the right to the relief and the causes of action arise from *the same act or transaction* and that there is a *common question of law or fact*, though they may not all be *jointly* interested in all the causes of action. But if the right to the relief claimed does not arise from *the same act or transaction* or if there is no *common question of law or fact*, the plaintiffs cannot all join in one suit unless they are *jointly interested* in the causes of action as provided by this rule (ii). See notes to O. 1, r. 1, "New Rule," *ills.* (1) to (4), on p. 338 above.

Where the plaintiffs are *not jointly interested* in the causes of action united in one suit, the suit is said to be bad for misjoinder of plaintiffs and causes of action. X sells to Y two plots of land adjoining each other, one of which is claimed by A by adverse possession and the other by B by adverse possession. Under the Code of 1882 A and B could not join together as plaintiffs in one suit against X and Y, for the evidence of adverse possession by A would not be evidence of adverse possession in favour of B and *vice versa* (j). The same would seem to be the case under this Code.

Procedure in case of misjoinder of plaintiffs and causes of action :—

Where a plaint is defective by reason of misjoinder of plaintiffs and causes of action, the Judge to whom the plaint is presented may return it for amendment (O. 6, r. 17).

Where the defect is not noticed when the plaint is presented, but is brought to the notice of the Court at a later stage (see r. 7 below), the Court may—

- (a) grant leave to the plaintiffs to amend the plaint within a time fixed by the Court, and may order that if the amendment is not made within the time prescribed, the suit shall stand dismissed with costs. Where leave is granted to amend, the plaintiffs have got to elect as to which of them should proceed with the suit as filed, and the plaint should then be amended by striking out the names of the other plaintiffs and making consequential amendments (k) [see O. 6, rr. 17, 18]; or,
- (b) order the plaint to be taken off the file, if the case has proceeded no further than the filing of the plaint, and the circumstances are such that the suit cannot be conveniently continued by one plaintiff after amendment (l). This, however, is a rare case.

[Note.—Where leave is granted to amend, the Court may allow the defendant to amend his written statement to meet the case of the particular plaintiff who has elected to proceed with the suit (m).

Where a suit is bad for misjoinder of plaintiffs and causes of action, it is not proper to dismiss the suit without giving the plaintiff an opportunity of amendment (n). If the suit is dismissed on account of misjoinder of plaintiffs and causes of action, and the plaintiffs appeal from the decree, the appellate Court may set aside the decree and remand

(ii) *Ramendra Nath v. Brajendra Nath* (1915) 45 Cal. 111, 122-123, *supra*.

(j) *Aiyappan v. Vallaya* (1910) 34 Mad. 55.

(k) *Aldridge v. Barrow* (1907) 34 Cal. 662; *Varajlal v. Ramdal* (1902) 26 Bom. 259, 266; *Baij Nath v. Chhagwaro* (1904) 26 All. 218. The first two cases are no longer authorities on the point of misjoinder. The last is no longer an authority on the point

actually decided therein.

(l) *Ali Serang v. Beadon* (1885) 11 Cal. 524 (no longer an authority on the point of misjoinder).

(m) *Aldridge v. Barrow* (1907) 34 Cal. 662, 671.

(n) *Beharilal v. Kodu Ram* (1893) 15 All. 380 (no longer an authority on the point of misjoinder).

- O. 2, r. 3. the case to the lower Court with a direction to that Court to return the plaint for amendment (o).

Where the defendant objects to the frame of a suit on the ground that the suit is bad for misjoinder of plaintiffs and causes of action, but the objection is overruled, and a decree is passed for the plaintiffs, and the defendant appeals from the decree on the ground that the suit ought to have been held to be bad for misjoinder of plaintiffs and causes of action, the appellate Court should not interfere with the decree, though it may find that the suit is bad for misjoinder of plaintiffs and causes of action, unless the misjoinder has affected the merits of the case. Such is the effect of the provisions of s. 99 of this Code which provides *inter alia* that no decree shall be reversed or substantially varied in appeal on account of any misjoinder of parties or causes of action, where such misjoinder does not affect the merits of the case. The italicized words are new. They did not occur in the corresponding s. 578 of the Code of 1882. They have been added into s. 99 to supersede the practice followed by the Courts under the old Code. Under that Code, where a decree was passed for the plaintiffs in a suit involving a misjoinder of plaintiffs and causes of action, and an appeal was preferred by the defendant from the decree on the ground that the suit ought to have been held to be bad for misjoinder of plaintiffs and causes of action, the course adopted by the appellate Court was to reverse the decree in appeal, and remand the case to the lower Court with directions to that Court to return the plaint to the plaintiffs for amendment, so that the plaintiffs might elect which of them should continue as plaintiffs in the suit (p). Such a course would not have been necessary if the Courts had held that a misjoinder of plaintiffs and causes of action was an irregularity such as could be condoned under s. 578. But it was held that a misjoinder of this kind was outside the scope of that section, and hence the practice followed in appeal of reversing the decree and remanding the case (q). The effect of the provisions of s. 99 is to preclude the appellate Court from reversing a decree on the ground of misjoinder of plaintiffs and causes of actions and remanding the case to the lower Court as was done under the old Code, unless the misjoinder has affected the merits of the case.

Misjoinder of defendants and causes of action.—Where there are two or more defendants and two or more causes of action, the rule says that the “plaintiff may unite in the same suit several causes of action against the same defendants jointly.” “Joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants” (r). If the causes of action alleged are separate and the defendants are arrayed in different sets, the suit is bad for misjoinder of defendants and causes of action, technically called multifariousness (s). “There is no provision in the Code allowing distinct causes of action against distinct sets of defendants, that is to say, causes of action in which the defendants are not all jointly interested, to be united in one suit” (t). This rule, however, is to be read subject to the provisions of O. 1, r. 3, which relates to joinder of defendants. Therefore, when there are two or more defendants and two or more causes of action, they may be joined as defendants in one suit if the right to the relief claimed arises from the same act or transaction and there is a common question of law or fact, though they may not all be jointly interested in all the causes of action. But if the right to the relief

(o) *Ramanuja v. Devanayaka* (1885) 8 Mad. 361; *Behari Lal v. Kodu Ram* (1893) 15 All. 380.
 (p) *Salima Bibi v. Shaikh Muhammad* (1896) 18 All. 131; *Rahim Baksh v. Amiran Bibi* (1896) 18 All. 219; *Rajjo Kuar v. Debi Dial* (1896) 18 All. 432; *Varajlal v. Ramdat* (1902) 26 Bom. 259; *Mohima Chandra v. Atul Chandra* (1897) 24 Cal. 540, at p. 544.
 (q) *Varajlal v. Ramdat* (1902) 6 Bom. 259, at p. 266; *Mohima Chandra v. Atul Chandra*

(1897) 24 Cal. 540, at p. 544.
 (r) *Bhagwati Prasad v. Bindeshri* (1884) 6 All. 106, 108. The principle stands, though the actual decision has been dissented from in *Harbans v. Tata Sahu* (1909) 32 All. 14.
 (s) *Narsingh Das v. Mangal Dubey* (1883) 5 All. 163, 171.
 (t) *Mullick Kefait Hossein v. Sheo Pershad Singh* (1896) 23 Cal. 821, 826; *Umabai v. Bhaubai* (1908) 34 Bom. 358.

claimed does not arise from the same act or transaction or if there be no common question of law or fact, the defendants cannot all be joined in one suit unless they are jointly interested in the causes of action as provided by this rule (u). See notes to O. 1, r. 3, "New Rule," 'ills. (4), (5) and (6), p. 341 above. The following are instances of cases in which it was held that the suit was bad for misjoinder of defendants and causes of action :

Suits held to be multifarious.

1. *B* agrees to sell certain lands to *A*. *A* sues *B* and a third person *C* alleging that *B* was willing to execute the deed of sale, but that he was unable to do so, as *C* held possession of the title deeds under a false claim of an equitable lien upon the lands, and that he had refused to deliver them up. As against *B*, *A* claims specific performance of the contract, and as against *C* he asks for a declaration that he has no lien upon the lands and for delivery up of the title deeds. The suit is bad for misjoinder of defendants and causes of action. The two causes of action are entirely distinct : they do not arise from the same transaction ; nor would their trial involve any common question of law or fact : *Luckumsey v. Fazulla* (1881) 5 Bom. 177, following *De Houghton v. Money* (1876) L. R. 2 Ch. App. 166 ; distinguished in *Krishnasami v. Sundarappayyar* (1884) 18 Mad. 415.

What is laid down in *De Houghton v. Money* and *Luckumsey v. Fazulla* is that "if on the face of the plaint, or of the plaintiff's case, it appears that a third party, who was not a party to the contract upon which the suit was brought, had a distinct interest, but which interest is sought to be declared null and void upon some equitable ground, such a claim against the said third party could not be made a fact of the suit. In the case of *De Houghton v. Money* it was admitted by the plaintiff that there was a conveyance in favour of *Money*, but it was said that that conveyance was executed under such circumstances as would make it a voidable one ; and in the case of *Luckumsey v. Fazulla*, it was distinctly admitted by the plaintiff that the third party, who was not a party to the contract, had a distinct interest" (v). It is different, however, where *A* (purchaser) sues *B* (vendor) and *C* (vendor's benamidar), claiming specific performance against *B* and a declaration against *C* that *C* is a mere benamidar. In such a case, the two defendants are identical and there is but one cause of action. There is therefore no misjoinder : *Mokund Lall v. Chotay Lall* (1884) 10 Cal. 1061, 1068-1069.

2. Seven different salt manufacturers enter into seven different contracts with *A* to manufacture salt for *A*, and deliver it in his factory. *A*, alleging that all the seven persons had failed to deliver salt according to the terms of the agreement with them brings one suit against them for a decree that they might be directed to deliver the salt to him. The suit is bad for multifariousness, for the breach of each contract gives rise to a distinct cause of action, and no one defendant is interested in any of the causes of action arising from the breach of contract with the other defendants : *Namasivaya v. Kadir Ammal* (1894) 17 Mad. 168.

3. *A* and *B* at Madras enter into an agreement to carry on business in partnership at Silangoor, and they send *C* as their agent to Silangoor to conduct the business there. *A*, alleging that *C* had failed to carry out his instructions and to furnish accounts, and that *B* was colluding with *C*, sues *B* and *C*, claiming dissolution of partnership as against *B*, and damages for breach of contract as agent as against *C*. The suit is bad for multifariousness, for there are two distinct causes of action and neither defendant is liable

(u) *Ramendra Nath v. Brajendra Nath* (1915) 45 Cal. 111, 122-123. But see *Compania Sarsinena v. Houlder Brothers & Co.* [1910] 2

K. B. 354, 362.
(v) *Mokund Lall v. Chotay Lall* (1884) 10 Cal. 1061, 1068.

O. 2, r. 3. in respect of the cause of action against the other: *Muthappa v. Muthu* (1904) 27 Mad. 80. See this case commented upon in *Aiyathurai v. Muhamad Meera* (1908) 18 Mad. L. J., 238, 243-244.

4. A joint Hindu family, consisting of 3 members *A, B* and *C*, owns several properties. *A* agrees to sell his share to *P*. *A* fails to execute the necessary sale-deed. *P* sues *A* for specific performance, and includes in the suit a claim for partition and possession against all the members of the family, namely, *A, B* and *C*. The suit is bad for misjoinder. The claim for partition cannot be joined with the claim for specific performance, as at the date of the suit the plaintiff had no right to sue for partition not having completed his title by a sale-deed: Wallis, C.J., said: "The other members of the family were no parties to the alleged contract and therefore were not proper parties to the suit in so far as it is a suit for specific performance, and it would in my opinion be a distinct hardship to them to force them to defend a suit for partition which would not lie if the plaintiff failed to prove his contract" *Rangayya v. Subramania* (1917) 40 Mad. 365 [F. B.]. See ill. (1) above.

In ills. (1) and (3) what were really two suits were combined into one. In ill. (2) what were really seven suits were united in one suit. In all these cases it was held that the suit was bad for misjoinder of defendants and causes of action. The reason why the law forbids a joinder in one suit of distinct causes of action against different defendants *each of whom is unconnected with the cause of action against the others*, may thus be stated in the words of Peacock, C.J. (*u*): "Such a joinder . . . complicates the case before the Judge, and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him, though admissible against one or more of the others. Moreover, it is vexatious and harassing to the different defendants. Such a procedure renders it almost compulsory on all the defendants to be present either in person or by their pleaders, whilst the case is going on against the others in respect of matters in which they are not interested; and, moreover, it is harassing and inconvenient as regards the attendance of the witnesses of the several defendants, as it renders it necessary for the witnesses of each to be present, and to be detained whilst the case of the others is being heard and determined." For further illustrations, see notes to O. 1, r. 3, under the heads "New Rule," p. 340 above, and "Severally," p. 343 above.

Procedure in case of multifariousness (misjoinder of defendants and causes of action).—Where a plaint is defective by reason of misjoinder of defendants and causes of action, the Judge to whom the plaint is presented may return it for amendment (O. 6, r. 17).

Where the defect is not noticed when the plaint is presented, but is brought to the notice of the Court at a later stage (see r. 7 below), the Court may, on the application of the plaintiff, and on such terms as to costs as the Court thinks proper, grant leave to the plaintiff to withdraw from the suit against those defendants who are not interested in the cause of action in respect of which he elects to proceed with liberty to bring a fresh suit or suits against them (*x*) [O. 23, r. 1], or allow the plaintiff to amend the plaint by striking out the names of those defendants and making consequential amendments (O. 6, r. 17). Where leave to amend is granted to the plaintiff, and the plaintiff does not amend within the time fixed by the Court, he will not be permitted to amend after

(*u*) *Raja Ram Tewari v. Luchman* (1867) 8 W. R. 15. | (*x*) *Luckumsey v. Fasulla* (1881) 5 Bom. 177, 179.

the expiration of that period, and the suit, it is presumed, will be dismissed, unless the **O. 2, r. 3**, time is extended by the Court (y). See **O. 6, r. 18**.

Where the plaintiff's suit is dismissed as being multifarious, and the plaintiff appeals from the decree on the ground that the suit is not multifarious, the appellate Court may confirm the decree if it finds that the suit is multifarious (z).

Where the defendants object to the frame of a suit on the ground that the suit is multifarious, but the objection is overruled, and a decree is passed for the plaintiff, and the defendants appeal from the decree on the ground that the suit ought to have been held to be multifarious, the appellate Court should not interfere with the decree, though it may find that the suit is multifarious, unless the misjoinder has affected the merits of the case. It is so provided by s. 99, which declares *inter alia* that no decree shall be reversed or substantially varied in appeal on account of any misjoinder of parties or causes of action, where such misjoinder does not affect the merits of the case. The words italicized above are new. They did not occur in the corresponding s. 578 of the Code of 1882. They have been inserted in s. 99 to supersede the practice followed by the Courts under the old Code. Under that Code, where a decree was passed for the plaintiffs in a suit which was bad for multifariousness, and an appeal was preferred by the defendants from the decree on the ground that the suit ought to have been held to be multifarious, the course adopted by the appellate Court was either to reverse the decree of the lower Court and dismiss the plaintiff's suit (a), or to sustain the decree of the lower Court as against a particular set of defendants in respect of the causes of action in which they were jointly interested, and grant permission to the plaintiff to withdraw from the suit against the other defendants with liberty to bring a fresh suit or suits against them (b). Such a course would not have been necessary had the Courts held that a misjoinder of defendants and causes of action was an irregularity such as could be cured by s. 578. But it was held that the section did not apply to a misjoinder of this kind, and that even if it did apply, the misjoinder should be regarded as a defect that must affect the merits of the case within the meaning of that section (c). The insertion of the words "on account of any misjoinder of parties or causes of action" in s. 99 makes it quite clear that the appellate Court should not interfere with a decree at all where the only objection to the decree is that of multifariousness unless the misjoinder has affected the merits of the case.

Two or more defendants and one cause of action.—Every case of multifariousness presupposes more than one cause of action. Hence where there is only one cause of action, there can be no multifariousness.

Suits held not to be multifarious.

1. A, alleging that his brother B mortgaged his (A's) share in his father's property to C without his knowledge and consent, and that C was in possession as mortgagee, sues B and C for a declaration of title to his share of the property, and for possession of the share. The suit is not bad for multifariousness, for there are no two causes of action, but only one, namely, the infringement of A's right of ownership by B. The mortgage and dispossession are both acts evidencing the infringement of A's right: *Indur Kuar v. Gur Prasad* (1899) 11 All. 33; *Mazhar Ali v. Sajjad Husain* (1902) 24 All. 358; *Kubra Jan v. Ram Bali* (1908) 30 All. 560.

(y) See *Kachar v. Bai Rathore* (1888) 7 Bom. 289, 291; *Ram Narain v. Annoda* (1887) 14 Cal. 681; *Muthappa v. Muthu* (1904) 27 Mad. 80, 85, all cases under the Code of 1882.
(z) *Kachar v. Bai Rathore* (1888) 7 Bom. 289; *Ram Narain v. Annoda* (1887) 14 Cal. 681.
(a) *Muthappa v. Muthu* (1904) 27 Mad. 80, 85; *Namasivaya v. Kadir* (1894) 17 Mad. 168,

178.
(b) *Ganesh Lal v. Khairati Singh* (1894) 16 All. 279, 283.
(c) *Ganesh Lal v. Khairati Singh* (1894) 16 All. 279, 283; *Namasivaya v. Kadir* (1894) 17 Mad. 168, 176; *Muthappa v. Muthu* (1904) 27 Mad. 80, 84.

- O. 2, r. 3.** 2. *A* sells three properties by private contract to *B*. After the sale to *B*, all the three properties are attached in execution of a decree held by *C* against *A*, and they are sold in execution to *D*, *E* and *F*, respectively. A suit by *B* against *A* (the vendor), *C* (the decree-holder), and *D*, *E* and *F* (execution-purchasers), to set aside the execution sale, is not bad for multifariousness: *Haranund v. Prosunno Chunder* (1883) 9 Cal. 763; *Gumani v. Ram Charan* (1878) 1 All. 555.

Note.—In the Calcutta case cited above, Garth, C.J., said: “The plaintiff has but one object, namely, to establish his private purchase as against the claim in execution; and the defendants who contest his claim have but one defence, which is common to them all, viz., that the plaintiff’s purchase is invalid.”

Unnecessary parties added as defendants.—Where persons who are not necessary parties are joined as defendants, they should be deemed not to be parties at all in considering whether or not the suit is bad for multifariousness. *A* and *B* are two co-sharers of a village. *A* and *B* sell their respective shares to *C* by two separate deeds of sale. *D*, alleging that he is entitled to pre-empt the property, sues *A*, *B* and *C* for pre-emption. Here the suit is not bad for multifariousness, for *A* and *B* being vendors, they are not necessary parties to a suit for pre-emption and the suit is against one defendant only, namely, *C* (*d*).

Suit for ejectment by the real owner against holders under derivative titles from a trespasser as the common source.—In a suit for possession all persons claiming by derivative titles from a trespasser as the common source may be joined as defendants. *A* obtains a lease of a piece of land from *B*, and enters into possession of the land. Subsequently *B*, ignoring the lease, lets the land in separate portions and by separate leases to *C*, *D* and *E*. *A* sues *B*, *C*, *D* and *E* to eject them from the land. The suit is not bad for multifariousness. In this, as in every action of ejectment, there is but one cause of action, namely, dispossession. It is immaterial that *C*, *D* and *E* claim under different titles. The title by which they claim forms no part of the plaintiff’s cause of action (*e*). It is different, however, if they do not all claim under the same trespasser. Thus if *A* owns lands, and he is dispossessed of one portion by *B*, of another portion by *C*, and of a third portion by *D*, *A* cannot bring one suit for possession against *B*, *C* and *D* (*f*).

Where two or more persons conspire together to commit a wrong, or to commit a breach of several contracts entered into with them separately by the plaintiff, they may all be joined as defendants in one suit.—The reason is that the plaintiff has in such a case but one cause of action against all the defendants, namely, a conspiracy to do the act complained of. Thus if in ill. (2) on p. 371 above the seven salt manufacturers had conspired together not to deliver the salt to *A*, *A* could have brought one suit against them all. Similarly, if *A* and *B* conspire together to assault *C*, *C* may bring one suit against them for damages for assault (*g*). Upon the same principle where *A* obtained a decree against *B* for possession of certain lands in which 86 persons had distinct and separate tenures, and those 86 persons combined together to keep *A* out of possession and declined to pay the rent to him, it was held that *A* might join the 86 tenants as defendants in one suit for a declaration of his proprietary right to the lands (*h*). But separate suits should be brought if there is no collusion or combination between the tenants (*i*).

(d) *Harbans v. Tota Sahu* (1909) 32 All. 14.
 (e) *Nundo Kumar v. Banomali* (1902) 29 Cal. 877, 880; *Ishan Chunder v. Rameswar* (1897) 24 Cal. 831; *Parbati v. Mahmud* (1907) 29 All. 267; *Umabai v. Vithal* (1909) 33 Bom. 294; *Raghunath v. Sarosh* (1899) 23 Bom. 263.
 (f) *Afzal Shah v. Lachmi Narain* (1918) 40 All.

7, 11.
 (g) *Varajlal v. Ramdat* (1902) 26 Bom. 259; *Singh Reddi v. Madava Rau* (1897) 20 Mad. 340.
 (h) *Loke Nath v. Keshab Ram* (1886) 13 Cal. 147.
 (i) *Ram Narain v. Annoda* (1887) 14 Cal. 681; *Sudhendu v. Durga* (1887) 14 Cal. 435.

Two or more plaintiffs, two or more defendants, and two or more causes of action.—In such a case the plaintiffs must be *jointly* interested in the causes of action, and the defendants also must be *jointly* interested in the causes of action. The rule says: "Any plaintiffs having causes of action in which they are *jointly* interested against the same defendants *jointly* may unite such causes of action in the same suit." If the plaintiffs are not *jointly* interested in the causes of action, the suit will be bad for misjoinder of plaintiffs and causes of action. If the plaintiffs are jointly interested in the several causes of action, but the defendants are not, the suit will be bad for multifariousness. And if neither the plaintiffs nor the defendants are jointly interested in the causes of action, the suit will be bad for a double misjoinder, namely, misjoinder of plaintiffs and causes of action and misjoinder of defendants and causes of action. Thus if *A* agrees to sell and deliver salt to *B*, and *C* agrees to sell and deliver salt to *D*, and *B* and *D* sue *A* and *C* for damages for breach of the contracts entered into with them respectively, the suit is bad for a double misjoinder. Neither plaintiff has any interest in the cause of action of the other, nor has either defendant any interest in the cause of action against the other. But if two contracts are entered into each between *B* and *D* of the one part and *A* and *C* of the other part, *B* and *D* may bring one suit against *A* and *C* on the two contracts.

O. 2,
rr. 3, 4.

Jurisdiction.—Where a plaintiff combines several causes of action against the same defendant in one suit, the jurisdiction of the Court as regards the suit depends on the value of the *aggregate* subject-matters (*j*). See sub-r. (2).

4. [S. 44, R.S.C., O. 18, r. 2.] No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except—

Only certain claims to be joined for recovery of immoveable property.

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; and
- (c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

Old section.—This rule corresponds with s. 44, C. P. C., 1882, except in the following particulars:—

1. The rule contained in s. 44 applied to (1) suits for the *recovery* of immoveable property, and to (2) suits to obtain a *declaration of title* to immoveable property. The words, "or to obtain a declaration of title to immoveable property," have been omitted in this rule, so that the operation of the

O. 2, r. 4

present rule is confined only to those cases where a cause of action is sought to be joined with a suit for the recovery of immoveable property.

2. Clause (c) of the rule is new. See notes below under the head "Claims in which the relief sought is based on the same cause of action."

3. The proviso to the rule is also new. It is taken from R. S. C., O. 18, r. 2.

Joinder of claims.—This rule deals with what may be called *joinder of claims*. It declares that no claims other than those specified in the three exceptions shall be joined *without the leave* of the Court with a suit for the "recovery of immoveable property." The object of the rule is to prevent a joinder with a claim for the recovery of *immoveable* property of claims of *other and dissimilar* character. If such latter claims are proposed to be joined with a claim for the recovery of *immoveable* property, the *leave* of the Court must first be obtained, and such leave will only be granted if the Court thinks that the two classes of claims can be conveniently disposed of together in one suit. But no leave is necessary where claims are joined in which the relief sought is based on the *same cause of action* [see cl. (c)].

This rule does not apply to a joinder of several claims all for the recovery of immoveable property. A plaintiff may therefore bring one suit for possession of several immoveable properties without the leave of the Court. Thus if *A* owns 29 parcels of land, and he is dispossessed of all these parcels by *B*, *A* may, *without the leave* of the Court bring one suit against *B* for the recovery of all the plots. Here there is a joinder of 29 claims, but they are all claims for the *recovery* of immoveable property (*k*). Similarly if *A* owns two plots of land in respect of which *B* is entitled to pre-emption, and *A* sells both the plots to *C* on the same day by two separate deeds of sale, *B* may claim pre-emption of *both* the plots in one suit *without the leave* of the Court (*l*). On the same principle, a mortgagee holding two mortgage deeds over separate properties from the same person may join both in one suit for *sale or foreclosure*, *without the leave* of the Court (*m*).

Suit for the recovery of immoveable property.—An action to *establish title* to immoveable property *not* claiming *possession*, is not an action for the *recovery* of immoveable property within the meaning of this rule so as to require the leave of the Court for its joinder with another cause of action (*n*). Similarly, an action to *restrain trespass* on immoveable property is not an action for the *recovery* of immoveable property (*o*). A suit for a declaration that an alleged mortgage is not a mortgage and for possession, or in the alternative for an account and for redemption, does not require the leave of the Court under this rule. "In *either* case he [plaintiff] asks for *possession*—possession at once if there is no valid mortgage, and possession upon payment of what may be found due if the mortgage is valid" (*p*). A suit for recovery of a mortgage debt, with an alternative prayer for sale of the mortgaged property, is not a suit for the *recovery* of immoveable property within the meaning of this rule (*q*).

Claims in which the relief sought is based on the same cause of action:—

1. *Joinder of claims for recovery both of moveable and immoveable property.*—This rule is to be read with r. 2 above which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action (*r*). Hence there is nothing irregular in seeking to recover immoveable and moveable property in one suit *without the leave* of the Court, *if the cause of action is the same in respect*

(k) *Chidambara v. Ramasami* (1882) 5 Mad. 161.

(l) *Ambika Datt v. Ram Uddi* (1895) 17 All. 274.

(m) *Raghubar v. Jwala* (1903) 25 All. 229.

(n) *Gledhill v. Hunter* (1880) 14 C. D. 492.

(o) *Spear's Glass Works, Ltd. v. Spear*, 37 L. J.

N. C. 578.

(p) *Hunt v. Worsfold* [1896] 2 Ch. 224.

(q) *Govinda v. Mana V. Kraman* (1891) 14 Mad. 284.

(r) *Giyana v. Kandasami* (1887) 10 Mad. 375, 506.

of both. Nay, if the plaintiff in such a case sues to recover only one of the two kinds of property, he will be precluded from suing for the other by virtue of the provisions of r. 2 above. Thus where a Mahomedan died leaving two heirs, *A* and *B*, and *C* purchased from *A* certain *immoveable property* which had come to *A*'s share, and from *B* certain *moveable property* which had come to *B*'s share, and both the properties were at the time of purchase in the wrongful possession of *D*, it was held that not only could *C* sue *D* for the recovery of both the moveable and immoveable property in one suit without the leave of the Court, but that if he did not do so, he would be precluded from afterwards suing for the property omitted in the first suit (*s*). In the above case, the cause of action in respect of both the properties was the same, namely, *dispossession and refusal to deliver up the property on demand*. But if the cause of action is not the same, a claim for the recovery of moveable property may *not* be joined with a claim for the recovery of immoveable property *without* the leave of the Court (*t*). Thus a claim against an administrator for damages for malfeasance under ss. 146 and 147 of the Probate and Administration Act, 1881, cannot be joined with a claim for recovery by the plaintiff of his share of immoveable properties alleged to have been bought by the administrator with moneys belonging jointly to the plaintiff and the administrator (*u*).

2. A plaintiff may join, *without the leave of the Court*, in an action for the recovery of immoveable property, other claims, such as a claim for a declaration of title, for an account of the rents and profits, for the appointment of a receiver, and for an injunction to restrain the defendant, from receiving the rents, *provided such claims do not amount to a new cause of action*, and are "mere machinery" (*v*).

Proviso to the rule.—The proviso to the rule enables a plaintiff to claim in one suit redemption or foreclosure *and* possession.

Leave of Court.—Leave should be obtained *before* the plaint is filed (*w*). But the leave under this rule is not a *condition precedent* to jurisdiction, and it may therefore be granted on good cause shown even *after* the institution of the suit (*x*). Under the Code of 1882 it was held that an objection that the plaintiff had joined together claims which, under s. 44 of that Code could not be joined together without the leave of the Court, should be taken in the Court of first instance, and that if it was not so taken, it should be regarded as waived, and it should not be entertained by the Court of appeal (*y*). Under this Code, the objection should be taken at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement. If it is not so taken, it will be deemed to have been waived (r. 7 below). And even if the objection is taken in time and disallowed, the appellate Court should not interfere with the decree in appeal merely on the ground that claims which ought not to be joined under this rule have been joined in one suit unless the misjoinder has affected the merits of the case (s. 99 above).

Where a claim cannot be joined with a claim for the recovery of immoveable property *without the leave of the Court*, it is optional with the plaintiff either to obtain the leave and bring *one* suit in respect of both the claims, or to bring *separate* suits in respect of each of them. The plaintiff is not confined to the first only of these two courses (*z*).

Counterclaim.—This rule applies to a counterclaim as well as to an original action (*a*).

(s) *Ganesh v. Jewadh* (1904) 31 Cal. 262, 31 I. A. 10; *C. Cook v. Enchmarch* (1876) 2 C. D. 111.

(t) *Hingu Lal v. Baldeo Ram* (1902) 24 All. 553.

(u) *Janardan v. Jankibai* (1917) 2 Pat. L. J. 642, 650.

(v) *Gledhill v. Hunter* (1880) 14 C. D. 492, 500.

(w) *Pitchev v. Hinds* (1879) 11 C. D. 905.

(x) See *Lloyd v. Great Western and Metropolitan*

Dairies Co., Ltd. [1907] 23 Times Rep. 570.

(y) *Dhondiba v. Ramchandra* (1881) 5 Bom. 554; *Maula v. Gulzar* (1894) 16 All. 130; *Upendra v. Tara* (1903) 30 Cal. 794, 800.

(z) *Sheo Ratan v. Sheo Sahai* (1884) 6 All. 358, 362; *Lalessor v. Janki* (1892) 19 Cal. 615.

(a) *Compton v. Preston* (1882) 21 C. D. 138; *Clark v. Wray* (1885) 31 C. D. 68.

O. 2, **Appeal.**—No appeal lies from an order under this rule rejecting an application
rr. 4, 5. for leave to join a claim with a claim for the recovery of immoveable property (b).

5. [S. 44, R. S. C., O. 18, r. 5.] No claim by or against an executor, administrator, or heir, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator, or heir, or such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Scope of the rule.—This rule provides that no claim by a person in his *representative character* shall be joined in the same suit with claims by him *personally*, nor shall claims against a person in his representative character be joined with claims against him personally—

- (1) unless the claims by or against him personally arise with reference to the estate which he represents, or
- (2) unless he was entitled to, or liable for, those claims *jointly* with the deceased person whom he represents.

The object of the rule is to prevent an executor or administrator from intermingling the assets of his testator with his own moneys (c).

Illustrations.

(a) *A* is a tenant for life of certain property, and *B* is the remainderman. *A* gives a lease of the property to *C*. *A* dies leaving a will of which *B* is the sole executor. Some months after *A*'s death, *B* sues *C* (1) for arrears of rent due to the estate of *A*, and (2) for rent due to him *personally* subsequent to *A*'s death. Here the first claim is by *C* as executor, and the second claim is by him *personally* as remainderman. The claim by *C* personally does not arise with reference to the estate of *A* of which *C* is executor. The two claims therefore cannot be joined together in the same suit: *Tredegar v. Roberts* [1914] 1 K. B. 283.

(b) *A* dies leaving a will of which *B* is the executor. By his will *A* directs *B* to continue his business. The executor purchases for the purposes of *A*'s business certain goods from *C* in his own name. *C* may in such a case sue *B* for the price of the goods, and he may claim the price against *B* personally, or, in the alternative, against him as executor. The reason is that the personal claim against *B* arises with reference to the estate of which he is the executor. But if *B* purchased certain goods from *C* as executor in the course of the administration of *A*'s estate, and other goods under a separate contract altogether in his own name and expressly for the purpose of his own business, *C* cannot join both claims against *B* in one suit (d).

(c) The second branch of the rule may be illustrated by the following case: *A* and *B* jointly purchase goods from *C*. *A* dies leaving a will of which *B* is the executor. Here *A* and *B* are jointly liable for the price of the goods. *C* may therefore sue *B* for

(b) *Bandhan v. Solhu* (1886) 8 All. 191.
 (c) *Tredegar v. Roberts* [1914] 1 K. B. 283, 287.
 (d) See *Fadwick v. Scott* (1876) 2 Ch. D. 736, 743;

Whitworth v. Darbishire (1893) 41 W. R. 317.

the price in his (*B*'s) personal as well as representative character. If *A* and *B* had purchased goods from *C* under *separate* contracts, *C* ought to bring two separate suits against *B*, one as *A*'s executor to recover the price of goods sold to *A*, and the other against *B* personally to recover the price of the goods sold to him (*B*).

O. 2,
rr. 5, 6.

Heir as such.—An heir may sue or be sued in his *personal* capacity, or he may sue or be sued in his *representative* capacity. [See notes to O. 7, r. 4.] The words “claim by an heir as such” in this rule refer to a claim by him in his *representative* capacity, that is, as representing the estate of the deceased whose heir he claims to be (*e*).

Illustrations.

1. A Mahomedan dies leaving a widow and daughters by a predeceased wife. The widow sues the daughters (1) for her dower, and (2) for her share of the inheritance in her husband's estate. It is contended on behalf of the daughters that the first claim is by the widow *personally*, and that the second claim is by her *as an heir*, and that the two claims cannot be joined in one suit. This contention is not sound, for the second claim cannot be said to have been preferred *by an heir as such*. That claim is not made by the widow as *representing* her husband's estate and *for the benefit of the estate*, but *for her own and personal benefit*. The two claims may therefore be joined in one suit: *Ahmad-ud-din v. Sikander* (1896) 18 All. 256.

2. A Hindu widow sues her husband's executors to recover (1) certain ornaments forming part of her *stridhana*, and (2) her share in her husband's estate. The suit is properly constituted: *Hafizaboo v. Mahomed* (1907) 31 Bom. 105, dissenting from *Ashabai v. Haji Tyeb* (1882) 6 Bom. 390; *Jankibai v. Shrinivas* (1913) 38 Bom. 120 [suit against husband's coparceners for *stridhana* and maintenance]. See ill. (1) above.

Procedure.—Where two claims which this rule does not allow to be joined are joined in one suit, the practice is to amend the plaint by striking out one of them, and the suit may then be proceeded with (*f*).

Objection as to misjoinder when to be taken.—See r. 7 below, and s. 99 above.

6. [S. 45, 2nd para. R. S. C., O. 18, r. 1.] Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

This rule does not apply to cases of *misjoinder*, but to cases where several causes of action have been *properly* joined in one suit and the causes of action so joined cannot be conveniently tried together (*g*). See notes to r. 3 above under the head “One plaintiff, one defendant, and two or more causes of action,” p. 368 above.

(e) *Ahmad-ud-din v. Sikander* (1896) 18 All. 256; *Hafizaboo v. Mahomed* (1907) 31 Bom. 105, dissenting from *Ashabai v. Haji Tyeb* (1882) 6 Bom. 390.

(f) *Ashabai v. Haji Tyeb* (1882) 6 Bom. 390, 394; *Tredegar v. Roberts* [1914] 1 K. B. 283.
(g) *Muthappa v. Muthu* (1903) 27 Mad. 80, 84.

- O. 2, r. 7. 7. [New.]** All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objection as to misjoinder.

This rule is new. In the absence of any such provision in the Code of 1882 it was held that an objection on the ground of misjoinder of plaintiffs and causes of action or of misjoinder of defendants and causes of action could be taken for the first time in appeal and even in second appeal. This rule places objections on the ground of misjoinder of causes on the same footing as objections on the ground of non-joinder and misjoinder of parties as regards the time when they should be taken. See O. 1, r. 13.

The misjoinder of causes of action referred to in this rule is not only the misjoinder contemplated by r. 3 above, but that contemplated by rr. 4 and 5 above. See also s. 99.

Additional rule framed by the Chief Court of the Punjab.—See Appendix VII below.

ORDER III.

Recognised Agents and Pleadors.

- O. 3, r. 1. 1. [S. 36.]** Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf:

Appearance, etc., may be in person, by recognized agent or by pleader.

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Appearance.—If a recognized agent, although able to do so, does not conduct the case on behalf of his principal, his mere presence in Court is not an “appearance” in the suit within the meaning of r. 6 or r. 8 of O. 9 (h). See notes to O. 9, r. 9, “Meaning of Appearance.”

Authority.—When a suit is brought by a person professing to act as another person’s agent, the Court has the power to enquire into the agent’s authority (i).

Application for leave to sue in forma pauperis—Such an application cannot be made by a recognized agent (j). See O. 33, r. 3.

(h) *Soonderlal v. Goorprasad* (1899) 23 Bom. 414.

(i) *Nam Narain v. Raghu* (1892) 19 Cal. 678, 19

I. A. 135.

(j) *Devgirguru, ex parte*, (1889) 4 B. H.C. A. C. 19.

2. [S. 37.] The recognized agents of parties by whom such appearances, applications and acts may be made or done are— O. 3,
rr. 2-4.

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties ;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

Alterations made in the rule by the High Court of Bombay under s. 122.—See Appendix IV below, Rules made by the High Court of Bombay.

3. [S. 38.] (1) Processes served on the recognised agent of a party shall be as effectual as if the same had been served on the party in person unless the Court otherwise directs.

Service of process on
recognised agent.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

Service of process on recognised agent.—A person holding a power-of-attorney is not bound to accept service of summons ; he may refuse to do so, for he is not bound to act under the power (k).

4. [S. 39.] (1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf.

Appointment of pleader.

(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client.

- O. 3.** (3) No advocate of any High Court established under the
rr. 4-6. Indian High Courts Act, 1861, or of any Chief Court, and no
 advocate of any other High Court who is a barrister shall be
 required to present any document empowering him to act.

Sub-rule (2): acceptance by pleader.—This rule does not require the acceptance of a vakalatnama to be in writing. But where, by the rules of the Court, the acceptance is required to be in writing, and it is not in writing, the pleader should not be heard by the Court (l).

Sub-rule (3).—The words “and no advocate of any other High Court who is a barrister” are new

Delegation of authority by pleader.—Where a pleader cannot attend, he has no power to delegate his authority to another pleader (m).

“Until determined with the leave of the Court.”—An attorney’s retainer cannot be revoked by his client by a mere letter; it can only be revoked with the leave of the Court by a writing signed by the client and filed in Court as provided in this rule (n).

For an additional sub-rule made by the Madras High Court.—See Appendix VI below.

5. [S. 40.] Any process served on the pleader of
 any party or left at the office or ordinary
 residence of such pleader and whether the
 same is for the personal appearance of the
 party or not, shall be presumed to be duly communicated and
 made known to the party whom the pleader represents, and,
 unless the Court otherwise directs, shall be as effectual for all
 purposes as if the same had been given to or served on the
 party in person.

6. [S. 41.] (1) Besides the recognized agents des-
 cribed in rule 2 any person residing with-
 in the jurisdiction of the Court may be
 appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall
 be made by an instrument in writing
 signed by the principal, and such instru-
 ment or, if the appointment is general, a
 certified copy thereof shall be filed in Court.

(l) *Mahesh Chandra v. Panchu* (1916) 43 Cal. 884; *Jogesh Chandra Gupta, in the matter of*, (1916) 20 Cal. W. N. 283; *In the matter of*

two Pleaders (1917) 2 Pat. L. J. 259.
 (m) *Shivdayal v. Khetu* (1896) 20 Bom. 293.
 (n) *Atul Chunder v. Lakshman* (1909) 36 Cal. 609.

ORDER IV.

Institution of Suits.

1. [S. 48.] (1) Every suit shall be instituted by pre- O. 4, r. 1.
Suit to be commenced by sending a plaint to the Court or such
plaint. officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

2. [S. 58.] The Court shall cause the particulars of
Register of suits. every suit to be entered in a book to be kept for the purpose and called the register, of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

For an additional sub-rule made by the Madras High Court.—See Appendix VI below.

ORDER V.

Issue and Service of Summons.

ISSUE OF SUMMONS.

1. [S. 64.] (1) When a suit has been duly instituted O. 5, r. 1.
Summons. a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified :

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear—

- (a) in person, or
- (b) by a pleader duly instructed and able to answer all material questions relating to the suit, or
- (c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

O. 5, rr. 1-5. **Decree without issue of summons.**—The proviso to sub-r. (1) contemplates cases where a decree may be passed against a defendant without issue or service of summons upon him (o).

2. [S. 65.] Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.
Copy or statement annexed to summons.

3. [S. 66.] (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.
Court may order defendant or plaintiff to appear in person.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

Consequence of non-attendance.—As to the consequence of non-attendance in person, see O. 9, r. 12.

Non-attendance of party on adjourned date.—Where an order is made under this rule for the personal appearance of a party on a specified day, he is not bound to appear personally on any adjourned date unless a fresh order is made requiring his appearance on that date. Where no fresh order is made, and the Court disposes of the suit under O. 9, r. 12, the order is one made without jurisdiction (p).

No party to be ordered to appear in person unless resident within certain limits.

4. [S. 67.] No party shall be ordered to appear in person unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate), less than two-hundred miles distance from the court-house.

5. [S. 68.] The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:
Summons to be either to settle issues or for final disposal.

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit. O. 5.
rr. 5-9.

As a general rule summonses for final disposal of suits should be issued only in simple cases (q).

6. [S. 69.] The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Fixing day for appearance of defendant.

7. [S. 70.] The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

Summons to order defendant to produce documents relied on by him.

8. [S. 71.] Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

Service of Summons.

9. [S. 72.] (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

Delivery or transmission of summons for service.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

- O. 5.** **10. [S. 73.]** Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.
- r. 10-14.** **Mode of service.**

Object of service.—The object of the service of a summons in whatever way it may be effected (other than substituted service to which other considerations apply) is that the defendant may be informed of the institution of the suit in due time before the date fixed for the hearing (r). See notes to r. 17 below, “service of summons.”

Additions made to this rule by the Chief Court of the Punjab under s. 122.—See Appendix VII below.

- 11. [S. 74.]** Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.
- Service on several defendants.**

Partners.—As to service on partners, see O. 30, r. 3.

- 12. [S. 75.]** Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.
- Service to be on defendant in person when practicable or on his agent**

- 13. [S. 76.]** (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work, for such person within such limits, shall be deemed good service.
- Service on agent by whom defendant carries on business.**

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

Manager or agent personally carrying on business.—The manager or agent contemplated by this rule is one who has an initiative and independent discretion albeit subject possibly to general orders for his guidance. A *mere servant* employed to carry out orders or to execute a particular commission or a factor or commission agent who is not identified with the firm for which he acts, is not such an agent (s).

- 14. [S. 77.]** Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to
- Service on agent in charge in suits for immoveable property.**

accept the service, it may be made on any agent of the defendant in charge of the property.

O. 5, rr. 14-17.

15. [S. 78.] Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendant's family.

Explanation.—A servant is not a member of the family within the meaning of this rule.

16. [S. 79.] Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require

Person served to sign acknowledgment.

the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

Refusal to sign acknowledgment.—A mere refusal to sign an acknowledgment of service is not an offence under s. 173 or s. 180 of the Penal Code (1).

17. [S. 86.] Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Procedure when defendant refuses to accept service, or cannot be found.

O. 5, r. 17. **The old section.**—This section corresponds with s. 80 of the Code of 1882 except in the following particulars :—

1. The words “after using all due and reasonable diligence” are new. They give effect to the decisions cited in the notes below under the head “After using all due and reasonable diligence.”
2. The words “or carries on business or personally works for gain” have been added to remove a doubt which arose under the old section as to whether it was good service to affix a copy of the summons on the outer door of the defendant’s *place of business* (u).
3. The words “and the name and address,” etc., at the end of the rule are also new. They merely give effect to the existing practice.

Service of summons.—The Code prescribes three modes of service of summons upon a defendant. They are as follows :—

1. In the first case, the summons is served by delivering a copy thereof to the defendant personally, or to an agent or other person on his behalf, and by obtaining the signature of the person to whom the copy is delivered to an acknowledgment of service endorsed on the original summons. See rr. 10—16 and r. 18.
2. In the second case, that is, cases mentioned in r. 17, service is effected *without an order of the Court* by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and the *Court has to declare* after examination of the serving officer that the summons has been duly served. When this mode of service is adopted, the provisions of r. 19 have to be complied with and the Court concerned has to decide whether the summons has or has not been duly served. See rr. 17 and 19.
3. In the third case, that is, cases mentioned in r. 20, service is effected *after obtaining an order of the Court* by affixing a copy of the summons in some conspicuous place *in the Court-house* and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit. Service so effected is as effectual as if it had been made on the defendant personally. This is called *substituted service*. See r. 20 and the marginal note thereto.

Refuses to sign the acknowledgment—Service cannot be said to be duly effected where a defendant refuses to sign the acknowledgment and the provisions of the present rule are not complied with (v).

“After using all due and reasonable diligence.”—The present rule provides that in cases where the defendant cannot be found, the mode of service prescribed by this rule should not be resorted to *until* the serving officer has used *all due and reasonable diligence* to find the defendant, and the defendant could not be found. To justify such service, it must be shown that *proper efforts were made to find the defendant, e.g.,* that the serving officer went to the place or places and at the times at which it was reasonable to

(u) *Chanbasappa v. Marnaba* (1870) 7 B. H. C., A. C., 138.
(v) *Maruti v. Vithu* (1891) 16 Bom. 117 (notice of

Appeal); *Diwan Chand v. Parbati* (1918) Punj. Rec. no. 99, p. 327.

expect he would be found (w). Thus, if a serving officer goes to a defendant's house, but does not find him there, and the defendant's adult son, who is in the house, refuses to accept service on behalf of the father, these facts by themselves do not justify the officer in resorting to the mode of service prescribed by this rule; he must, before effecting such service, inquire of the son as to where the defendant is and otherwise use due and reasonable diligence in finding the defendant (x). When a defendant is temporarily absent from home, and is not represented in his house by an agent or male member of his family, the summons should be again taken to the defendant's house to be served upon him when the enquiries made show that he is likely to be at home and to be found there (y). Mere temporary absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant's house (z); much less, if the serving officer knows where the defendant is, though the defendant may not have been in the house at the time when he went to serve the summons (a). See notes above under the head "The old section."

O. 5,
rr. 17-19.

Cannot find the defendant.—These words are wide enough to cover the case where the serving officer is not able to obtain access to a *pardanashin* lady who has to be served, and cannot deliver or tender a copy of the summons to her (b). See notes to r. 19 below, and notes also to O. 9, r. 13, "Grounds on which *ex parte* decree may be set aside."

Proof of service.—If the plaintiff appears at the hearing of the suit, but the defendant does not appear at the hearing, the question whether the summons was duly served arises directly for the determination of the Court, for the Court cannot proceed *ex parte* unless it is proved that the summons was duly served [O. 9, r. 6 (1)]. Where a decree is passed *ex parte* against a defendant, and the defendant satisfies the Court which passed the decree that the summons was not duly served upon him, the Court may set aside the decree [O. 9, r. 13].

18. [S. 81.] The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Endorsement of time and manner of service.

Form of return.—See Appendix B to Schedule I, Form No. 11. The said Form has been altered in certain respects by the Chief Court of the Punjab: see Appendix VII below.

19. [S. 82, 1st para.] Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if

Examination of serving officer.

(w) *Rajendra v. Jan Meah* (1899) 28 Cal. 101;
Cohen v. Nursing Dass (1892) 19 Cal.
 201; *Sankaralinga v. Ratinasabhapati* (1896)
 21 Mad. 824; *Kassim v. Johurmull* (1916)
 43 Cal. 447.
 (z) *Sakaram v. Padmakar* (1906) 30 Bom. 623.
 (y) *Bhomasetti v. Umabai* (1897) 21 Bom. 223.

(x) *Subramania v. Subramania* (1898) 21 Mad.
 419; *Abraham v. Donald* (1906) 29 Mad.
 324.
 (a) *Sakin v. Gouri* (1902) 24 All. 302.
 (b) *Kahirode v. Nahin Chandra* (1915) 19 C. W.
 N. 1231.

O. 5. it has been so verified, examine the serving officer on oath, or
rr. 19-21. cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

“Or order such service as it thinks fit.”—These words empower the Court, even when there has been a technical compliance with the provisions of r. 17. to order service in another mode, if the Court thinks fit to do so in the interests of justice. Thus where the person to be served is a *pardanashin* lady, and the serving officer, not being able to obtain access to her, affixes a copy of the summons on the outer door of her dwelling house as provided by r. 17, though the service is properly effected, the Court may under this rule direct the service of summons by means of notice by registered post, so that the cover may in due course reach the lady herself (c).

20. [S. 82, 2nd para. Ss. 83, 84.] (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house [if any] in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

Substituted service.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Effect of substituted service.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Where service substituted, time for appearance to be fixed.

Substituted service.—See notes to r. 17 above, “Service of summons.”

For any other reason.—Where by the custom in India a defendant (being a Hindu woman of rank) could not be personally served with a summons, the Judicial Committee allowed service to be substituted on her *Deewan* [chief servant] (d).

21. [S. 85, 1st para.] A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Service of summons where defendant resides within jurisdiction of another Court.

22. [S. 86.] Where a summons issued by any Court established beyond the limits of the towns **O. 5, rr. 22-24.**

Service, within Presidency-towns and Rangoon, of summons issued by Courts outside.

of Calcutta, Madras, Bombay and Rangoon is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

Additions made to the rule by the High Court of Bombay—See App. IV.

23. [S. 85, 2nd para.] The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

Duty of Court to which summons is sent.

Form of Return.—See Schedule I, Appendix B, Form No. 0, and note the alterations made in the said Form by the High Court of Bombay in exercise of the powers conferred by s. 122 above.

Sufficiency of service.—Where a summons has been transmitted by one Court to another for service by the latter, and the return made by the Court serving the summons states that the service has been duly effected, the presumption will be that the service was sufficient unless the return itself shows the insufficiency (*e*). Similarly when the return made by the Court serving the summons states that the summons has not been duly served, and the summons is returned with that declaration to the Court from which it was issued, the presumption is that the service was not sufficient, and the Court from which the summons was issued should act upon that presumption unless there is good and strong evidence which comes or is brought to its notice going to show that the summons was duly served (*f*). According to the Calcutta High Court, however, the Court issuing the summons must not proceed upon any presumption either way, but must determine for itself whether the service was sufficient or not, the reason given being that the present rule does not require the Court to which the summons is sent for service to make any return touching the *sufficiency* of service (*g*). This view has been dissented from by the High Court of Allahabad on grounds of expediency, and, further, on the ground that it ignores the last sentence of rule 19 above which applies not only to the Court issuing the summons, but also to the Court to which it is sent for service (*h*).

24. [Ss. 87-88.] Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Service on defendant in prison.

As to the duty of the officer to whom the summons is sent for service, see r. 22 below.

(*e*) *Nasir Mohamed v. Kazbai* (1886) 10 Bom. 202.

(*f*) *Dwarka Prasad v. Brij Mohan Lal* (1911) 33 All. 649.

(*g*) *Romanath v. Goggodu* (1895) 22 Cal. 889.

(*h*) *Dwarka Prasad v. Brij Mohan Lal* (1911) 33 All. 649.

O. 5,
rr. 25, 26.

Service where defendant
resides out of British India
and has no agent.

25. [S. 89.] Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Where summons is sent by post.—This rule is to be read with s. 27 of the General Clauses Act 10 of 1897 by which it is provided that when any document is required by an Act passed after 11th March 1897 to be served by post, and the expression used is “send”, [which is the expression used in the present rule], then, “unless a different intention appears, [and no such intention appears in the present rule], the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.” Reading the present rule with the said s. 27, the High Court of Bombay held in a case in which it appeared that the postal packet enclosing the summons was properly addressed to the defendant, and was registered, duly stamped and posted, but the packet was returned endorsed “refused,” that the Court was entitled to draw the inference indicated in the said s. 27 and to hold that there was sufficient service (i). In the earlier cases which arose under the corresponding section of the Code of 1882, where a postal packet was returned endorsed “refused,” it was held that the service was not sufficient and that further evidence was necessary before the Court could act upon such endorsement (j). As to those cases, however, it is to be noted that they were all decided without any reference to s. 27 of the General Clauses Act as all of them except one were cases before the said Act came into force, and the one decided after the said Act came into force was not governed by the provisions of the said s. 27, as that section did not apply to the Code of 1882 it being an enactment passed before 11th March 1897, the date on which the General Clauses Act came into force.

Service in foreign
territory through Political
Agent or Court.

26. [S. 90.] Where—

- (a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or
- (b) the Governor-General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any

(i) *Balaram v. Bai Pannabai* (1910) 35 Bom. 213.

See also *Roopchand v. Haji Hussein* (1914)
16 Bom. L. R. 204.

(j) *Jogendra Chunder v. Dwarka Nath* (1888) 15

Cal. 681; *Jagannath v. Sassoon* (1893) 18
Bom. 606; *Aga Gulam Husain v. Sassoon*
(1897) 21 Bom. 412, 418; *Fakhr-ud-din v.*
Ghajur-ud-din (1901) 28 All. 99.

such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be a valid service, O. 5,
rr. 26-29.

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

The words italicized in CL. (b) of this rule are new. They were inserted in this rule by the Second Repealing and Amending Act XVII of 1914.

27. [S. 422.] Where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

Service on civil public officer or on servant of railway company or local authority.

Officer belonging to the Indian Marine Service.—An officer or mechanic in the employ of the Indian Marine Service is subject to exactly the same rules as every other person under the Code, that is to say, service upon him is to be effected in the manner prescribed by rr. 15 to 17 above (k).

This rule has been amended by the Madras High Court.—See Appendix VI below.

28. [S. 468.] Where the defendant is a soldier, the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

Service on soldiers.

This rule has been amended by the Madras High Court.—See Appendix VI below.

29. [Cf. Ss. 87, 88, 468.] (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible,

Duty of persons to whom summons is delivered or sent for service.

O. 5, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

For an additional rule made by the Madras High Court.—See Appendix VI below.

30. [Ss. 91, 92.] (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

Substitution of letter for summons.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

Additional rule framed by the High Court of Allahabad under s. 122.—See Appendix V below.

ORDER VI.

Pleadings generally.

O. 6, r. 1.

Pleading.

1. [*New. Cf. Jud. Act, 1873, S. 100.*] “Pleading” shall mean plaint or written statement.

Introduction of English rules of pleadings.—The object of this Order is to introduce into British India the leading rules of pleadings followed in England. The whole of this Order, excepting rr. 14 and 15, is new. The rules comprised in this Order, except rr. 14 and 15, have been taken most of them from Order 19 and the rest from Order 28 of the English Rules made under the Judicature Acts. In one respect, however, the rigour of the English Rules has been relaxed by providing that the

Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who alleges it (see O. 8, r. 5).

O. 6,
rr. 1, 2.

Function of pleadings.—"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules [relating to pleadings] was to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be discussed and decided was. In fact, *the whole meaning of the system is to narrow the parties to definite issues*, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing" (l). To attain this end, the plaintiff should state in his plead all the facts which constitute his cause of action. It is not sufficient to allege what may be a ground of action if something else be added which is not stated in the plead. "Upon all sound principles of pleading it is necessary to allege what must, and not what may, be a cause of action" (m). The defendant also should state in his written statement the material facts on which he relies for his defence. When the result of the pleading on both sides is that a material fact is affirmed on the one side and denied on the other, the question thus raised between the parties is called an issue of *fact*. When one party answers his opponent's pleading by stating an objection in point of law, the legal question thus raised between the parties is called an issue of *law*. See O. 14, r. 1.

A plaintiff's pleading is his plead (O. 7). A defendant's pleading is his written statement (O. 8). In some cases a plaintiff who has filed his plead may, with the leave of the Court, file a *written statement*, or the Court may require him to file a *written statement*. In such cases the written statement forms part of the plaintiff's pleadings. Again, there are cases in which a defendant who has filed his written statement may, with the leave of the Court, file an *additional written statement* or the Court may require him to do so. In such cases the *additional written statement* forms part of the defendant's pleadings. The plaintiff's written statement and the defendant's additional written statement are called *subsequent pleadings*. See O. 8, r. 6.

2. [New. R. S. C., O. 19, r. 4.] Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

Pleading to state material facts and not evidence.

General rules of pleading.—O. 6 deals with Pleadings in general, O. 7 deals with Pleadings, and O. 8, with Written Statements. The following is a summary of the rules comprised in this Order:—

1. State your *whole* case in your pleading, in other words, set forth in your pleading *all* material facts on which you rely for your claim or defence (r. 2).
2. State facts and *not* law (r. 2). If any matter of law is set out in your opponent's pleading, do not plead to it (n).
3. State the material facts on which you rely, and *not* the evidence by which they are to be proved (rr. 2, 10, 11, 12).

(l) *Per* Jessel, M.R., in *Thorp v. Holdsworth* (1876) 3 Ch. D. 637, 639.
(m) *West Rand Central Gold Mining Co. v. Rex*

[1905] 2 K. B. 391, 400.

(n) *Richardson v. Mayor of Orford* (1793) 2 H. B. 182.

D. 6, r. 2.

4. State *material facts* only; omit immaterial and unnecessary facts. Do not anticipate your opponent's pleading and plead to any matter which is not alleged against you (r. 2).
5. State the facts of your case *concisely*, but with precision (r. 2).
6. It is not necessary to allege the performance of any condition precedent; an averment of performance is now implied in every pleading (r. 6).
7. It is not necessary to set out the whole or any part of a document, unless the precise words thereof are necessary. It is sufficient to state the effect of the document as briefly as possible (r. 9).
8. It is not necessary to allege any matter of fact which the law presumes in your favour, or as to which the burden of proof lies upon your opponent (r. 13).

Fundamental rule.—Rule 2 of this Order is the fundamental rule of pleadings. When analysed, it will be found to require four things:—

- I. Every pleading must state *facts* and not law.
- II. It must state *material facts*, and material facts only.
- III. It must state only the facts on which the party pleading relies for his claim or defence, and *not the evidence* by which they are to be proved.
- IV. It must state such facts *in a concise form*.

“The main object, or one of the main objects, of this rule is that the one party may know what are the facts on which the other party relies in order that he may be prepared to meet the case” (o).

I. Every pleading must state facts and not law.—A pleading must not set forth a public statute, for the Court is bound to take judicial notice of it (p). Nor should parties plead conclusions of law or of mixed law and fact: it is for the Court to declare the law arising upon the facts before it. The parties should only state the *facts* on which they rely for their claim or defence.

It is bad pleading to allege merely that a *right* or a *duty* exists; the *facts* must be set out which give rise to the right or create the duty. Thus in a suit for damages for negligence, it is not enough for the plaintiff to state that “the defendant has been guilty of negligence,” without showing in what respect he was negligent and how he became bound to use care to prevent injury to others. Negligence means a breach of duty to take due care and caution. The plaintiff, therefore, ought to state facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged (q). Similarly, it is not sufficient for the plaintiff to aver that the defendant did the act complained of “wrongfully, unlawfully and improperly” or “without any justification therefore or right so to do.” He must state the facts upon which he proposes to rely as showing that the act was done wrongfully or unlawfully. “Those epithets, under the present system of pleading, are useless and redundant. They add nothing whatever to the plaintiff's case. They are merely now epithets of abuse. They were formerly in declarations essential, because under that form of pleading *legal rights* were stated for *facts*; but *facts* alone are stated now” (r). Upon like principles, it is not sufficient for the plaintiff to say, “Under and by virtue of a certain deed I am entitled,

(o) *Re Morgan, Owen v. Morgan* (1887) 35 C. D. 492, 496.

(p) *Partridge v. Strange* (1816) Plowd. 77, 84.

(q) *Gautret v. Egerton* (1867) L. R. 2 C. P. 371,

374; *West Rand Central Gold Mining Co. v. Rex* [1905] 2 K. B. 391, 400.

(r) *er Jessel, M. R., in Day v. Brownrigg* (1878) 10 C. D. 294, 302.

etc. He must state the facts which go to show his title (s). In like manner, a plaintiff claiming under a *donatio mortis causa* must state the facts which, according to him, would constitute it a valid *donatio mortis causa*: it is not sufficient to say that the deceased "two days before his death made a good and valid *donatio mortis causa* to the plaintiff" of the property (t). Where a plaintiff claims by inheritance, it is not sufficient to say, "I am the heir-at-law." He must state the particulars showing the links of relationship on which he relies as constituting him such heir (u).

The same principles apply to a defendant. He must not say merely, "I am not liable." He must allege facts which show that he is not liable. Thus a defendant, who claims privilege in a suit for defamation, must not plead merely that "he published the words on a privileged occasion." He must state the facts which give rise to the privilege (v).

II. Every pleading must state material facts and material facts only.—To begin with, a party should set out in his pleading *all* material facts on which he relies for his claim or defence. "What particulars are to be stated must depend on the facts of each case. But it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial" (w). If a party omits to plead a material fact, he will not be allowed to give evidence of that fact at the trial, unless the Court gives him leave to amend his pleadings under r. 17 below. "If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings" (x). Thus if A sues B for specific performance of a contract, alleged to have been signed by B's agent, and the only fact stated in B's written statement as a ground of defence is that the alleged agent was of unsound mind and therefore incompetent to contract, B will not be allowed to prove at the hearing that the alleged agent *had in fact no authority to sign the contract*. B ought to have pleaded want of authority in his written statement, if he intended to rely upon it for his defence. Nor will B be allowed to amend his written statement in such a case under rule 17 below, for "if a defendant were to be at liberty to put in a defence inconsistent with the rules of pleading, and then at the trial get the case to stand over in order to put in a new defence, the consequences might be very prejudicial" (y).

Matters affecting damages—The present rule provides that every pleading should contain, and contain only, *material facts on which the party pleading relies for his claim or defence*, as the case may be. That is to say, a plaint should contain only those material facts on which the plaintiff relies for his claim and a written statement should contain only those material facts on which the defendant relies for his defence. Does this mean that the plaint should be confined to those facts only which constitute the plaintiff's *cause of action*, and that the written statement should be confined to those facts only which constitute the defendant's *defence*? It has been held, as regards a *plaintiff's claim*, that the words "material facts on which the party pleading relies for his claim," are not confined to those facts which are essential to the plaintiff's cause of action, but include any fact which the plaintiff is entitled to prove at the hearing. Thus facts which

(s) *Riddell v. Earl of Strathmore* (1887) 3 Times L. R. 829.

(t) *Re Parton, Townsend v. Parton* (1882) 30 W. R. 28, [Eng.].

(u) *Palmer v. Palmer* [1892] 1 Q. B. 319.

(v) *Simmonds v. Dunne* (18.1) Ir. R. 5 C. L. 358.

(w) *Per Cotton, L.J., in Phillips v. Phillips*

(18.8) 4 Q. B. D. 127, 139.

(x) *Phillips v. Phillips* (18.8) 4 Q. B. D. 127, 133, *per Brett, L.J.*; *Brook v. Brook* (1886) 12 P. D. 19; *Davis v. James* (1884) 28 C. D. 778.

(y) *Byrd v. Nunn* (1877) 7 C. D. 284.

O. 6, r. 2. merely tend to increase the amount of damages are not essential to the cause of action, but they certainly are facts which the plaintiff is entitled to prove at the hearing as matters in aggravation of damages. Such facts are therefore "material" facts within the meaning of this rule and a plaintiff has to state them in his plaint (z). As observed by Brett, L.J., in *Phillipps v. Phillipps* (a), the words of the rule are not "the facts which will be necessary to support the cause of action": they are, "the material facts on which the party relies for his claim." In *Millington v. Loring* (b), which was a suit for damages for breach of a contract to marry, the plaintiff, after alleging the promise to marry in the first paragraph and the breach thereof in the second, went on to allege in the third paragraph that "the plaintiff relying upon the said promise permitted the defendant to debauch and carnally know her, whereby the defendant infected her with a venereal disease." Analysing the above plaint, it may be stated that the first and second paragraphs stated facts that were essential to the cause of action, viz., facts relating to the making of the contract and facts relating to the breach of the contract, being facts which constitute the cause of action in a suit for damages for the breach of a contract. But the facts stated in the third paragraph were not essential to the cause of action. Nevertheless they were material facts within the meaning of the rule, for the plaintiff was entitled to prove them as matters in aggravation of damages, and it was held that they were properly set forth in the plaint. Turning now to the defence in a suit for damages, the rule laid down in *Wood v. Durham* (c) is, that a defendant is not in general entitled to plead in his defence matters in mitigation of damages. The ground of the decision in that case is that such matters do not constitute any defence to an action, and a defendant can under the rule allege only those material facts on which he relies for his defence. As to *Millington v. Loring*, it was said that it was a case where "there was a good cause of action of a double character stated: there were damages claimed by reason of an alleged breach of promise of marriage, but there was far more, because part of the cause of action was that by reason of that the plaintiff had been ill through the seduction by the defendant, who had ruined her character, and had infected her with a bad disease." One may be permitted to doubt whether illness through seduction and infection with disease formed part of the cause of action. Moreover, the decision in *Millington v. Loring* has been followed in a case later than *Wood v. Durham*, where it could not be said that there was a cause of action of a double character (d). However this may be, it is to be remarked that the decision in *Wood v. Durham* turned not only on the construction of the corresponding English rule, but on O. 21, r. 4, which provides in express terms that "no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted." O. 21, r. 4, of the English rules has not been reproduced in the Code. See notes to O. 7, r. 3, "Except damages."

Facts not yet material to a case.—The pleadings should only contain such facts as are material at the present stage of the suit. It is not proper to anticipate the answer of the adversary. To do so is "like leaping before one comes to the stile" (e). "It is no part of the statement of claim ['plaint' in our pleadings] to anticipate the defence, and to state what the plaintiff would have to say in answer to it. That would be a return to the old inconvenient system of pleading in Chancery, which ought certainly not to be encouraged, when the plaintiff used to allege in his bill imaginary defences of the defendant, and make charges in reply to them." (f). Thus it is unnecessary in a suit upon a bond

(z) *Millington v. Loring* (1880) 6 Q. B. D. 190, 194; *Whitney v. Moignard* (1890) 24 Q. B. D. 680.

(a) (1878) 4 Q. B. D. 127, 133.

(b) (1880) 6 Q. B. D. 190.

(c) (1888) 21 Q. B. D. 501; *Wood v. Cox* (1888)

4 Times Rep. 550.

(d) *Whitney v. Moignard* (1890) 24 Q. B. D. 680.

(e) *Sir Ralph Bovy's case* (1678) Vent. 217.

(f) *Hall v. Eve* (1876) 4 C. D. 341, 345, per James, L.J.

to allege that the defendant was of full age when he executed the bond. For if he were a minor when he executed the bond, it is for him to prove it: it need not be denied by anticipation (g). Similarly a defendant should not plead to any matter which is not alleged against him. Thus if a defendant is sued for slander, the only way to meet the plaintiff's claim is to plead (1) that the words in question were not spoken and published, or (2) that they were spoken and published and are true, or (3) that they were spoken and published and are privileged. If, instead of so doing, he pleads that he did not say the words alleged in the plaint, but that he said something else, and that the something else which he said was true and spoken on a privileged occasion, the defence will be struck out under r. 16 below as one embarrassing the fair trial of the suit (h).

O. 6, r. 2.

III. Every pleading must state facts, and not the evidence by which they are to be proved.—Every pleading must contain a statement of the *material facts on which the party pleading relies but not the evidence* by which those facts are to be proved. "It is an elementary rule of pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation" (i). No doubt, evidence too consists of facts, but there is a convenient nomenclature to distinguish the two. The material facts on which the party pleading relies for his claim or defence are called *facta probanda*. The evidence or the facts by means of which they are to be proved are called *facta probantia*. Every pleading should contain only *facta probanda*, and not *facta probantia*. "The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle, C.J., expressed it in this way. He said there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon that expression of opinion of Erle, C. J., that rule 4 [of the English rules, corresponding to the present rule] was drawn. The facts which ought to be stated are the material facts on which the party pleading relies" (j). Thus where a suit is brought against an Insurance Company on a policy on the life of A, and one of the conditions of the policy is that it should be void if the insured committed suicide, the Company should only plead, if the defence is that A committed suicide, that A died by his own hand. It is wrong to state in the written statement that A had been melancholy for weeks, that he bought a pistol and shot himself with it. These facts are merely evidence (*facta probantia*) facts by means of which the *factum probandum*, namely, suicide, is to be proved (k). Similarly, it is wrong to set out in the pleading admissions made by the opponent, for admissions are only evidence (l). Thus where a plaintiff alleged that certain windows of his were ancient, and the defendant stated in his defence that the plaintiff had in a former action admitted that they were not ancient, the allegation was struck out (m). Upon the same principle, "where the facts in a pedigree are facts to be relied upon as facts to establish the right or title, they must be set out; but where the pedigree is the means of proving the facts relied on as facts by which the right or title is to be established, then the pedigree is evidence that need not be set out" (n).

Rule 10, 11 and 12, of this Order are special applications of the general principle laid down in this rule.

(g) *Walsingham's case* (1816) 2 Plowd. 564; *Sir Ralph Bovy's case* (1673) Vent. 217.

(h) *Rassam v. Budge* [1893] 1 Q. B. 571.

(i) *Williams v. Wilcox* (1838) 8 A. & E. 314, 331, per Lord Denman, C.J.

(j) *Philpotts v. Philpotts* (1878) 4 Q. B. D. 127, 133, per Brett, L.J.

(k) See *Borrodale v. Hunter* (1846) 5 Man. and Gr. 639.

(l) *Davy v. Garrett* (1878) 7 C. D. 478, 485; *Williamson v. L. and N. W. Railway Co.* (1879) 12 C. D. 787, 793; *Spedding v. Fitzpatrick* (1888) 38 O. D. 410, 414; *Briton Medical Life Association v. Britannia Fire Association* (1888) 59 L. T. 888.

(m) *Lumb v. Beaumont* (1884) 49 L. T. 772.

(n) *Philpotts v. Philpotts* (1878) 4 Q. B. D. 127, 134, per Brett, L.J.

O. 6,
rr. 2, 3.

IV. Every pleading must state material facts in a concise form—To attain this end, the forms in Appendix A when applicable, and, where they are not applicable, forms of the like character, as nearly as may be, should be used for all pleadings (see r. 3 below). At the same time the rules given above under the head "General rules of pleading," p. 395 above, should be borne in mind. But the pleader should not sacrifice precision to conciseness. For, as observed by Kay, J., "although pleadings must now be concise, they must also be precise" (o). In fact, rule 4 expressly requires that in all cases "in which particulars may be necessary beyond such as are exemplified in the forms [in Appendix A], particulars (with dates and items if necessary) shall be stated in the pleadings." As to further information on this subject of "certainty" in pleadings, see notes to rr. 4-5 below.

Alternative and inconsistent allegations.—The rule now under consideration does not prohibit inconsistent pleadings. "A person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them; and it appears to me to be far too strict a construction of this Order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark" (p). The rules as to joinder of defendants (O. 1, r. 3) and causes of action (O. 2, r. 3), as also the rules as to the reliefs that may be claimed by a plaintiff (O. 7, rr. 7, 8) clearly show that either party may allege in his pleadings two or more inconsistent sets of material facts and claim relief thereunder in the alternative (q). A plaintiff may rely "upon several different rights alternatively, although they may be inconsistent" (r). But then "as to each of those he ought to set out the facts upon which he would have to rely as facts to maintain that right" (s). So, too, a defendant may, by his written statement, "raise as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in [rule 16 below]" (t). A pleading is not embarrassing within the meaning of rule 16, merely because it sets up inconsistent sets of facts (u). It may in a proper case be struck out as embarrassing and oppressive to the other side (v). "But to go to the length of saying that no inconsistent pleading can be pleaded, appears to me not warranted by the rules and contrary to the established practice of the Courts" (w). But, "if alternative cases are alleged, the facts ought not to be mixed up, leaving the [other party] to pick out the facts applicable to each case; but facts ought to be distinctly stated, so as to show on what facts each alternative of the relief sought is founded" (x).

See also notes to O. 7, r. 7, under the head "Alternative relief."

3. [New. R. S. C., O. 19, r. 5] The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

Forms of pleading.

(o) *Townsend v. Parton* (1882) 30 W. R. [Eng.] 287.
(p) *Re Morgan Owen v. Morgan* (1887) 35 C. D. 492, 499, *per* Lindley, L.J.
(q) See *Parrot v. Easton* (18) 7 C. D. 1.
(r) *Phillips v. Phillips* (1878) 4 Q. B. D. 127, 134, *per* Brett, L.J.
(s) *Id.* See also O. 7, r. 8.

(t) *Ferdan v. Greenwood* (18 8) 3 Ex. D. 251, 255.
(u) *Re Morgan, Owen v. Morgan* (188) 35 C.D. 492.
(v) (188) 35 C. D. 492, *supra*.
(w) (188) 35 C. D. 492, 500, *per* Lindley, L.J.
(x) *Davy v. Garrett* (18 8) C. D. 4.3, 4.9, *per* Thesiger, L.J. See also O. 8, r. 7.

4. [New. R. S. C., O. 19, r. 6.] In all cases in which O. 6, r. 4.

Particulars to be given
where necessary.

the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

Object of particulars.—"Although pleadings must now be concise, they must also be precise" (y). For this purpose all necessary particulars must be embodied in the pleadings. If the particulars stated in the pleadings are not sufficiently specific, the other party may apply for further and better particulars under the next rule. The object of particulars is to prevent surprise at the trial by informing the opposite party what case he has to meet, to define and narrow the issues to be tried and so save unnecessary expense (z). Particulars supplement pleadings which would otherwise be too vague and general, and ensure a fair trial by giving notice of the case intended to be set up (a). "What particulars are to be stated must depend upon the facts of each case" (b). As a general rule it may be stated that "as much certainty and particularity must be insisted on as is reasonable having regard to the circumstances and to the nature of the acts themselves. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry" (c). At the same time the distinction between *particulars* and *evidence* must be steadily kept in view. "The Courts have uniformly endeavoured to prevent the plaintiff, for the defendant, as the case may be from prying into the brief of his opponent for finding out *what is to be the evidence which is to be produced at the trial*. On the other hand, the Courts have uniformly said that the plaintiff or the defendant is entitled to be told *any and every particular which will enable him properly to prepare his case for the trial*, so that he may not be taken by surprise" (d). That is to say, whilst particulars may be ordered to prevent surprise, and to inform the opposite party of the case he has to meet, particulars are not ordered of the mode in which it may be proposed to prove the case set up in the pleading (e). To use the phraseology of r. 2 above, particulars will be ordered of the *material facts* on which the party pleading relies for his claim or defence, but not of the *evidence* by which those facts are to be proved. Thus, a defendant is not entitled to know the names of the plaintiff's witnesses, for that is to require particulars of the *evidence* by which the plaintiff's case is to be proved. But where the names of witnesses form part of the *material facts* constituting a party's case, he is bound to state them in his pleading, and if he does not, an order may be made under the next rule requiring him to disclose the names (f). "If the particulars are those that he ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of the witnesses he proposes to call" (g). This may be explained by an illustration. A deals in drugs bearing the registered trademark "Herbalin." B uses the word "*Herbaline*" on drugs manufactured by him. B sues A for infringement of his trade-mark, alleging in the plaint that the use of his trade-

(y) *Townsend v. Parton* (1882) 30 W. R. (Eng).
237 *per* Kay, J.
(z) *Spedding v. Fitzpatrick* (1888) 38 C. D. 410
413, *Saunders v. Jones* (1877) 7 C. D.
439, 451; *Thompson v. Birkley* (1883) 31,
W. R. 230 [Engl].
(a) *Milbank v. Milbank* (1900) 1 Ch. 376, 383,
385.
(b) *Philippus v. Philippus* (1878) 4 Q. B. D. 107

139.
(c) *Radcliffe v. Evans* [1892] 2 Q. B. 524, 532, 532.
(d) *Humphries and Co. v. The Taylor Drug Co.*
(1888) 39 C. D. 693, 695.
(e) *Duke v. Wisden* (1897) 77 L. T. 67, 68.
(f) *Marriott v. Chamberlain* (1886) 17 Q. B. D.
154, 161.
(g) *Ziorenberg v. Labouchere* [1893] 2 Q. B. 100

- O. 6, r. 4. mark by *B* is calculated to induce, and had in fact induced "divers persons" to purchase *B*'s goods as and for *A*'s goods. *B* applies for particulars of the names and addresses of the "divers persons." *B* is entitled to the particulars, for the names in this case form part of the *material* facts which constitute *A*'s case. The whole question in such a case is, has the defendant induced *divers persons* to buy his goods as and for those of the plaintiff? (*h*).

Fraud and coercion.—Where fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the *particulars* of the fraud which he alleges. It is not enough to use such general words as "fraud," "deceit," or "machinations." "General allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice" (*i*). Where a plaintiff seeks relief on the ground of fraud, but the particulars of the fraud alleged are not set forth in the plaint, the plaint should be rejected under O. 7, r. 11, as not disclosing a cause of action (*j*). A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it (*k*). Nor is it proper for the appellate Court to entertain a case of fraud other than the one specifically alleged in the pleadings (*l*). The same rules apply when *coercion* is charged in the plaint (*m*).

If the particulars of fraud stated in the plaint are not sufficiently specific, the defendant may apply for further particulars under the next rule. Thus, where it is alleged by the plaintiffs that the defendants have made false entries in the plaintiffs' books for the purpose of defrauding them, the plaintiffs may be directed to furnish particulars specifying the entries charged to be false, and the nature of their objection to each item (*n*). See notes to rule 5, "Discovery before particulars," *ill.* (1).

Misrepresentation.—Where it is alleged in the plaint that "the defendant represented to the plaintiff," etc., it should be stated whether the representation was verbal or in writing (*o*). It is not enough in an action to restrain infringement of a trade-mark to allege that "divers persons" were induced by the acts of the defendant to purchase his goods as and for those of the plaintiff. The plaintiff should state in the plaint particulars of the names and addresses of those "divers persons" (*p*).

Breach of trust.—Where breach of trust is charged, the pleading must specify the acts constituting the alleged breach of trust. It is not enough to say that the defendant had "in various ways misapplied rent and profits of leaseholds, which he had received on behalf of the plaintiff, and had committed breaches of trust" (*q*).

Other cases in which particulars may be necessary :—

Misconduct.—Where the dismissal of a servant or an agent is justified on the ground of misconduct, the party so justifying must specify the acts of misconduct (*r*).

(*h*) *Humphries v. The Taylor Drug Co.*, (1888) 39 C. D. 693. See also *Milbank v. Milbank* [1900] 1 Ch. 376.

(*i*) *Walsford v. The Mutual Society* (1880) 5 App. Ca. 685, 697, *per* Lord Selborn, L. C.; *Bal Gangadhar Tulak v. Shrinivas Pandit* (1915) 42 I. A. 135, 151, 39 Bom. 441, 467.

(*j*) *Gunga Narain v. Tilukram* (1888), 15 Cal. 533, 15 I. A. 119; *Balaji v. Gangadhar* (1908) 32 Bom. 255; *Jyoti Prakash v. Jhonnul* (1909) 36 Cal. 134. Under the Code of 1882, a plaint may, in the discretion of the Court, be rejected if it did not disclose a cause of action, or it may be returned for amendment (s. 53); under this Code, it shall be rejected (O. 7, r. 11).

See *Kriahnaji v. Wannaji* (1894) 18 Bom. 144.

(*k*) *Abdul Hossein v. Turner* (1887) 11 Bom. 620, 14 I. A. 111.

(*l*) *Mahomed Mira v. Savvasi Vijaya* (1900) 23 Mad. 227, 237.

(*m*) *Purushotam v. Pandurang* (1914) 39 Bom. 149.

(*n*) *Newport Shipway, &c., Co. v. Paynter* (1886) 34 C. D. 88.

(*o*) *Seligmann v. Young* (1884) W. N. 93.

(*p*) *Humphries v. Taylor Drug Co.* (1888) 39 C. D. 693.

(*q*) *Anstice, In re* (1885) 54 L. J. Ch. 1104; (1885) 33 W. R. 557, [Eng.]

(*r*) *Saunders v. Jones* (1877) 7 C. D. 435.

Negligence.—Where negligence or contributory negligence is charged, full details must be given of the acts on which the party pleading relies as constituting negligence (*s*).

Agreement.—Where an agreement is alleged, the pleading should state the date of the agreement, the names of the parties to it, and whether it was in writing or verbal (*t*). If it is an implied agreement, it should appear from what facts or circumstances it is to be implied (see r. 12 below).

Defamation.—In an action for slander, the plaintiff must give particulars of the names of the persons to whom the alleged slander was made (*u*).

In an action for libel, where the charge made against the plaintiff in the alleged libel is general in its nature, a defendant who pleads a justification must state in his pleading the facts on which he relies in support of his justification (*v*). *A* sends a book of which he is the author to *B* for a review. *B*, in reviewing the book, prints and publishes, among other statements, the following: "*A* is, by his own confession, a most barefaced liar." *A* sues *B* for damages for libel. *B* justifies, pleading the truth of the alleged libel. *B* must specify in his pleading the passage in *A*'s work on which he relies in support of the defence of justification (*w*).

Accounts.—Where a plaintiff claims merely to have a general account taken, he need not give particulars as to the items. But it is otherwise if the plaintiff claims a definite amount instead of an account. In the latter case the plaintiff must give particulars as to the items of which it is composed (*x*).

Where a lump sum is claimed.—Where a plaintiff claims a lump sum, the defendant is entitled to particulars of the items composing such sum (*y*). So, also, where a plaintiff gives credit for a lump sum, and sues for the balance (*z*).

Particulars of defence.—The general principles upon which the Courts act in requiring particulars to be given of allegations or matters stated in plaints are applicable equally to defences, and the rules relating to the giving of particulars are in general applicable to all pleadings, though from the nature of the case the occasion for particulars arises somewhat less frequently in regard to defences than in regard to claims. Thus where a defence consists of traverses or denials of allegations in the claim so that the defendant is not taking upon himself the *onus* of proving any substantive facts, but is only denying or requiring proof of those alleged by the plaintiff, the occasion for particulars does not arise; but where he pleads *affirmatively* or sets up facts to be proved in answer to the plaintiff's case, he may be, and in general is, as much under obligation to give particulars as if he were alleging such or similar matters in a plaint (*a*). For instance, if a defendant sets up a defence of payments made, he has to give particulars of the dates and amounts of such payments. So if he justifies a libel, he must state the facts fully in his pleadings or give particulars (*b*). Similarly where he alleges that he is released from, or exonerated and discharged from, the performance of his contract, he must in his written statement give sufficient information to his opponent as to how and when he was so released or discharged (Bullen and Leake, *Precedents of Pleadings*, 6th ed., 532, 533). But where the onus of establishing a positive or negative allegation lies on the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation. Thus where the plaintiff alleged that the committee of the Stock Exchange

(*s*) *Gaulret v. Egerton* (1867) L. R. 2 C. P. 371;

Martin v. M'Taggart [1906] 2 L. R. 120.

(*t*) *Turquand v. Fearon* (1879) 48 L. J. Q. B. 703.

(*u*) *Roselle v. Buchanan* (1886) 16 Q. B. D. 656;

Davey v. Beninck [1893] 1 Q. B. 185, 188.

(*v*) *Zierenberg v. Labouchere* [1893] 2 Q. B. 183.

(*w*) *Devereux v. Clarke & Co.* [1891] 2 Q. B. 582.

(*x*) *Augustinus v. Nerinckx* (1880) 16 C. D. 13;

Blackie v. Osmaston (1884) 28 C. D. 119;

Kemp v. Goldberg (1887) 36 C. D. 505, 507.

(*y*) *Philippis v. Philippis* (1878) 4 Q. B. D. 27, 133.

(*z*) *Gadden v. Corsten* (1879) 5 C. P. D. 17.

(*a*) *Roberts v. Owen* (1890) 6 Times L. R. 172

James v. Radnor County Council (1890)

6 Times L. R. 240.

(*b*) *Zierenberg v. Labouchere* [1893] 2 Q. B. 183.

O. 6, in declining to re-elect him as a member of the Exchange did not act *bonâ fide*, fairly, reasonably, or judicially in coming to the conclusion they did, and the committee in their defence alleged that they acted *bonâ fide* and honestly, it was held that the onus of proving that the committee had not acted *bonâ fide* being on the plaintiff, he was not entitled to particulars of the facts or grounds upon which the committee based their decision (c).

5. [New. R. S. C., O. 19, r. 7.] A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to cost and otherwise, as may be just.

Further and better statement of particulars.

Application for particulars.—"The object of particulars is to prevent surprise at the trial and to limit the inquiry at the trial to the matters set out in the particulars. So I think particulars ought to be encouraged. They tend to narrow the issues (d)." If a party does not state in his pleading all the particulars required by r. 4, the other party may apply under this rule for further and better particulars. If the English practice is to be allowed here, the application need not be supported by any affidavit except, perhaps, in a special case (e).

When application should be made.—As a general rule a defendant who claims particulars should apply for them with reasonable promptitude (f) and before putting in his defence, but he does not by putting in his defence waive his right to particulars (g). Nay, in a proper case, the Court may order an application for particulars to stand over till a written statement has been put in to enable the Court to know what the points raised by the defence are, as where the defendant is the plaintiff's agent, and the particulars in question are all in the knowledge of the defendant, but not in the knowledge of the plaintiff (h).

Discovery before particulars.—The question often arises, where a defendant has applied for particulars, whether the plaintiff should deliver particulars before obtaining discovery and inspection of the defendant's books or whether discovery should be given before particulars are delivered. "There is no hard and fast rule as to the class of cases in which particulars should precede discovery or discovery be ordered before particulars; but the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances" (i). The result of the authorities appears to be that where the party pleading is unable to give particulars of his allegations without previously inspecting his opponent's books or documents, or obtaining discovery from his opponent by interrogatories, the Court may order discovery before particulars, and the application for particulars may be adjourned till after inspection or discovery. "It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars" (j).

(c) *Weinberger v. Inglis* [1918], 1 Ch. 133.

(d) *Thompson v. Birkley* (1883) 31 W. R. [Eng.] 230, per Watkin Williams, J.

(e) *Thompson v. Birkley* (1883) 31 W. R. [Eng.] 230, where the action was for seduction, and the defendant applied for particulars of the alleged immoral intercourse, but the Court refused to make any order unless he made an affidavit that he had not seduced the girl: approved in *Sachs*

v. *Sheilman* (1888) 37 C. D. 295, 304. But see *Kelly v. Briggs*, 85 L. T. Journal, 78.

(f) *Gourand v. Fitzgerald* (1889) 37 W. R. [Eng.] 285.

(g) *Sachs v. Sheilman* (1888) 37 C. D. 295, 302.

(h) *Sachs v. Sheilman* (1888) 37 C. D. 295, 302.

(i) *Waynes Merthyr Co. v. Radford & Co.* [1906] 1 Ch. 29, 35.

(j) *Millar v. Harper* (1888) 38, C. D. 110, 112.

Illustrations.

O. 6, r. 5.

1. *Suit by principal against agent for accounts charging agent with fraud.*—*A* employs *B* to purchase goods, as his agent, at the lowest possible price. *A* sues *B* for an account alleging in the plaint that *B* had purchased goods at prices higher than the current prices and had secretly received commission from the vendors. The charges against *B* are stated in general terms, no particulars being given. *A* is unable to state the particulars of the fraud charged until he sees *B*'s books. *A* is entitled to inspection of *B*'s books before he can be called upon to deliver particulars of the fraud (*k*).

2. *Suit by a wife's executor against husband.*—*A*, who is the executor of *J*, sues *B*, *J*'s husband, to recover from him all the furniture and other chattels purchased by *J* with her separate income and included in an inventory of all the goods in *B*'s house made sometime before *J*'s death. *B* applies for particulars of the furniture. He is not entitled to the particulars until he declares by an affidavit which of the articles comprised in the inventory belonged to his wife. "Where the plaintiffs are executors who do not know, and the defendant a person who does know, it is right that discovery should come first" (*l*).

3. *Suit by a colliery company against a colliery merchant.*—A colliery company sues *R*, a coal merchant, for damages for fraudulently passing off coal not gotten from the company's mines as coal gotten from the company's mines. The plaintiffs in their plaint give one specific instance of fraud, and allege that "on divers other occasions" the defendant had taken orders from "divers other persons" for coal to be supplied from the company's mines, and fraudulently sold coal not purchased from the plaintiff as coal gotten from the company's mines. *R* applies for particulars of the names and dates. The company then applies for inspection of *R*'s books. The company is entitled to discovery before delivering particulars. Chitty, J., said: "Having regard to the circumstances that many of these alleged frauds are within the defendant's means of knowledge and are not within the knowledge of the plaintiffs, I think discovery ought to precede particulars" (*m*).

The practice followed in the above cases was sought to be applied in a libel case where *A* sued *B* for calling him a "charity swindler" and "imposter," and *B* pleaded justification, and, when called upon to give particulars of the charge, said that he could not unless he was allowed inspection of *A*'s books of account. The Court held that *B* was not entitled to discovery before he had delivered particulars. Kay, L.J., said: "To apply this practice to the case of a libel would be to sanction the publication of a libel when the libeller knew no facts justifying the libellous statement, because he believed he could, by the process of discovery, elicit such facts" (*n*).

Further particulars granted.—For cases in which further and better particulars have been ordered, see notes to r. 4, "Other cases in which particulars may be necessary," p. 402 above.

Objections to particulars :—

1. *A* applies for particulars from *B* under this rule. It is a valid objection to the application that the particulars applied for by *A* relate to the mode in which *B*'s case is to be proved, and not to material facts constituting *B*'s case. See notes to r. 4, "Object of particulars," p. 401 above.

(*k*) *Whyte v. Ahrens* (1884) 26 C. D. 717; *Leitch v. Abbott* (1886) 31 C. D. 374. See also *Sachs v. Sheilman* (1888) 37 C. D. 295.
(*l*) *Millar v. Harper* (1888) 38 C. D. 110.

(*m*) *Waynes Merthyr Co. v. Radford & Co.* [1896] 1 Ch. 29. See also *Maxim Nordenfiet & Co. v. Nordenfiet* [1893] 3 Ch. 122.
(*n*) *Zierenberg v. Labouchere* [1893] 2 Q. B. 183.

O. 6,
rr. 5, 6.

2. Particulars will only be ordered of *material facts* constituting a party's case, but not of any *immaterial* allegation (o).
3. Particulars will only be ordered of material facts *alleged* by a party in his pleading, but not of those *denied* by him. See notes to r. 4, "Particulars of defence," p. 403 above.
4. *A* applies for particulars from *B* under this rule. It is no objection to the application that *A* must know the true facts of the case better than *B* (p).
5. Where a party from whom particulars are sought is unable to give the particulars without laborious inquiry, the practice is to make an order for "the best particulars the party can give" (q). This is usually the case where the party fills a representative character (r).

"Upon such terms as to costs or otherwise."—Thus an order may be made directing that unless particulars are delivered within a certain time, the suit shall be dismissed (s).

Amending or delivering further particulars.—Where a party who has delivered particulars under an order afterwards desires to amend them or to deliver further particulars, the proper course for him is to obtain an order giving him leave to do so (t). And leave, will, in general, be granted, where the amendment will cause no injury to the opposite party except such as can be sufficiently compensated for by costs (u). Leave to amend may be refused where it is sought to introduce a new cause of action (v), or to add to the amount claimed after the defendant has paid into Court the full amount originally claimed (w). An application to amend particulars will, as a rule, be refused if made at the *trial* of the suit (x). See s. 153 and r. 17 of this Order.

6. [*New. R. S. C., O. 19, r. 14.*] Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

Neither party need allege the performance of any condition precedent.—*A* agrees to build a house for *B* at certain rates specified in the contract. It is a condition of the agreement that payment to *A* should only be made upon a certificate signed by *B*'s architect that so much is due. *A* demands payment upon completion of the building, but *B* refuses to pay. *A* sues *B* claiming Rs. 5,000. Here the obtaining of the architect's certificate is a *condition precedent* to *A*'s right of action. The present rule provides that it is not necessary for *A* expressly to aver in his plaint that he has obtained

(o) *Cave v. Torre* (1886) 54 L. T. 516; *Gibbons v. Norman* (1886) 2 Times L. R. 676.
 (p) *Harbord v. Monk* (1878) 38 L. T. 411.
 (q) *Marshall v. Inter-Oceanic & Co.* (1885) 1 Times L. R. 394; *Williams v. Ramsdale* (1887) 36 W. R. 125; *Harbord v. Monk* (1878) 38 L. T. 411.
 (r) *Higgins v. Weekes* (1889) 5 Times L. R. 238.
 (s) *Davey v. Bentinck* [1893] 1 Q. B. 185.
 (t) *Yorkshire Provident Co. v. Gilbert* (1895)

2 Q. B. 148, 153; *Emdens v. Burns* (1894) 10 Times L. R. 400.
 (u) *Clarapeds v. Commercial Union Association* (1884) 32 W. R. (Eng.) 262.
 (v) *Cocksedge v. Metropolitan Coal Association* [1891] 65 L. T. 432.
 (w) *Sanders v. Hamilton* (1907) 23 Times L. R. 389.
 (x) *Moss v. Malings* (1886) 33 C. D. 603 (patent action).

O. 6,
rr. 6, 7.

the architect's certificate. Such averment, the rule says, shall be *implied* in his pleading. The rule further provides that if *B* intends to contest the fulfilment of the condition precedent, he must distinctly specify the condition precedent in his written statement. He must plead that the architect has not certified the amount claimed in the suit. If *B* does not plead the non-performance of the condition, it will be presumed that the condition has been duly performed. If *B* pleads non-performance, the burden of *proving* due performance will be on *A*.

A condition precedent, it must be observed, *does not strictly speaking form part of the cause of action*. Thus in the case put above *A*'s cause of action consists of the *making* of the contract and of the *breach* thereof by *B*. The condition of obtaining the architect's certificate is but an additional formality introduced by the express agreement of the parties, *suspending* *A*'s right to sue until the condition has been performed.

History of the rule.—This rule is a reproduction of O. 19, r. 14, of the English Rules. Before the year 1852, it was a recognized rule of English pleadings that the plaintiff should allege *expressly* the performance of *each* necessary condition precedent to the rights claimed. Then came the Common Law Procedure Act, 1852, which modified the earlier practice by enabling the plaintiff to aver performance of conditions precedent *generally*. For this purpose, the form in use was, "all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said promise performed by the defendant, and to maintain his action for the breach thereof hereinafter alleged." The present rule does away with the necessity of even a *general* averment of performance of condition precedent. A plaintiff need not now allege the performance of any condition precedent. It is for the *defendant* to object if he intends to dispute the performance of any condition precedent.

"Distinctly."—This rule requires that where a party intends to contest the performance of any condition precedent, he must *distinctly* specify the condition precedent in his pleading. An allegation in general terms that there was "an express condition" is not enough. The pleading must state the terms of the conditions, the names of the parties to it, and whether it was in writing or verbal (*y*).

7. [New. R. S. C., O. 19, r. 16.] No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Departure.

Departure in pleading.—This rule provides against what is called "a departure in pleading." It is a reproduction of O. 19, r. 16, of the English Rules. Its importance in this country is not likely to be so great as in England where the practice is for each party *in turn* to state his own case, and answer that of his opponent before the hearing. Not that the Code does not recognize *subsequent pleadings* (see O. 8, r. 9) but such pleadings are seldom resorted to in this country even in the Presidency towns. The general principles on which the system of pleading in England is founded are as follows :—

1. The plaintiff by his *statement of claim* alleges the material facts on which he relies in support of his case.

O. 6, r. 7.

2. The defendant, in answer thereto, delivers a *defence* in which he may take all or any of the following courses :—

first, he may deny or refuse to admit the facts stated by the plaintiff ;

secondly, he may confess or admit them, and avoid their effect by answering fresh facts which afford an answer thereto ;

thirdly, he may admit the facts stated by the plaintiff, and may raise a question of law as to their legal effect.

If the defendant adopts the first or third of these three courses, a question of fact or of law is at once raised between the parties.

3. If the defendant adopts the second of the three courses, the plaintiff may *reply*—

first, by denying the fresh facts alleged by the defendant ; or

secondly, by admitting them, and alleging other facts which avoid their effect ;
or

thirdly, by raising a question of law as to their effect.

4. If the plaintiff pleads a reply of the second kind, that is, if he replies by way of confession and avoidance, the defendant has the same courses open to him in pleading a *rejoinder* (2). A rejoinder is now seldom pleaded.

5. It is very seldom that further proceedings are taken, but there may be *sur-rejoinders*, *rebutters*, and *surrebutters*.

Under the Code, a plaintiff commences his suit by presenting a *plaint*. The defendant then puts in his *written statement* in answer to the plaintiff's claim. There is nothing corresponding to a *Reply* or *Rejoinder* in the Anglo-Indian system of pleadings. But the plaintiff may, with the leave of the Court, tender a *written statement*, and the defendant may, with like leave, tender an *additional written statement* (O. 8, r. 9). The Code of 1882 also contained a similar provision (a), but pleadings in this country seldom go beyond the defendant's written statement.

The word "pleading" at the commencement of this rule refers to *subsequent pleadings*. Thus in England a plaintiff may not raise in his *Reply* a ground of claim different from that raised in his *Statement of Claim* ; nor can he in his *Reply* set up facts inconsistent with those set up in his *Statement of Claim*. A reply is not the proper place in which to raise new claims. A plaintiff who wishes to add new claims can do so only by *amending* the statement of claim (r. 17). Like remarks apply to a defendant's *Rejoinder*. As a plaintiff's *Reply* must be consistent with his *Statement of Claim*, so a defendant's *Rejoinder* must be consistent with his *Defence*. Thus if a plaintiff alleges merely a *negligent* breach of trust in his *Statement of Claim*, the *Reply* must not assert that the breach of trust was *fraudulent* (b). Similarly, if the *Defence* alleges that the arbitrators *did not make any award*, the *Rejoinder* must not assert that the award *was not tendered by the proper time* ; "for it is one thing not to make an award, and another thing not to tender it when made" (c). Upon the same principle, a plaintiff who claims *rent* on the basis of a lease cannot claim the same sum in his *Reply* as *damages* for unlawfully "holding over" ; for by his *Statement of Claim* he treats the defendant as his tenant, and he

(2) Bullen and Leake, *Precedents on Pleadings*, 6th ed., pp. 1, 2.
(a) See Code of 1882, s. 112.

(b) *Kingston v. Corker* [1892] 29 L. R. Ir. 364, 527.
(c) *Roberts v. Martlett* (1871) 2 Wms. Saund. 188.

cannot turn round in his Reply and say: "If the defendant is not liable as a tenant, he is liable as a trespasser" (d)

O. 6,
rr. 7-9.

8. [New. R. S. C., O. 19, r. 20.] Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Denial of contract.—All matters which go to show that the contract sued on is void or unlawful must be *specifically* pleaded. If such matters are not expressly pleaded, no evidence thereof can, as a rule, be given at the trial. Thus if *A* sues *B* on a contract, and *B* in his written statement *merely denies* the contract, such denial will be taken to mean only that there was *in fact* no such contract as alleged: it will not be construed as a denial of the *legality* of the contract. The result is that if *A* proves the contract sued upon, *B* will not be allowed to contend at the hearing that the contract was a *wagering contract*, and therefore void. *B* ought to have specifically pleaded in his written statement that the contract was a wagering contract (e). But where at the hearing of a suit the *plaintiff's case discloses* that the transaction which is the basis of his claim is *illegal*, the Court cannot properly ignore the illegality, *even if the illegality be not pleaded or relied on by the defendant* (f). "No Court ought to enforce an *illegal* contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is *illegal*, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. *If the evidence adduced by the plaintiff proves the illegality*, the Court ought not to assist him" (g). Note that an agreement by way of wager is not illegal but merely void [see Indian Contract Act, 1872, ss. 23 and 30].

See O. 8, r. 2, which is a general rule.

9. [New. R. S. C., O. 19, r. 21.] Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Effect of document to be stated.—This rule provides what is to be the proper method of pleading where a material fact (r. 2) is evidenced by a document (h). The intention expressed by the first part of the rule seems clearly to be that, where a document is material, it shall not be necessary to set it out at length, but only to state the legal effect of it, the object apparently being to prevent long pleadings (i). Thus it is sufficient if a plaintiff in a suit for the recovery of immoveable property states in his

(d) *Duckworth v. McClelland* (1878) 2 L. R. Ir. 527.

(e) *Colborne v. Stockdale* (1795) 1 Str. 495;

Grizewood v. Blane (1851) 11 C. B. 528;

Willis v. Lovie [1901] 2 K. B. 195; *Bull*

v. Chapman (1853) 8 Ex. 444.

(f) *Gedge v. Royal Exchange Assurance Corporation*

[1900] 2 Q. B. 214; *Alice Mary Hill v. Clarke* (1904) 27 All. 268.

(g) *Scott v. Brown, Doering Co.* [1892] 2 Q. B. 724, 728.

(h) *Darbyshire v. Leigh* [1896] 1 Q. B. 554, 557.

(i) [1896] 1 Q. B. 554, p. 558, *supra*.

O. 6,
rr. 9-11.

paint the *effect* of the will under which he claims. He is not bound to set out the precise words of the will, although a question has arisen as to the true construction of those words (*j*). At the same time it is not enough for a plaintiff to say that, under and by virtue of a certain deed, he is entitled to the property claimed by him. He must state the *effect* of the document on which he relies (*k*).

Precise words.—In an action of libel or slander it is always necessary to set out the *exact* words alleged to be libellous (*l*).

10. [*New.* R. S. C., O. 19, r. 22.] Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Condition of mind.—Rules 10, 11 and 12 are no more than practical applications of the general principle laid down in r. 2 above. Malice, fraudulent intention, knowledge, etc., constitute in some cases the *material facts* of a party's case; they must therefore be alleged in the party's pleading. But the circumstances from which they are to be inferred need not be stated in the pleading; for they are but the *evidence by which those facts* are to be proved.

Malice.—Malice is a necessary part of the cause of action in suits for slander of title and for malicious prosecution. It must therefore be alleged by the plaintiff in his plaint. Similarly, where a defendant in an action of libel claims privilege, alleging that the words complained of were used on a privileged occasion, the plaintiff may allege and prove malice, that is, improper motive.

Fraudulent intention.—See notes to r. 4 above under the head "Fraud," p. 402 above.

Knowledge—In a suit by a servant against his master for injury caused by the dangerous condition of a building where he is employed, the plaint must not only affirm the master's knowledge of the danger, but must also negative the servant's knowledge of it (*m*). To support an action for damages for the bite of a dog, the plaintiff must allege and prove that the dog had to the defendant's *knowledge* bitten or attempted to bite some person before it bit the plaintiff (*n*).

11. [*New.* R. S. C., O. 19, r. 23.] Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

Notice as part of cause of action.—Notice, where it forms part of the cause of action, must be pleaded as a fact, *e.g.*, notice of suit proposed to be brought against the Secretary of State for India [see s. 80 below], or against a Railway Company (*nn*), or against

(*j*) [1896] 1 Q. B. 554, *supra*.

(*k*) *Philkpps v. Philkpps* (1878) 4 Q. B. D. 127.

(*l*) *Harris v. Warre* (1879) 4 C. P. D. 125.

(*m*) *Griffiths v. London and St. Katharine Docks*

& Co. (1884) 13 Q. B. D. 259.

(*n*) *Thomas v. Morgan* (1885) 4 Dowl. 223; *Osborne v. Chocqueel* [1896] 2 Q. B. 109.

(*nn*) Indian Railways Act 1890 s. 77, 140.

a Municipality, notice of dishonour of a bill of exchange, notice to a tenant to quit, etc. It is not necessary to set out the notice *verbatim* in the plaint.

O. 6,
rr. 11, 14.

12. [New. R. S. C., O. 19, r. 24.] Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Implied contract —A contract may be expressed in one document, or it may have to be implied from a series of documents or conversations or from a number of other circumstances. Rule 9 applies in the former case: the present rule, in the latter case. Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either (o). As regards contracts to be implied from a series of letters, it is to be noted that where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration (p).

13. [New. R. S. C., O. 19, r. 25.] Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (e.g., consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim).

Presumptions of law.—A plaintiff need not, in his plaint, allege the consideration for which a bill of exchange was given to him, when he sues *only on the bill*, for it will be presumed in his favour that the bill was made for consideration (q). It will be for the defendant to plead that there was no consideration for the bill. But if the plaintiff sues *on the consideration* as a substantive ground of claim, he must allege the consideration specifically.

14. [Ss. 51, 115.] Every pleading shall be signed by the party and his pleader (if any): provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person

(o) *Brogden v. Metropolitan Railway Co.* (1877) 2 App. Cas. 666.

(p) *Hussey v. Horne Payne* (1879) 4 App. Cas. 311.

(q) See Negotiable Instruments Act 26 of 1881, s. 118.

O. 6, rr. 14, 16. duly authorized by him to sign the same or to sue or defend on his behalf.

Omission to sign plaint.—The signing of plaints is merely a matter of procedure (r). If a plaint is not signed by the plaintiff or by any person duly authorised by him in that behalf, and the defect is discovered at any time before judgment, the Court may allow the plaintiff to amend the plaint by signing the same. If the defect is not discovered until the case comes on for hearing before an appellate Court, the appellate Court may order the amendment to be made in that Court. In any event the appellate Court should not dismiss the suit or otherwise interfere with the decree of the lower Court, merely because the plaint is not signed as required by this rule. The reason is that though the omission to sign or verify a plaint is a defect, it is not such a defect as could affect the merits of the case or the jurisdiction of the Court (s): see s. 99.

15. [Ss. 51, 52, 115.] (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

Verification of plaint.—The verification of a plaint is not evidence on which a suit can be decreed whether the defendant does or does not appear (t).

Procedure when verification is defective.—A verification is defective, if it omits to indicate which matters are true to the knowledge of the person making it and which (if any) are stated on information and belief. The procedure to be followed when a verification is defective is the same as that followed in the case of defective signature (u). See notes to r. 14 above.

16. [New. R. S. C., O. 19, r. 27.] The Court may, at any stage* of the proceedings, order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

(r) *Bisheshar Nath, in the matter of*, (1918) 40 All. 147.

(s) *Basdeo v. Smidt* (1900) 22 All. 55; *Mohini v. Bungat* (1890) 17 Cal. 580.

(t) *Ross & Co. v. Scriven* (1910) 43 Cal. 1001,

1010-1012.

(u) *Rajit Ram v. Katesar* (1896) 18 All. 396; *Pateh Chand v. Mansab Rai* (1898) 20 All. 442.

Amending your opponent's pleading.—This rule deals with amendments **O. 6, r. 16.** which a party desires to be made in *his opponent's pleading*. The next rule deals with amendments which a party desires to make in *his own pleading*.

Striking out or amending pleadings.—"It seems to me," said Bowen, L. J., in *Knowles v. Roberts* (v), "that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right." It is a recognized principle that "a defendant may claim *ex debito justitiæ* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it; and the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery" (w).

"Unnecessary."—This rule has been reproduced verbatim from O. 19, r. 27, of the English Rules. According to the English practice, the mere fact that a pleading contains matters which are unnecessary is no ground for striking out those matters (x). It only affects the costs of the pleading (y). An allegation in a pleading will not be struck out merely because it is unnecessary, unless it is scandalous, or tends to prejudice, embarrass or delay the fair trial of the action. Thus, where in a suit against a Local Board, the plaintiff alleged that a member of the Board had used his influence with the Board for *his own private interest*, and that in consequence thereof the Board had declined to meet the just demands of the plaintiffs, the allegations were ordered to be struck out (z). In such a case, the allegations are not only unnecessary, but they are scandalous. For the same reason, unnecessary allegations of *dishonest conduct* made against the defendant will be struck out under this rule (a). In an action to enforce a compromise of a former action, it is unnecessary and embarrassing for the plaintiff to set out in the plaint the original disputes between the parties: such allegations will therefore be struck out (b). Where a statement of claim contained immaterial facts and set out at great length documents which could not be material except as evidence by way of admission, so that the defendant could not know what case he had to meet, it was held that the whole statement of claim should be struck out as being unnecessarily prolix and embarrassing (c). In an action for slander it is unnecessary and embarrassing for the defendant to state in his defence that he did not say the words alleged in the plaint, but that he said something else, and that the something else which he said was true; such statements will therefore be struck out (d).

"Scandalous."—Every Court has an inherent power, quite independently of this rule, to strike out scandalous matter in any record or proceeding. "The Court has a duty to discharge towards the public and the suitors, in taking care that its records are kept free from irrelevant and scandalous matter" (e). "Scandal is calculated to do great and permanent injury to all persons whom it affects, by making the records of the Court the means of perpetuating libellous and malignant slanders; and the Court, in aid of the public morals, is bound to interfere to suppress such indecencies which may stain the reputation and wound the feelings of the parties and their relatives and friends" (f). Thus

(v) (1888) 38 C. D. 263, at pp. 270, 271.

(w) *Davy v. Garrett* (1877) 7 C. D. 473, 486.

(x) *Rock v. Fursell*, 84 L. T. Jo. 45; *Heap v. Morris* (1876) 2 Q. B. D. 630, 633.

(y) *Weymouth v. Rich* (1885) 1 Times Rep. 609.

(z) *Murray v. Epsom Local Board* [1897] 1 Ch. 35.

(a) *Brooking v. Maudslayi* (1886) 55 L. T. 343.

(b) *Knowles v. Roberts* (1888) 38 C. D. 263.

(c) *Davy v. Garrett* (1877) 7 C. D. 473.

(d) *Rassam v. Budge* [1893] 1 Q. B. 571.

(e) *Christie v. Christie* (1873) 8 L. R. Ch. 499, 507, per *Selborne, L. C.*

(f) *Story's Equity Pleadings*, 10th Ed., sec. 270.

O. 6, r. 16. where an application for bail to the High Court contained defamatory allegations against the trying Magistrate which were all irrelevant, the High Court of Bombay refused to allow the application to be filed, and ordered it to be returned (g). Similarly, where a memorandum of appeal alleged partiality against the Judge whose decree was in question, the High Court of Madras ordered the objectionable passages to be expunged (h). It must, however, be noted that "*nothing can be scandalous which is relevant*" (i). Thus matters in aggravation of damages are relevant; they will not, therefore, be struck out, though scandalous (j). Similarly, allegations of dishonesty or fraud or conspiracy will not be struck out as scandalous, if they are relevant to the facts in issue. They will be struck out only if they are irrelevant (k).

An application to strike out scandalous matter may be made by any person, whether or not he is a party to the suit or personally affected by the scandalous matter (l).

"Tend to prejudice, embarrass or delay the fair trial of the suit."—In considering the question whether a pleading tends "to prejudice, embarrass or delay the fair trial of the suit," a liberal interpretation should be given to the words "trial of the suit." Hence not only a pleading which tends to prejudice or embarrass a party at the actual trial of a suit but a pleading which tends to prejudice or embarrass a party at any stage of the proceedings in the suit, would be within this rule (m).

A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial (n). But a pleading is not embarrassing merely because it is prolix (o). Nor is a pleading embarrassing, merely because it contains allegations that are inconsistent or stated in the alternative (p). See notes to r. 2 above, "Alternative and inconsistent allegations," p. 400 above. See also notes above, "Unnecessary."

"At any stage of the proceedings."—The application under this rule should be made with reasonable promptitude, and as a rule before the close of the pleadings. If it is not so made, the Court may, in its discretion, refuse to make the order, though the rule expressly states that an order may be made "at any stage of the proceedings." The reason is that the power to make the order under this rule is discretionary (q).

Practice.—The Court may, under this rule, order the whole pleading to be struck out, as was done in the undermentioned cases (r), where the statement of claim consisted partly of unintelligible matters, partly of irrelevant matters, and the rest of scandalous matter, or it may order the objectionable matter only to be struck out, which appears to be the usual practice (s). Where the defect can be remedied by amendment, the Court may give leave to amend (t). Where a pleading is not so specific as it ought to be, the Court may direct the party to amend his pleading or give further particulars (u).

(g) *Clive Durant, In re* (1891) 15 Bom. 488.

(h) *Zamindar of Tuni v. Bennayya* (1899) 22 Mad. 155.

(i) *Fisher v. Owen* (1878) 8 C. D. 645, 653, *per* Cotton, L.J.

(j) *Millington v. Loring* (1880) 6 Q. B. D. 100; *Whitney v. Moignard* (1890) 24 Q. B. D. 680.

(k) *Christie v. Christie* (1878) L. R. 8 Ch. 499, (allegations of fraud struck out); *Rubery v. Grant* (1872) L. R. 1 Eq. 443 (allegations of fraud struck out); *Cashin v. Cradock* (1876) 3 C. D. 376 (conspiracy alleged—whole statement of claim struck out, as besides containing scandalous and irrelevant matters, it was unintelligible); *Brooking v. Maudslay* (1886) 55 L. T. 343 (allegations of dishonesty struck out); *Murray v. Epsom Local Board* [1897] 1 Ch. 35 (allegations of bad faith struck out).

(l) *Cracknall v. Janson* (1878) 11 C.D. 1, 13; *Bright*

v. Varner (1878) W. N. 211, where the application was made by a co-defendant.

(m) *Berdan v. Greenwood* (1878) 3 Ex. D. 251, 256.

(n) *British Land Association v. Foster* (1888) 4 Times Rep. 574; *Stokes v. Grant* (1878) 4 C. P. D. 25.

(o) *Heap v. Marris* (1877) 2 Q. B. D. 630, 633.

(p) *Child v. Stenning* (1877) 5 C. D. 695; *In re Morgan, Owen v. Morgan* (1887) 492.

(q) *Cross v. Howe* (1893) 62 L. J. Ch. 342.

(r) *Cashin v. Cradock* (1876) 3 C. D. 376; *Davy v. Garrett* (1877) 7 C. D. 473.

(s) *Christie v. Christie* (1873) L. R. 8 Ch. 499; *Rubery v. Grant* (1872) L. R. 13 Eq. 443; *Brooking v. Maudslay* (1886) 55 L. T. 343; *Murray v. Epsom Local Board* [1897] 1 Ch. 35; *Rassam v. Budge* [1893] 1 Q. B. 571.

(t) *Knowles v. Roberts* (1888) 38 C. D. 263, 269.

(u) *In re Morgan, Owen v. Morgan* (1887) 35 C.D. 492, 500.

17. [*New. R. S. C., O. 28, r. 1.*] The Court may at any **O. 6, r. 17.** stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Different kinds of amendment.—Hitherto we have dealt with four kinds of amendment. The present rule deals with one more. All these may be grouped together as follows:—

1. S. 152 [amendment of clerical and arithmetical mistakes in judgments, decrees and orders].
2. S. 153 [amendment of proceedings in a suit by the Court, whether moved thereto by the parties or not, for the purpose of determining the real question or issue between the parties].
3. O. 1, r. 10, sub-r. (2) [striking out or adding parties].
4. O. 6, r. 16 [amending your opponents pleading; compulsory amendment].
5. O. 6, r. 17 [amending your own pleading: *voluntary* amendment].

Amending your own pleading.—The preceding rule dealt with amendments which a party desires to be made in *his opponent's pleading*, as where the pleading contains irrelevant and scandalous matter, or where it may tend to prejudice, embarrass or delay the fair trial of the suit. The present rule deals with amendments which a party desires to make in *his own pleading*.

LEAVE TO AMEND, WHEN GIVEN.

As a general rule, leave to amend will be granted so as to enable the *real question in issue* between the parties to be raised on the pleadings, where the amendment will occasion *no injury to the opposite party*, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order (v). "I have had much to do in Chambers," said Bramwell, L.J., "with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *malâ fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise" (w). It does not matter that the original omission arose from negligence or carelessness. "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. *There is no injustice if the other side can be compensated by costs*" (x). "I have found in my experience," said Bowen, L.J., "that there is one panacea which heals every sore in litigation, and that is costs" (y). It is immaterial to consider whether the error sought to be amended was accidental or not. There is no rule that only slips or accidental errors are to be corrected. The rule says, "all such amendments shall be

(v) *Tildesley v. Harper* (1878) 10 C. D. 393; *Steward v. North Metropolitan Tramways Co.* (1885) 16 Q. B. D. 178, 180, and C. A. p. 558; *Australian Steam Navigation Co. v. Smith* (1889) 14 App. Cas. 818, 820; *Kisrandas v. Rachappa* (1909) 33

Bom. 644, 655.

(w) *Tildesley v. Harper* (1878) 10 C. D. 393.

(x) *Clarapede v. Commercial Union Association* (1884) 32 W. & A. [Eng.] 262, 263; *Weldon v. Neal* (1887) 16 Q. B. D. 394, 396.

(y) *Cropper v. Smith* (1884) 26 C. D. 700, 711.

- O. 6, r. 17.** made as may be necessary for the purpose of determining the real questions in controversy." There is no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party (z). Thus a plaintiff in a suit for debt may be allowed to amend the plaint by setting out an acknowledgment passed to him by the defendant even after the defendant has filed his written statement raising the plea of limitation (a). Even an admission made by mistake may be allowed to be withdrawn, and the pleading amended accordingly (b). The party applying, however, must not be acting *malâ fide*: the application to amend must be a *bonâ fide* one, and made in good faith (c).

LEAVE TO AMEND WHEN REFUSED.

It follows from what has been stated above that leave to amend should be refused—

- (1) Where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties, as where it is—
 - (i) merely technical, or
 - (ii) useless and of no substance.
- (2) Where the amendment would occasion injury to the opposite party such as cannot be compensated for by costs.
- (3) Where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a late stage of the proceedings.
- (4) Where the application for amendment is not made in good faith.

We shall deal with these four cases in order.

1. Leave to amend will be refused where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties.—This happens where the amendment is merely technical or of no substance.

Where the amendment is merely technical.—Where after the evidence for the plaintiff has been taken, the defendant applies for an amendment for the purpose merely of enabling him to raise a purely technical objection to the plaintiff's right to sue, the application should be refused (d). *B* and *C* wrongfully remove *A*'s furniture. *A* sues *B* for damages, and recovers judgment against him. [*B* and *C* being joint wrongdoers, the judgment against *B*, according to English law, precludes *A* from suing *C* for the same wrong.] *A* afterwards sues *C* for damages for the same wrong. *C* does not plead the judgment against *B* in his defence, but, after the evidence for *A* has been taken, applies for leave to amend his written statement by pleading that the judgment against *B* is a bar to the suit against him. The application must be refused (e), for the amendment is not necessary to bring out the real questions between the parties, but proposes merely to enable *C* to avail himself of a technical rule of law (f).

Where the amendment is useless and of no substance.—The object of the present rule being to enable the real questions in dispute being raised on the pleadings, leave to amend has been refused to the plaintiff where the proposed amendment would not help him

(z) (1884) 26 C. D. 700, 710, 711, *supra*.
 (a) *Gunnaj v. Munnaj* (1909) 84 Bom. 250.
 (b) See *Holte v. Burton* [1892] 3 Ch. 226, 236.
 (c) *Tidesley v. Harper* (1878) 10 C. D. 393, 397.

(d) *Collette v. Goode* (1878) 7 C. D. 842, 847.
 (e) *Edvain v. Cohen* (1889) 43 C. D. 187, in app. from 41 C. D. 568.
 (f) (1889) 43 C. D. 187, 190, *supra*.

in substantiating his *claim* (*g*), and to the *defendant*, where the proposed amendment would **O. 6, r. 17.** not help him in supporting his *defence* (*h*). Thus where *A* sued *B*, and finding that the suit against *B* would fail, applied to join *C* as a defendant, the application was refused on the ground that even if the plaintiff were amended by adding *C* as a party, the case was such that *A* would not be entitled to any relief even against *C*. In refusing leave to amend, Vaughan Williams, L.J., said: "One good reason for our not doing so is that looking at the case that he [plaintiff] tells us he would wish to present, that case, if presented by amendment, would, in my judgment, also fail; so that there is nothing to be gained by amendment" (*i*). Similarly, where *A* sued *B* for a libel, and *B* pleaded justification, and *B* afterwards applied to amend his defence by adding a paragraph which virtually contained a plea in *mitigation of damages*, but was no answer to the action, the application was refused (*j*). See notes to r. 2 above under the head "Matters affecting damages," p. 397 above.

2. Leave to amend will be refused where the amendment would cause injustice to the opposite party such as cannot be compensated for by imposing terms as to costs or otherwise (*k*).—Thus leave to amend will be refused, if the amendment will prejudice a right that has already accrued to the opposite party on the pleadings as then standing. *A* sued a tramway company for damages caused by their negligence in allowing their tramway to be in a defective condition. By their defence the company denied negligence. It was no part of the defence that the company were not the proper parties to be sued. More than six months after the delivery of the defence the company applied for leave to amend the defence by adding an allegation that by a contract between the company and the local authority of the district, the liability to maintain the roadway had been transferred to the local authority and that the company had ceased to be responsible for the railway. At the date of the application *A*'s remedy against the local authority had become time-barred. If the agreement had been pleaded earlier, *A* could have maintained an action against the board. Under these circumstances the application was refused. It is clear from the above facts that if the amendment were allowed, *A* might fail against the company, the company not being the proper defendants, and if *A* brought an action against the local authority, it would be too late. That would be an injury to *A* such as could not be compensated for by any costs that the court might order the company to pay to *A*. "The test as to whether the amendment should be allowed," said Pollock, B., "is, whether or not the defendant can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs or otherwise. Here the action would be wholly displaced by the proposed amendment, and I think it ought not to be allowed" (*l*).

On the same principle the Courts have refused to allow amendment of the plaintiff by introducing a new cause of action after the period of limitation in respect of such cause of action has expired. The leading English case on the subject is *Weldon v. Neal* (*m*). The facts of that case may be stated in the form of an illustration: *A* sues *B* for damages for slander. *A* afterwards applies for leave to amend the plaintiff by adding fresh claims in respect of assault and false imprisonment. Those claims are at the date of the application barred by limitation, although they were not barred at the date of the suit. The application must be refused, for the effect of allowing it would be to take away from *B*

(*g*) *Morel Brothers and Co., Ltd., v. Westmoreland* [1903] 1 K. B. 64, 77, [1904] A. C. 11; *Sinclair v. James* [1894] 3 Ch. 654, 657; *Laurence v. Lord Norreys* (1888) 39 O. D. 213, 236.

(*h*) *Machado v. Fontes* [1897] 2 Q. B. 231.

(*i*) *Jones v. Hughes* [1905] 1 Ch. 180, 187; *Ganesha Singh v. Mundi Forest Co.* (1899) 21 All. 346, 348.

(*j*) *Wood v. Earl of Durham* (1888) 21 Q. B. D. 501.

(*k*) *Steward v. North Metropolitan Tramways Co.* (1885) 16 Q. B. D. 178, 180; *Edevain v. Cohen* (1899) 41 O. D. 563, 567, (1890) 43 C. D. 187.

(*l*) *Steward v. The North Metropolitan Tramways Co.* (1886) 16 Q. B. D. 178.

(*m*) (1880) 19 Q. B. D. 394; *Janardhan v. Shri Pershad* (1916) 43 Cal. 95; *Balkaran v. Gya* (1915) 36 All. 370.

O. 6, r. 17. the defence under the law of limitation and therefore unjustly to prejudice him. "We must act," said Lord Esher, M.R., "on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so." The case of *Kisandas v. Rachappa* (n), decided by the High Court of Bombay, is an instance in which such an amendment was allowed on the ground that the circumstances of the case were so peculiar that it should properly be excepted from the general rule. The facts of the case may be stated in the form of an illustration. A, alleging that he had brought in Rs. 4,000 as capital under a partnership agreement between him and B, sues B, for dissolution of partnership and for accounts. *It is clear from the proceedings before the Court of first instance that though the suit was in form one for dissolution and accounts, A intended from the first to sue only for the recovery of his money, and B had actually pleaded to the money claim, and the claim had actually been put in issue and evidence given in respect thereof.* The lower Court finds as a fact that the sum was due, but dismisses A's suit on the technical ground that the agreement set up by A did not constitute a partnership between A and B. A appeals from the decree, and applies for the first time in appeal for leave to amend the plaint by adding a prayer for the recovery of Rs. 4,000. At this date the claim for money is barred by limitation. The amendment must be allowed notwithstanding this fact. The defence of limitation would never have been open to B, had it not been for the inexpertness of the pleadings. There was no fresh claim sought to be set up as it was in *Weldon v. Neal* cited above B knew what A's claim was, though the suit was wrongly framed. Similarly, where the plaintiff sued in the first instance for possession of the books of accounts of his shop from the defendants who he alleged were his servants, and stated in the plaint that he would bring a separate suit for the money due by them, but subsequently applied for leave to amend the plaint by adding a further relief, namely, recovery of money, it was held that the amendment should be allowed even though the money claim was barred by limitation between the date of the plaint and the date of the application for amendment (o).

3. Leave to amend will be refused where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a very late stage of the proceedings.—This proposition follows directly from the Rule. The object of the Rule is to allow an amendment for the purpose of determining the real questions in dispute between the parties. That being the purpose of amendment, no amendment should be allowed which would introduce a totally different, new and inconsistent case (p). An amendment of this character could not bring out the real issues in the suit; it implies rather an abandonment of the real issues on the part of the party applying for the amendment. It has therefore been the practice both of the English and Indian Courts to refuse leave for such amendment, especially where the application has been made at a late stage of the proceedings. On looking into the cases it will be found that in almost every case in which the application was refused, it was made either when the suit was ripe for hearing or at the trial of the suit. The result of the cases is thus summed up in Bullen and Leake's Precedents of Pleadings (q): "Leave to amend may be refused where at the trial or hearing the party seeks to alter the whole nature of his case by an unexpected amendment which may require further evidence to be adduced by his opponent."

(n) (1909) 33 Bom. 644; *Muhammad v. Abdul Majid* (1911) 33 All. 616; *Jalal Din v. Qaim Din* (1914) Punj. Rec. No. 62, p. 211.
(o) *Sevugan v. Krishna* (1911) 36 Mad. 378.

Newby v. Sharpe (1876) 8 C. D. 39;
Upendra v. Janaki Nath (1915) 45 Cal. 305, 317-318; *Padma v. Girish Chandra* (1919) 46 Cal. 168, 171-172.
(q) 6th Ed., p. 16.

The above proposition may be split into two:—

O. 6, r. 17.

- A. Leave to amend a *plaint* should not be granted, if the amendment would convert the suit into another of a different and inconsistent character.
- B. Leave to amend a *written statement* should be refused, if the amendment would convert the defence into another of a different and inconsistent character [p. 422 below].

We shall deal with these propositions in order.

A. *Leave to amend a plaint should not be granted, in any event at the hearing of a suit, if the amendment would convert the suit into another of a different and inconsistent character.*—The question involved in the above proposition arises in this wise: A institutes a suit against B. B files his written statement. At the hearing of the suit, A finds that his case must fail as laid in the plaint, and that he can only succeed on a different case. He then applies for leave to amend the plaint. Should the leave be granted? It has been held under the corresponding English rule that no amendment should be allowed if it would “introduce an entirely different case from that which the defendant came to meet” (r) or, to put it in another form, if it would “change one action into another of a substantially different character” (s). Section 53 of the Code of 1882 which dealt with amendment of plaints, expressly provided that “a plaint shall not be amended so as to convert a suit of one character into a suit of another and inconsistent character.” That section has been omitted in this Code, and the present rule (which is a reproduction of O. 28, r. 1, of the English Rules) now takes its place. But the decisions under the old section on the point now under consideration are still good law, and we proceed to examine them.

It must be observed at the outset that a plaintiff must in general be limited to the case which he puts forward in his plaint. There are, however, cases in which by some mistake or misapprehension the plaintiff has failed to state his case correctly and properly in the plaint. In such cases the Court may allow the plaint to be amended (t) for if the amendment is refused, the plaintiff may have to bring another suit, and the object of the rule allowing amendment of plaints is to avoid multiplicity of suits (u). But the Court ought not to allow an amendment, if it would convert the suit into another of a different and inconsistent character. “We cannot countenance the notion,” said Straight, J., “that a plaintiff, coming into Court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that directly in antagonism with his primary allegation” (v). The law prohibits every amendment that would change the *fundamental character* of the suit (w). It is not, however, to be supposed that if the fundamental character of the suit is not altered, a plaintiff is entitled as of right to amend the plaint. As stated by the High Court of Bombay, “the power to get a plaint amended is subject to the *discretion* of the judge, and is *not claimable as a right of the suitor* in all circumstances” (x).

Rules.—“The general rule is that any amendment allowed must be such as is either raised in the pleadings (i.e., plaint and written statement), or is consistent with the case as originally laid, and that the state of facts and the equities and ground of relief originally

(r) *Ellis v. Manchester Carriage Co.* (1876) 2 C. P. D. 13, 16; *Hipgrave v. Case* (1885) 28 C. D., 356, 361; *Newby v. Sharpe* (1878) 8 C. D. 39, 49.

(s) *Raleigh v. Goschen* [1898] 1 Ch. 73, 81.
(t) *Lakshmi Bai v. Hari* (1872) 9 B. H. C. 1; *Bhyro v. Lekhranee* (1871) 16 W. R. 123; *Hunoompersaud v. Musumal Koonwerse* (1856)

6 M. I. A. 393, 410.

(u) *Saral Chand v. Mohun Bibi* (1898) 25 Cal. 371.

(v) *Hamilton v. The Land Mortgage Bank of India* (1883) 5 All. 456, 459.

(w) *Kasinath v. Sadasiv* (1893) 20 Cal. 805.

(x) *Tapiram v. Sadu* (1897) 21 Bom. 570.

O. 6, r. 17. alleged and pleaded by the plaintiff should not be departed from. This is the rule laid down by their Lordships of the Judicial Committee in the case of *Eshen Chunder Singh v. Shama Churn Bhutto* (y), and this rule has been followed in numerous decisions of our Courts " (z).

From the general rule stated above, we deduce the following three rules each of which is borne out by the cases cited under it:—

Rule I.—Where a plaintiff bases his claim upon a *specific legal relation* alleged to exist between him and the defendant, he may not be allowed to amend the plaint so as to base it on a different legal relation.

Note.—Even if the legal relation between the plaintiff and the defendant remains unchanged, the plaint will not be allowed to be amended, if it completely alters the cause of action.

Rule II.—Where a plaintiff bases his claim on a *specific title*, he may not be allowed to amend the plaint so as to base it on a different title.

Note.—Even if the title by which the plaintiff claims remains unaltered, the plaint will not be allowed to be amended, if it completely alters the cause of action.

Rule III.—When one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it.

Illustrations of Rule I.

1. *A*, alleging that *B* hired cargo boats from him, and that a balance of Rs. 3,000 is due to him on that account, sues *B* for the amount. It is proved at the hearing that *B* did not himself hire the boats, but that he was merely *A*'s agent to find hires for the boats. *A* then applies to amend his plaint by claiming an account from *B* on the footing that *B* was *A*'s agent. The amendment cannot be allowed, because in the one case the legal relation between *A* and *B* is that of *letter and hirer*, and, in the other, that of *principal and agent*: *Shibkrishna v. Abdool* (1880) 5 Cal. 602.

2. *A* sues *B* for the *rent* of a house alleged to have been let by *A* to *B*. *B* denies the lease, and contends that he is the owner of the house. *A* will not be allowed to amend the plaint by converting the suit into a suit for a *declaration of ownership*: *Bai Shri Majirajba v. Naganlal* (1895) 19 Bom. 303.

3. *A* sues *B* for *damages for wrongful occupation* of his land and for injury done to his land. After the issues are framed, *A* applies to amend his plaint by claiming from *B* *rent* for the land on the basis of a *subsisting tenancy*. The amendment cannot be allowed, because it will convert a claim based on *trespass* into a claim on the basis of a *subsisting lease*: *Narayan v. Hari* (1889) 13 Bom. 664; *Jhari Singh v. Pirthi Nath* (1917) 2 Pat. L. J. 69 (a). See ill. (5) below.

4. A suit for possession on the footing of a *subsisting lease* cannot be converted at a late stage of the proceedings into a suit for ejectment: *Newby v. Sharpe* (1878) 8 C. D. 39, 49; *Laird v. Briggs* (1880) 16 C. D. 440.

5. *A suit for rent will not be allowed to be converted at the hearing into a suit for use and occupation.*—*A* sues *B* to recover Rs. 1,000 alleged to be the *rent* due under a lease executed by *B*. The Court finds that *B* was in occupation of the premises during the period for which the rent is claimed, but that the alleged lease was not executed by *B*.

(y) (1860) 11 M. I. A. 7; *Mylapore v. Yeokay* (1887) 14 Cal. 801, 14 I. A. 168.
(z) *Mukhoda v. Ram Churn* (1882) 8 Cal. 871, 875; *Hamilton v. Land Mortgage Bank*

(1883) 5 All. 456.
(a) See also *Gavrishankar v. Atmaram* (1894) 18 Bom. 611; *Ramchandra v. Vasudev* (1886) 10 Bom. 451.

At this stage *A* applies to amend his plaint by alleging that, though the lease was not executed by *B*, he is entitled to recover the amount for use and occupation of the premises. The amendment will not be allowed (b). O. 6. r. 17.

6. *A*, who is *P*'s agent to manage certain property belonging to *P*, appoints *S* to act as a sub-agent for *P*, and gives him Rs. 1,000 belonging to *P*, for the payment of Government revenue and other purposes. *S* fails to account for the money. *P* sues *A* to recover the amount paid by *A* to *S*, claiming the same on the ground that *S* was appointed sub-agent without *P*'s authority. It is found at the hearing that *S* was appointed sub-agent with *P*'s authority. *P* will not be allowed to amend the plaint so as to base his claim on the ground that *A* had not exercised ordinary prudence in selecting *S* as a sub-agent for *P*: *Hamilton v. Land Mortgage Bank* (1883) 5 All. 456. [This is an illustration of the proposition in the Note to Rule 1. If the amendment were allowed, the legal relation between the plaintiff and the defendant, which is that of principal and agent, would no doubt remain unchanged, but the cause of action would be completely changed.]

Illustrations of Rule II.

1. *A* sues *B* to recover certain property as the heir of *C* who, *A* alleges, was the adopted son of *D*. The Court finds that the adoption of *C* was not valid. *A* then contends for the first time in appeal to the Privy Council that even if the adoption was not valid, he is entitled to recover the property as the heir of *D*. This is a totally new case, and *A* cannot be permitted in appeal to set up an entirely new case: *Gopee Lal v. Chundraoee* (1872) 19 W. R. 12 I. A. Sup. Vol. 131.

2. *A* obtains a decree against a Hindu father, and after the death of the latter, attaches certain immovable property in execution of the decree. *B* and *C*, sons of the deceased, sue *A* for a declaration that the property is joint family property, and it is not liable to be sold in execution of the decree against the father, on the ground that the debts contracted by the father were for immoral purposes, and that the property therefore could not be attached. It is proved that the debts were not incurred for immoral purposes. Thereupon *B* and *C* apply to amend the plaint by alleging that they had separated from their father before the decree was passed against him, and the decree was not therefore binding upon their shares. The amendment cannot be allowed, because the plaintiff's claim as originally laid was based on the assumption that there was no partition between them and their father: *Narayanrao v. Javhervahu* (1888) 12 Bom. 431.

3. *A*, a Hindu, claiming as the heir of his uncle, sues the executors of his uncle's widow for possession of property left by the widow, alleging that the same belonged to the estate of his uncle, and that the widow had no power to dispose of it by will. The Court holds that the widow had power to will away the property. *A* will not be allowed to amend the plaint by adding that even if the widow had the power to dispose of the property by her will, he was entitled to the residue as his uncle's heir as the same was left to charitable objects of an unspecified and general character, and could not therefore be legally applied to charity: *Damodar v. Purmanandas* (1883) 7 Bom. 155. [This is an illustration of the Note to Rule II. If the amendment were allowed, the title by which the plaintiff claims, namely, as his uncle's heir, would no doubt remain unchanged, but the cause of action would be completely altered.]

(b) *Lukhee Kanto v. Sumseruddi* (1874) 18 W. R. 243; *Lakshmidas v. Hari* (1872) 9 B. H. C. 1; *Surendra Narain v. Bhai Lal*

(1895) 22 Cal. 752; *Rachhee v. Upendra* (1900) 27 Cal. 289; *Distinguish Balmabund v. Dahu* (1903) 25 All. 498.

O. 6, r. 17.

Illustration of Rule III.

A, the official assignee of the estate of a deceased insolvent, sues B for Rs. 1,50,000 alleged in the plaint to be unlawfully withheld from the estate in consequence of a payment fraudulently concealed from A's predecessor in office. It is proved that A's predecessor was aware of the payment. A applies to amend the plaint by alleging that though his predecessor consented to the payment, such consent was illegal as being a fraud, though of a different kind, upon the Court. The amendment cannot be allowed, because to allege fraud of one kind and to substitute fraud of another kind is to convert the suit into one of an inconsistent character: *Abdul Hoosein v. Turner* (1887) 11 Bom. 620, 14 I. A. 111. See Notes to O. 6, r. 4, "Fraud and coercion," p. 402 above.

B. A written statement should not be allowed to be amended at the hearing so as to convert the defence into another of a different and inconsistent character.—As in the case of a plaint, so in the case of a written statement, the Court will not at the hearing allow any amendment that would involve "a complete change of front in the defence" (c).

Illustration.

A agrees to grant a lease of a brickfield to B. No lease is executed, but B enters into possession under the agreement. B then sues A for specific performance of the agreement, alleging that A, though frequently requested to do so, had neglected and refused to grant the lease. A denies that he was requested by B to grant the lease and expresses his readiness to execute the lease. A also counter-claims for Rs. 1,500 by way of rent. After the suit is set down for trial, A applies for leave to amend his defence and counter-claim, and to join therewith a claim for possession of the land. The application must be refused. To allow A to amend would be to allow him to present "a totally distinct, new and inconsistent case": *Clark v. Wray* (1886) 31 C. D. 68.

4. **Leave to amend will be refused where the application for amendment is not made in good faith.**—Leave to amend will not be given if the party applying is acting *mala fide* (d), as where there is no substantial ground for the case proposed to be set up by the amendment (e).

Amendment of plaint by adding new reliefs.—The amendment of a plaint by adding a new prayer may or may not convert the suit into another of a different and inconsistent character. If the amendment converts the suit into another of a different and inconsistent character, it will not be allowed. If the amendment does not convert the suit into another of a different and inconsistent character, it may or may not be allowed at the discretion of the Court. In the exercise of this discretion, the Court will not allow an amendment, if the application for amendment is made at such a late stage of the proceedings that, if allowed, it would create a necessity of practically trying the case *de novo* (f); otherwise the amendment may be allowed (g). Thus a mortgagee suing for sale of the mortgaged property may be allowed to amend the plaint by asking merely for a simple money decree against the mortgagor. In such a case, the character of the suit is not fundamentally altered, nor could the defendant be possibly taken by surprise (h). Similarly, a purchaser suing for specific performance may be allowed to amend his plaint by asking for a refund of the earnest money, if the Court does not decree specific performance (i).

(c) *Laird v. Briggs* (1880) 16 C. D. 440, 446.

(d) *Tildesley v. Harper* (1878) 10 C. D. 393, 396-397.

(e) *Lawrence v. Norreys* (1888) 39 C. D. 213, 235.

(f) *Narayana v. Sankunni* (1892) 15 Mad. 255; *Ramanadan v. Pullikutti* (1898) 21 Mad. 288.

(g) *Kashinath v. Sadashiv* (1898) 20 Cal. 805
Sukhdeo v. Lachman (1902) 24 All. 4 to 6;

(h) *Sukhdeo v. Lachman* (1902) 24 All. 456.

(i) *Ibrahimbhai v. Fletcher* (1897) 21 Bom. 327.

Amendment by adding a plea of fraud.—It is “the universal practice, except **O. 6, r. 17.** in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance” (*j*). Where facts supporting the charge of fraud were *disclosed in the cross-examination of the defendant*, leave was given to amend by adding a plea of fraud (*k*). Similarly, where the plaintiff sued on a mortgage, and the defendant in his written statement alleged that he was a minor at the date of the mortgage, leave was given to the plaintiff to amend the plaint by raising an alternative case that the loan was obtained by the defendant by the fraudulent representation that he had attained majority at the time (*l*). See Notes to **O. 6, r. 4,** “Fraud”, p. 402 above.

“AT ANY STAGE OF THE PROCEEDINGS.”

Leave to amend may be granted at any stage of the proceedings. It may be granted in appeal [s. 107, sub-s. (2)], or even in second appeal (s. 108). In the undermentioned case (*m*), the plaintiff was allowed to amend his plaint in appeal before the Privy Council. The appellate Court may allow an amendment whether leave to amend was asked for in the Court below or not. It may also allow an amendment even if the Court below offered leave to amend but the offer was declined (*n*).

There is no such rule as that leave to amend should be granted as a matter of course where the application is made *before the hearing*, and that it should be refused on the ground of delay where the application is made *at the hearing*. More delay has hardly ever been a ground for refusing leave to amend. It is only when delay is coupled with one or other of the four grounds for refusing leave enumerated above, that leave to amend has been refused (*o*). Where the application is made *before the hearing*, there is as a rule little difficulty in obtaining leave to amend, for the opposite party can then be compensated by costs. But where the application is made after the suit has been set down for trial (*p*), or where it is made at the hearing, the probability is that it will be refused, for it is at this stage that the grounds for refusing leave chiefly arise, and can be effectively set up. In fact, almost all the cases in which leave to amend has been refused are cases where the application was made at the hearing. The majority of them were cases where the party applying, seeing that he could not succeed on the case as made in his pleading, sought to alter the whole nature of his case by an unexpected amendment, and leave was refused on the ground that a party should not be allowed “a change of front” at that stage. But leave may be granted even at the hearing, if there is no ground against its being granted. Thus leave to amend will generally be granted at the trial where there is a defect in the parties and it has become necessary to amend the proceedings in the suit (*q*). It would also be granted where both parties knew what the case was and there was no surprise (*r*).

(*j*) *Bentley v. Black* (1893) 9 Times Rep. 580.

(*k*) *Riding v. Hawkins* (1889) 14 P. D. 56.

(*l*) *Saral Chand v. Mohun Bibi* (1898) 2 C. W. N. 201.

(*m*) *Mohammed Zahoor Ali Khan v. Rutta Koer* (1867) 11 M. I. A. 468, 486.

(*n*) *Ecklin v. Little* (1887) 19 Q. B. D. 394; *Kisandas v. Rachappa* (1909) 33 Bom. 644.

(*o*) *Edevain v. Cohen* (1889) 43 C. D. 187; 190 [delay and technical amendment]; *Steward v. The North Metropolitan Tramway Co.* (1885) 16 Q. R. D. 178 [delay and injury to accrued right]; *Hipgrave v. Case* (1885) 28 C. D. 356 [delay and new case]; *Clark v. Wray* (1885) 31 C. D.

68 [delay and new case]; *Mohesh Chandra v. Radha Kishore* (1908) 12 C. W. N. 28; 36-37 [delay and new case]; *Lawrence v. Norreys* (1888) 39 C. D. 213, 235 [delay and mala fides].

(*p*) See *Clark v. Wray* (1885) 31 C. D. 68.

(*q*) *Lydall v. Martinson* (1877) 5 O. D. 780; *Dowdeswell v. Dowdeswell* (1878) 9 C. D. 294; *Bowden's Patents Syndicate, Ltd. v. Herbert Smith & Co.* (1904) 2 Ch. 86.

(*r*) *Green v. Sevin* (1879) 13 C. D. 589, 595. See also *Nobel's Explosives Co. v. Jones & Co.* (1880) 17 C. D. 721 [cause of action allowed to be added after evidence of defendant].

- O. 6, r. 18. **18.** [*New.* R. S. C., O. 28, r. 7.] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

ORDER VII.

Plaint.

- O. 7, r. 1. Particulars to be contained in plaint. **1.** [S. 50. para. 1.] The plaint shall contain the following particulars:—
- (a) the name of the Court in which the suit is brought;
 - (b) the name, description and place of residence of the plaintiff;
 - (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
 - (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
 - (e) the facts constituting the cause of action and when it arose;
 - (f) the facts showing that the Court has jurisdiction;
 - (g) the relief which the plaintiff claims;
 - (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
 - (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees, so far as the case admits.

“Facts constituting the cause of action.”—As to the meaning of cause of action, see notes to s. 20 on p. 86 above. See also notes to O. 6, r. 2.

“Facts showing that the Court has jurisdiction.”—See ss. 16, 19 and 20, and cl. 12 of the Charter set forth in Appendix II.

Relief which the plaintiff claims.—See r. 7 below and notes thereto.

O. 7,

“Relinquished a portion of his claim.”—See O. 2, r. 2, sub-r. (2).

rr. 1-4.

Statement of Value.—See notes to s. 15, under the head “Where the subject-matter of a suit does not admit of being satisfactorily valued,” p. 75 above.

2. [S. 50, paras. 2, 3.] Where the plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed:

In money suits.

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaintiff shall state approximately the amount sued for.

Additions made into this rule by the Chief Court of the Punjab under s. 122.—See Appendix VII below.

Suit for mesne profits or accounts—See notes to s. 6, “Pecuniary jurisdiction in passing decrees,” p. 15 above.

3. [New.] Where the subject-matter of the suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers.

Where the subject-matter of the suit is immovable property.

4. [S. 50, para. 4.] Where the plaintiff sues in a representative character the plaintiff shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

When plaintiff sues as representative.

“Where the plaintiff sues in a representative character.”—Where a person dies leaving a will, the executor named in the will may obtain probate of the will. Where a person dies intestate, his heirs may apply for letters of administration. The person to whom letters of administration are granted is called administrator. The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased vests in him as such. A suit by a person as executor or administrator of a deceased person is a suit by him in a representative character. There are some cases in which the law requires probate or letters of administration, as the case may be, to entitle a person suing in a representative character to a decree in respect of the estate of the deceased. In a large number of cases, however, it is not necessary to obtain probate or letters of administration to entitle a plaintiff suing in a representative character to a decree in respect of the

O. 7, r. 4. estate of the deceased. This will be seen from the following statement of the law on the subject:—

1. *Europeans, Parsis, Jews and other persons subject to the provisions of the Indian Succession Act X of 1865.*—When the deceased is a person to whom the provisions of the Succession Act apply, probate or letters of administration must be obtained, otherwise no decree will be passed in respect of any matter concerning the estate of the deceased: Succession Act, section 187 (as to probate), and section 190 (as to letters of administration).

The Succession Act does not apply to Hindus, Mahomedans, and Buddhists: see s. 331 of the Act.

2. *Hindus subject to the provisions of the Hindu Wills Act XXI of 1870.*—Where a Hindu subject to the provisions of the Hindu Wills Act dies *leaving a will*, his executor is not entitled to a decree in respect of any matter concerning the estate of the deceased unless he has obtained probate of the will [see s. 2 of the Act which incorporates s. 187 of the Succession Act which requires probate]. But where he dies *intestate*, his heirs may sue in respect of his property without obtaining letters of administration, unless the suit is one to recover a *debt* due to the deceased, in which case either letters of administration or a succession certificate must be obtained before a decree can be passed in favour of the heirs: see Succession Certificate Act VII of 1889, ss. 1 and 4.

The Hindu Wills Act applies to Hindus, Jains, Sikhs and Buddhists, when *either* the will is made within the territories subject to the Lieutenant-Governor of Bengal or in the towns of Madras and Bombay, *or* the will, though made outside those places, relates to immovable property situate in those places.

3. *Hindus not subject to the provisions of the Hindu Wills Act.*—These are governed by the provisions of the Probate and Administration Act V of 1881. The latter Act does not require probate or letters of administration, so that the executor of a Hindu not governed by the Hindu Wills Act may sue without obtaining probate, and his heirs may sue without obtaining letters of administration. But when the suit is to recover a *debt* due to deceased, no Court can pass a decree against the debtor, except on the production, by the person suing, of a probate or letters of administration or a succession certificate: see Succession Certificate Act VII of 1889, s. 4.

The Probate and Administration Act applies to all persons to whom the Indian Succession Act does not apply. It therefore applies to Mahomedans, and, subject to the provisions of the Hindu Wills Act, to Hindus.

4. *Mahomedans.*—Mahomedans are governed in matters of probate and administration by the provisions of the Probate and Administration Act. Hence the rules, as to probate, letters of administration, and succession certificate in the case of Mahomedans are the same as in Case (3) above.

5. *Native Christians.*—Up to the year 1901, Native Christians were governed by the provisions of the Indian Succession Act. Hence it was necessary, where the deceased left a will, that the executor should obtain *probate* before he could establish any right as executor to the property of the deceased (Succession Act, s. 187). And where the deceased died *intestate*, *letters of administration* were required before any right could be established to any part of the property of the deceased in a Court of Law (Succession Act, s. 190). In the year 1901, an Act was passed called the Native Christian Administration of Estates Act (VII of 1901), declaring *inter alia* that the provisions of section 190 of the Succession Act shall not apply to any part of the property of a Native Christian who has died *intestate*. The result therefore is exactly the same as in Case (2) above.

O. 7, r. 4.

that is to say, if a Native Christian dies leaving a will, *probate* must be obtained to entitle the executor to obtain a decree in respect of the property of the deceased as provided by s. 187 of the Succession Act. But if he dies *intestate*, his heirs may sue in respect of his property without obtaining letters of administration, unless the suit is one to recover a *debt* due to the deceased, in which case either letters of administration or a succession certificate must be obtained before a decree can be made in favour of the heirs: see Native Christian Administration of Estates Act, s. 5.

“Has taken the steps.”—In cases to which the Probate and Administration Act, 1881, applies, it is necessary, where the suit is one for the recovery of a *debt* due to the deceased, that representation should be obtained to the estate of the deceased. But such representation is not a condition precedent to the institution of the suit. It is sufficient if it is obtained before the passing of the decree. It is so provided by the Succession Certificate Act, 1889, s. 4.

Suppose now that the deceased has left a will, and that the case is one governed by the Indian Succession Act, 1865, or the Hindu Wills Act, 1870, and that the suit is one to establish a right as executor or legatee. In such a case it has been held by the Privy Council that the grant of probate is not a condition precedent to the institution of the suit though the suit be one to establish a right as executor or legatee, and that the executor or legatee may institute the suit without obtaining probate, but that he will not be entitled to a decree until he obtains probate (s). See Succession Act, s. 187.

But suppose the deceased has left no will, and the case is one governed by the Indian Succession Act, and the suit is one to establish a right to the property of the deceased. Is it necessary that letters of administration to the estate of the deceased should be obtained before the institution of the suit, or is it sufficient if they are obtained before the decree is passed? It has been held by the High Court of Bombay that if letters of administration are not obtained before the institution of the suit, and the plaintiff does not show that the plaintiff has obtained letters of administration, the plaintiff should be rejected on presentation; but if the plaintiff is not rejected, and the hearing has been allowed to proceed, there is nothing to prevent the Court from passing a decree for the plaintiff if letters of administration are obtained before the decree (t). See Indian Succession Act, 1865, s. 190. The English law on the subject may thus be stated in the language of the Judicial Committee in *Meyappa v. Subramanian* (u): “An administrator derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: see Comyn’s Digest, ‘Administration,’ B. 9 and 10; *Thompson v. Reynolds* (v); *Woolley v. Clark* (w).”

Title of suit.—See Appendix A, “(2) Description of Parties in Particular Cases,” the last two forms. See also r. 9 (2) below.

Suit by or against an unregistered Company.—In the case of a registered company, the suit is brought in the name of the company. But where a company is not registered, all the members of the company should be made parties to the suit (x).

(s) *Chandra Kishore v. Prasanna Kumari* (1910) 38 Cal. 327, 38 I. A. 7 [a case under the Hindu Wills Act, 1870]; *Jamshedji v. Hirjibhai* (1909) 37 Bom. 158, (a case under the Indian Succession Act 1865); *Meyappa v. Supramanian* (1916) 43 I. A. 113, 115, 119, [a case from Singapore decided with reference to the English law]. The contrary view expressed by the High Court of Madras is not, it is submitted, correct: *Bala Krishnudu v. Narayanasawmy* (1912) 37

Mad. 175, 180.

(t) *Setna v. Hemingway* (1914) 38 Bom. 618; *Adm. Gen. of Bengal v. Lali* (1908) 12 C. W. N. 738 [on appeal the case was remanded, see Henderson’s Ind. Suc. Act, notes to s. 192.]

(u) (1916) 43 I. A. 113, 119.

(v) 3 C. & P. 123.

(w) 5 B. & Ald. 744.

(x) *Ganesh v. Mundi Forest Co.* (1899) 21 All. 346.

O. 7,
rr. 47.

Suit by or against a club.—The secretary of a club cannot alone sue a member for a debt due by the member to the club. All the members must join as plaintiffs in the suit (y). If the number of members is numerous, any one of the members may sue for himself and the other members with the permission of the Court (see O. 1, r. 8). Similarly, the members of a club could not be sued through the secretary as their representative. All the members must be joined as defendants (z).

5. [S. 50, para. 5.] The plaintiff shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Defendant's interest and liability to be shown.

6. [S. 50, para. 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.

Grounds of exemption from limitation law.

Grounds of exemption from limitation law.—These grounds are set forth in sections 12 to 20 of the Limitation Act, 1908. If no ground of exemption is shown in the plaint, and the suit appears from the statement in the plaint to be barred by limitation, the plaint shall be rejected [see r. 11, cl. (d) below]. But a plaint should not be rejected merely because the exemption is not claimed *specifically*. All that the rule requires is that the *plaint should show the ground of exemption* (a). If a plaintiff does not show the ground of exemption, the Court of first instance should allow the plaint to be amended save under very exceptional circumstances (b). But a plaintiff should not be allowed for the first time at the hearing of an appeal to rely upon a ground of exemption from the law of limitation (c). See Notes to O. 41, r. 2, below.

It has been held by the High Court of Bombay, that when a plaintiff does satisfy the requirements of this rule by stating what is in his opinion the ground upon which he intends to get over the bar of limitation, he ought not to be precluded from taking another and not inconsistent ground, should he be later advised that the latter is the true ground (d). The same view has been taken by the High Court of Calcutta (e).

7. [New. R. S. C., O. 20, r. 6.] Every plaintiff shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

Relief to be specifically stated.

(y) *Michael v. Briggs* (1891) 14 Mad. 362.
(z) *N. W. P. Club v. Sadullah* (1898) 20 All. 497.
(a) *Raghu Nath v. Syed Samad* (1908) 12 C. W. N. 617.
(b) *Ram Sukh Das v. Ghulam* (1918) Punj. Rec. no. 102, p. 387; *Gunnaji v. Makanji* (1909) 34 Bom. 260.

(c) *Gobinda Mal v. Santa* (1914) Punj. Rec. no. 83, p. 293.
(d) *Yakub Ebrahim v. Bai Rahmatbai* (1908) 10 Bom. L. R. 346.
(e) *Gangadhar v. Khaja* (1909) 14 C.W. N. 128, explaining *Jogeshwar Roy v. Raj Narain* (1904) 31 Cal. 195.

Relief.—Every plaint must state specifically the relief which the plaintiff claims, O. 7, r. 7. whether it be damages, or specific performance, or an injunction, or a declaration, or an account, or the appointment of a receiver, or possession of land, or relief of any other kind. A plaintiff who omits, except with the leave of the Court, to sue for all the reliefs to which he may be entitled in respect of the same cause of action will not afterwards be allowed to sue for any relief so omitted [O. 2, r. 2, sub-r. (3)]. But it is not necessary to ask for general or other relief.

Where a relief is claimed upon a specific ground the Court may grant it upon a ground different from that on which it is claimed in the plaint, if the ground is disclosed by the allegations in the plaint and the evidence in the case (f). Thus in a case in which a plaintiff claimed an easement by *prescription*, and it was found that he was not entitled to the easement by prescription, their Lordships of the Privy Council dealing with the case as a special appeal, decreed the claim on the *presumption of title arising from a grant* (g).

Where a plaint asks for more than what the plaintiff is entitled to, the Court may give him only that much relief as he is entitled to; but the suit must not be dismissed (h). Where a plaint asks for less than what the plaintiff is found to be entitled to, the Court cannot give him more than what is asked for in the plaint, unless the plaint is amended before judgment. Thus if a suit is brought upon a balance of accounts or for mesne profits, and the plaintiff, instead of claiming whatever may be found due on the taking of accounts and stating an approximate amount [O. 7, r. 2], states a specific sum as the amount claimed, the Court cannot, without an amendment of the plaint [O. 6, r. 17], pass a decree for more than what is claimed (i).

General or other relief.—Under the system of pleadings hitherto followed in India, it was usual to add in the plaint a prayer for general relief called *general prayer* which ran thus: "The plaintiff claims *such further or other relief* as the nature of the case may require." Under the present rule it is no longer necessary specifically to ask for such relief. Such relief may now always be given to the same extent as if it had been asked for, provided it is not inconsistent with that specifically claimed, as well as with the case raised by the pleading (j). In order, however, to entitle a plaintiff to a relief under the claim for general relief, it is necessary that the ground for such relief must be disclosed by the allegations in the plaint (k). "A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings" (l). Thus where a plaintiff sues for a declaration of title to certain property *under a deed of sale* he cannot be allowed to succeed on the basis of title *by adverse possession* (m).

With regard to the *nature* of the general or other relief which a plaintiff may have, the rule is that if the plaint contains allegations, offering issues on facts that are material, the plaintiff is entitled to the relief which those facts will sustain; but he cannot desert specific relief claimed, and under the claim for general relief ask specific relief of *another description*, unless the facts and circumstances alleged on the pleadings will, consistently with the rules of the Court, maintain that relief (n).

(f) *Rasul Jehan v. Ram Surun* (1895) 22 Cal. 589; *Haji Khan v. Baldeo Das* (1902) 24 All. 90.

(g) *Rajrup v. Abul* (1881) 6 Cal. 394, 7 I. A. 240; *Achul v. Rajun* (1881) 6 Cal. 812; *Secretary of State v. Mathurabhai* (1889) 14 Bom. 218, 220.

(h) *Pitambar v. Ram Joy* (1867) 7 W. R. 93; *Lakshman v. Hart* (1880) 4 Bom. 584; *Pulamada v. Ravuthu* (1888) 11 Mad. 94, 97.

(i) *Sooriah Raw v. Colagherey* (1838) 2 M. I. A. 114; *Percival v. Collector of Chittagong*

(1903) 30 Cal. 518, 519. But see *Kannayya v. Venkata* (1917) 40 Mad. 1, 7-8.

(j) *Cargill v. Bower* (1878) 10 C. D. 502, 508.

(k) *Jugal Kishore v. Kartic Chunder* (1894) 21 Cal. 116, 120-21.

(l) *Mohammed Zahoore v. Rutla Koer* (1867) 11 M. I. A. 468, 474.

(m) *Somasundaram v. Vadivelu* (1908) 31 Mad. 531.

(n) *Hiern v. Mill* (1806) 13 Ves. 119, *per* Lord Eldon; *Cockerell v. Dickens* (1840) 2 M. I. A. 863, 889.

O. 7, r. 7.

Where a suit is brought by a reversioner against a Hindu widow (1) for an injunction restraining her from waste, (2) for appointment of a receiver, and (3) for "further relief," the plaintiff, if he fails in the substantial heads of his claim, is not entitled, under cover of a request for "further relief," to obtain a declaration that he is the next reversionary heir (o).

In a suit by a mortgagee for *sale* of the mortgaged property, the mortgagee may relinquish his claim for *sale*, and ask for a *simple money* decree, though such relief is not specifically claimed. This he may do under the claim for general relief. The Court has the power to grant that relief, provided the mortgage contains a *personal* covenant to pay the mortgage debt (p). But the Court has no power, under a claim for general relief, to grant to a *pro forma* plaintiff the relief claimed by the active plaintiff, if it turns out that the *pro forma* plaintiff, and not the active plaintiff, is entitled to the relief claimed. This may be explained by an illustration. *B* sells his interest in certain property in the possession of *C* to *A*. *A* and *B* then sue *C* to recover possession of the property. *B* makes no claim, and he is joined merely as a *formal* party to the suit. The Court finds the sale to *A* void as champertous (Contract Act, s. 23). Such being the case, no decree can be passed in favour of *A* for possession. Nor should any decree be passed in favour of *B* awarding possession of the property to him under the claim for general relief, though the Court may find that *C* is in wrongful possession of the property, and the person really entitled to the property is *B*. *B* must bring a separate suit against *C* to recover possession (q).

Alternative relief.—A plaintiff may rely "upon several different rights alternatively, although they may be inconsistent" (r). A pleading is not embarrassing within the meaning of O. 6, r. 16, because it contains inconsistent sets of facts (s). Thus a plaintiff may in the same suit claim to have a partnership agreement with the defendant cancelled on the ground that he was induced to enter into it by the fraud of the defendant, or, in the alternative, for a dissolution of partnership and accounts (t). Similarly, a plaintiff may sue for the cancellation of a bond on the ground that it was a forgery, or, in the alternative, that it was void for want of consideration (u). Likewise, a plaintiff may claim over the same plot of land a right of *ownership*, or, in the alternative, a right of *easement*. In such a case the plaintiff's contention amounts to this: "I believe the land is mine, but I may be unable to prove it; if I should fail to prove it, I can at any rate prove that I have been using the right of way as an easement over the land" (v).

There is nothing in law to prevent a plaintiff in a suit for pre-emption basing his claim in the alternative on contract, custom, or Mahomedan law (w); nor is there any thing to prevent him in such a suit from setting up an alternative claim for possession as owner (x).

For further information on this subject, see notes to O. 6, r. 2, under the head "Alternative and inconsistent allegations," on p. 400 above.

When Court should take notice of events happening after institution of suit.—Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief

(o) *Janaki v. Narayanasami* (1916) 43 I. A. 207, 39 Mad. 634.

(p) *Sukhdeo v. Lachman* (1902) 24 All. 456; *Abbakke v. Kinkhama* (1906) 29 Mad. 491.

(q) *Devi Dayal v. Bhan Pertap* (1904) 31 Cal. 433.

(r) *Philippis v. Philipps* (1879) 4 Q. B. D. 127, 134, per Brett, L.J.

(s) *Re Morgan, Owen v. Morgan* (1887) 35 C. D. 492.

(t) *Bagot v. Enston* (1877) 7 C. D. 1.

(u) *Jino v. Manon* (1896) 18 All. 125. But see *Iyyappan v. Ramalakeshnamma* (1890) 13 Mad. 549. See also *Mahomed Bukhs Khan v. Hosseini Bibi* (1888) 15 Cal. 684, 15 I.A. 81, as explained in 18 All. 125, 128.

(v) *Narendra v. Abov Charan* (1907) 34 Cal. 51.

(w) *Muhammad v. Shams-un-Nissa* (1914) 36 All. 456.

(x) *Bhagurá v. Parmeshar* (1914) 36 All. 476.

claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made (y).

O. 7, rr.
7-9.

8. [New. R. S. C., O. 20, r. 7.] Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

Relief founded on separate grounds.

See notes to O. 6, r. 2, under the head "Alternative and inconsistent allegations," on p. 400 above.

9. [S. 58.] (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

Procedure on admitting plaint.

Concise statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is used.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

Sub-rule (2): representative capacity.—It is not necessary to state in the title of the suit the representative capacity in which the plaintiff or the defendant sues or is sued, although no doubt that is a convenient place to make such a statement. It is enough if the pleading shows that the plaintiff or the defendant sues or is sued in a representative capacity (z). See O. 7, r. 4, and Appendix A, "(2) Description of Parties in Particular Cases," the last two forms.

(y) *Nurimian v. Ambica* (1916) 44 Cal. 47, 55.
(z) *Kuarmoni v. Wasif Ali* (1915) 19 C. W. N.

1193; *Bidhu v. Kuladaprasad* (1919) 40 Cal. 877, 883.

O. 7,
rr. 10, 11.

10. [S. 57.] (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Return of plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure of returning
plaint.

"At any stage of the suit."—These words are new, and they have been added to give effect to the undermentioned decision (a) in which it was held that a plaint may be returned to be presented to the proper Court at any stage of the suit even after the trial has begun and concluded.

Court-fee.—Where a plaint is returned by a Court to be presented to the proper Court, the latter Court is bound to give credit for the fee levied by the former Court (b).

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (1)].

Appeal.—An appeal lies from an order returning a plaint to be presented to the proper Court, whether the order is made by the Court of first instance [O. 43, r. 1, cl. (a)] or by the Court of first appeal in the exercise of powers conferred upon it by s. 107 (c).

A files his plaint in a District Munsif's Court. The Munsif returns the plaint for presentation to the proper Court, holding that the suit is beyond his pecuniary jurisdiction. On the plaint being presented to a Subordinate Judge's Court, it is again returned by that Court on the ground that the Munsif's Court had jurisdiction. Is A entitled to appeal to the District Court from the order of the District Munsif, having regard to the fact that he in obedience to that order filed the plaint in the Subordinate Judge's Court? No, according to a Calcutta decision, the reason given being that by electing to file the plaint in the Subordinate Judge's Court, he forfeited his right of appeal (d). Yes, according to the Madras High Court (e).

Rejection of plaint.

11. [S. 54.] The plaint shall be rejected in the following cases :—

- (a) where it does not disclose a cause of action ;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so ;

(a) *Prabhashankar Bhat v. Vishwambhar* (1884), 8 Bom. 313 [F. B.]
 (b) *Vivekswara v. Nair* (1911) 35 Mad. 567 [F. B.]
 (c) *Wahidullah v. Kanhaya Lal* (1902) 25 All. 174; *Dalip Singh v. Kundan Singh* (1914) 36 All. 58; *Goor Bux v. Brij Lal* (1899)

26 Cal. 275; *Chinnasami v. Karuppa* (1898) 21 Mad. 234.
 (d) *Bent Madhub v. Jotendra* (1907) 5 Cal. L. J. 580, doubted in *Backunla Nath v. Nawab Salimulla* (1907) 6 Cal. L. J. 547, 556.
 (e) *Narayanan v. Cheria* (1918) 41 Mad. 721.

(c) where the relief claimed is properly valued, but the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so :

(d) where the suit appears from the statement in the plaint to be barred by any law.

Change of law.—Clause (a) is new. See notes below, “Clause (a).”

Chartered High Courts.—Clauses (b) and (c) of this rule do not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction. See O. 49, r. 3 (1).

“Shall be rejected.”—This rule may be applied at any stage of a suit. Therefore, a plaint may be rejected under this rule even after it has been numbered and registered as a suit (f).

The provision contained in this rule that the plaint shall be rejected in the four cases mentioned in the rule is mandatory. In a case, therefore, where the relief claimed was properly valued, but the plaint was written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper, failed to do so, it was held that the plaintiff should not be allowed to amend the plaint by omitting the prayer in respect of which the extra court-fee was directed to be paid and that the plaint should be rejected (g).

Rejection of plaint in part.—This rule does not justify the rejection of any particular portion of a plaint (h).

Clause (a).—Under the Code of 1882, s. 53, it was not obligatory upon the Court to reject a plaint if it did not disclose a cause of action. Under the present rule the Court is bound to reject a plaint if it does not disclose a cause of action. As to the meaning of “cause of action” see notes to s. 20, “Cause of Action,” p. 86 above.

Clause (c): Where a plaint is written upon paper insufficiently stamped.—There are three points to be noted in connection with this clause:—

1. Where a plaint is written upon paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency. This follows, it is said, from the terms of cl. (c) of this rule (i).

2. If the plaintiff fails to supply the requisite stamp-paper within the period fixed by the Court, the plaint may be rejected under this rule, even after it has been numbered and registered as a suit. The reason is that the power to reject a plaint under this rule is not exhausted when the plaint has been admitted and registered (j). See notes above under the head “Shall be rejected.”

3. A plaint is presented on the last day allowed by the law of limitation. It is written upon paper insufficiently stamped. The plaintiff is ordered to supply the requisite

(f) *Kishore v. Sabdal* (1890) 12 All. 553; *Venkatesa v. Ramasami* (1895) 18 Mad. 338; *Nanak Chand v. Jivan Mal* (1914) Punj. Rec. no. 35, p. 121.
(g) *Midnapur Zemindary Co. v. Secretary of State* (1917) 44 Cal. 352.
(h) *Raghubans Puri v. Jyoti Svarupa* (1907)

29 All. 325.
(i) *Achut v. Nagappa* (1915) 38 Bom. 41, 43; *Ram Sahay v. Kumar Lachmi* (1917) 2 Pat. L. J. 74, 76.
(j) *Brahmomoys Dast v. Andi Si* (1900) 27 Cal. 376; *Padmanund Sing v. Anant Lal* (1907) 34 Cal. 20.

O. 7; r. 11. stamp-paper within a week. The order is complied with on the fourth day after the date of presentation of the plaint. This would necessarily be *after the expiration* of the period of limitation prescribed for the institution of the suit. Can the plaint be admitted under these circumstances? Under this Code it can be [see s. 149]. Under the Code of 1882 there was a conflict of decisions on the point. It was held by the High Courts of Calcutta (k), Madras (l), and Bombay (m), that the Court had power to admit the plaint in the circumstances mentioned above, while it was held by the Allahabad High Court that the Court had no such power (n). The view taken by the Calcutta, Madras and Bombay High Courts was that the Court had power under s. 54 of that Code, at any time and without any regard to limitation, to fix a time within which the requisite stamp-paper should be supplied, and if the stamp was made good within the period fixed by the Court, the suit was to be deemed to be *instituted* when the plaint was *first presented* and not when the requisite stamp-paper was supplied. On the other hand, the view taken by the Allahabad High Court was that, though the Court had the power to give time to a plaintiff within which to supply the requisite stamp-paper, it must be a time within limitation, and that s. 54 did not give any power to the Court to extend the period of limitation. This conflict has now been set at rest by the provisions of s. 149 of this Code. That section gives effect to the Calcutta, Madras and Bombay decisions. It empowers the Court *at any stage* to allow a plaintiff to make up the deficiency of court-fees, and provides in effect that when the deficiency has been made up, the plaint is as valid as if it had been properly stamped when presented. It follows from the provisions of s. 149 that where a plaint written upon paper insufficiently stamped is presented to the Court on the last day allowed by the law of limitation, and the Judge to whom the plaint is presented directs extra court-fee to be paid *but fixes no time for payment*, and the plaintiff pays the extra court-fee though it be *after the expiration* of the period of limitation and the Court accepts it, the plaint should be treated as if the full fee had been paid in the first instance, and the suit cannot be held to be barred by limitation (o).

The procedure prescribed by the present rule is not applicable to a case in which an appellate Court acts under s. 12 of the Court-Fees Act, 1870 (p). Compare O. 21, r. 17, sub-r. (2).

Memorandum of appeal insufficiently stamped—See notes to s. 149 “Appeals and Applications for review of judgment,” p. 222 above.

Clause (d):—Suit barred by any law—Where a suit appears from statements in the plaint to be barred by the law of limitation, but the plaint is not rejected when presented, the Court may in a proper case allow the plaint to be amended at the hearing (q). Where a suit is brought against the Secretary of State without giving the notice required by s. 80, the plaint should be rejected under this clause (r).

Enlargement of time.—The Court may *enlarge* the time fixed under cls. (b) and (c). See s. 148.

Appeal.—An order rejecting a plaint is a decree [s. 2 (2)] and appealable as such (s). It has been held by the High Court of Patna that an order rejecting a plaint is

- (k) *Moti Sahu v. Chhatrī Das* (1892) 19 Cal. 780; *Hari Mohun v. Naimuddin* (1893) 20 Cal. 41; *Rajkishori Koer v. Madan Mohan Singh* (1904) 31 Cal. 15.
 (l) *Assam v. Pathuanna* (1899) 22 Mad. 494; *Gavarungu v. Boto Krishna* (1909) 32 Mad. 305.
 (m) *Dhondiram v. Tala Savadan* (1903) 27 Bom. 330.
 (n) *Jaynti Prasad v. Bachu Singh* (1893) 15 All.

- 65; *Durga Singh v. Bisheshar Dayal* (1902) 24 All. 218.
 (o) *Gaya v. Awadh* (1916) 1 Pat. L. J. 420.
 (p) *Pandit Brij Krishna v. Murli* (1919) 4 Pat. L. J. 703.
 (q) *Gunnaji v. Makanji* (1909) 34 Bom. 250.
 (r) *Bachchu v. Secretary of State* (1903) 25 All. 187.
 (s) *Sada Kuar v. Bula Singh* (1914) Punj. Rec. no 80, p. 278.

not appealable when such order is based on a question of valuation *pure and simple*, but if the order necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation, the order is appealable (t).

O. 7,
rr. 11-14

Revision.—It has been held by the Chief Court of the Punjab that an order directing a plaintiff to make up the deficiency in Court-fee is not open to revision. The reason given is that if the plaintiff feeling that the order is wrong does not comply with it, it will under this rule result in the rejection of his plaint from which he has a right of appeal, an order rejecting a plaint being appealable as a decree (u). See notes above "Appeal."

12. [S. 55.] Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

Procedure on rejecting
plaint.

Procedure on rejecting memorandum of appeal.—The same procedure is to be followed when a memorandum of appeal is rejected (v).

13. [S. 56.] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Where rejection of plaint
does not preclude present-
tion of fresh plaint.

Documents relied on in plaint.

14. [S. 59.] (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document
on which plaintiff sues.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

Production of documents relied upon.—A horoscope does not require to be entered in the list of documents mentioned in sub-r. (2). The reason is that it is not a document to be relied upon as a probative document in itself, but it is a record made by the maker of the horoscope to which he is entitled to refer for the purpose of refreshing his memory in the witness-box (w).

(t) *Chandramani v. Basdeo* (1919) 4 Pat. L. J. 57, 70.

(u) *Narab v. Duni Chund* (1912) Punj. Rec. no. 69, p. 265.

(v) *Rudr Prasad v. Baijnath* (1893) 15 All. 367.

(w) *Baniwari Lal v. Mahesh* (1918) 45 I. A. 281, 286-287, 41 All. 63, 60.

O. 7, rr. 14-17. **Failure to produce documents.**—The penalty for not producing the documents referred to in this rule is that prescribed in r. 18 below, and not the rejection of the plaint (z).

15. [S. 60.] Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

Statement in case of documents not in his possession or power.

16. [S. 61.] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

Suits on lost negotiable instruments.

17. [S. 62.] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account, in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

Production of shopbook.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so, and return the book to the plaintiff and cause the copy to be filed.

Original entry to be marked and returned.

Bankers' Books Evidence Act 18 of 1891.—This act provides a special mode of proof of entries in bankers' books by dispensing with the production of the books. S. 4 of the Act provides that a *certified copy* of any entry in a banker's book is to be received as *prima facie* evidence of the existence of such entry, and that it should be admitted as evidence of the matter contained therein to the same extent as the original entry.

18. [S. 63.] (1) A document which ought to be produced in Court by the plaintiff when the

Inadmissibility of document not produced when plaintiff filed.

plaint is presented, or to be entered in the list to be added or annexed to the plaintiff, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

In what cases leave may be granted under this rule.—The object of the rule is to provide against false documents being set up after the institution of a suit. In those cases, therefore, where there is no doubt of the existence of a document at the date of the suit, the Court should admit the document in evidence even though the document was not produced with the plaint or entered in the list of documents annexed to the plaint (y).

ORDER VIII.

Written Statement and Set-off.

1. [S. 110.] The defendant may, and, if so required by the Court, shall, at or before the first

O. 8,
rr. 1, 2.

Written statement.

hearing or within such time as the Court may permit, present a written statement of his defence.

Written statement.—The written statement must contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his defence, but not the evidence by which those facts are to be proved (O. 6, r. 2). A defendant may, by his written statement, raise as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in O. 6, r. 16, as to striking out embarrassing matters (z). A written statement is not embarrassing within the meaning of O. 6, r. 16, merely because it sets up inconsistent defences (a). But where the defendant relies upon several distinct grounds of defence they must be stated separately and distinctly (r. 7 below).

2. [New. R. S. C., O. 19, r. 15.] The defendant must

New facts must be specially pleaded.

raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by

(y) *Devadas v. Pirjada Begam* (1884) 8 Bom. 377.
(z) *Berdan v. Greenwood* (1878) 3 Ex. D. 251, 255.

(a) *Re Morgan, Bowen v. Morgan* (1887) 35 C. D. 492.

O. 8, surprise, or would raise issues of fact not arising out of the
 rr. 2-4. plaint, as, for instance, fraud, limitation, release, payment,
 performance, or facts showing illegality.

Fraud.—See notes to O. 6, r. 4. “Fraud and coercion” on p. 402 above.

Facts showing illegality.—See notes to O. 6, r. 8, on p. 409 above.

3. [New. R. S. C., O. 19, r. 17.] It shall not be suffi-
 Denial to be specific. cient for a defendant in his written state-
 ment to deny generally the grounds alleg-
 ed by the plaintiff, but the defendant must deal specifically
 with each allegation of fact of which he does not admit the
 truth, except damages.

“Deal specifically with each allegation of fact.”—The defendant must
 take each fact which is alleged against him separately, and say that he admits it, or
 denies it, or does not admit it. “It is not merely denial which is meant, but the rule
 covers non-admission, for [the defendant] is to *deal specifically* with every allegation of
 fact of which he does not admit the truth” (b). Every allegation of fact in the plaint
 will be taken to be admitted if it is not denied specifically or by necessary implication
 or stated to be not admitted (r. 5).

A defendant ought not to deny, by his written statement, plain and acknowledged
 facts which it is neither to his interest nor in his power to disprove (c); nor should a
 defendant plead to any matter which is not alleged against him (d). See notes to
 O. 6, r. 2, under the head “Facts not yet material to a case,” on p. 398 above.

“Except damages.”—It is not necessary for a defendant, in a suit for
 damages, to deny specifically the damages; it is quite sufficient if he pleads generally
 to the damages (e). See notes to O. 6, r. 2, “Matters affecting damages,” on p. 397
 above.

4. [New. R. S. C., O. 19, r. 19.] Where a defendant
 Evasive denial. denies an allegation of fact in the plaint,
 he must not do so evasively, but answer
 the point of substance. Thus, if it is alleged that he received
 a certain sum of money, it shall not be sufficient to deny that
 he received that particular amount, but he must deny that he
 received that sum or any part thereof or else set out how much
 he received. And if an allegation is made with divers cir-
 cumstances, it shall not be sufficient to deny it along with
 those circumstances.

Evasive denial.—Where the plaintiff sets up an agreement, and “the defendant
 denies that the terms of the agreement between himself and the plaintiff were *definitely*
 agreed upon as alleged,” the denial is evasive. “He [defendant] is bound to deny that any

(b) *Thorpe v. Holdsworth* (1876) 3 C. D. 637, 640,

per Jessel, M. R.

(c) *Lee Conservancy Board v. Button* (1879) 12

O. D. 388, affirmed (1881) 6 App. Cas. 686.

(d) *Rassam v. Budge* [1893] 1 Q. B. 571.

(e) *Ross & Co. v. Scriven* (1916) 43 Cal. 1001,

1010.

agreement or any terms of arrangement were ever come to if that is what he means; if he does not mean that, he should say that there were no terms of arrangement come to, except the following terms, and then state what the terms were; otherwise there is no specific denial at all" (f). Similarly, where the plaintiff alleges that "the defendant offered to the plaintiff's agent a bribe of Rs. 500 on 17th July, 1908, at the defendant's office," it is an evasive traverse for the defendant to plead "the defendant did not offer to the plaintiff's agent a bribe of Rs. 500 on 17th July, 1908, at his office;" for the defendant might have offered any other sum on another day and in another place. Here the *point of substance* is that a bribe was offered. The details as to the amount, time and place are only *circumstances*. The defendant should plead that he never offered a bribe of Rs. 500 or any other sum (g). Where a denial is evasive, leave to amend may be given under O. 6, r. 17, unless the Court is satisfied that the defendant was acting *malâ fide* (h).

O. 8,
rr. 4, 5.

5. [New. R. S. C., O. 19, r. 13.] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Specific denial.

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

Admissions of fact in pleadings.—The first paragraph of this rule states what amounts to admissions of fact in a pleading. Rule 3 requires that the defendant must deal specifically with each allegation of fact of which he does not admit the truth. The present rule provides that every allegation of fact in the plaint, if not denied in the written statement, shall be taken to be admitted by the defendant (i). It is not sufficient for the defendant to say that he "does not admit the correctness of the allegations in the plaint;" he ought to state in what respect he disputes them. If he simply says he does not admit them, he will be taken to have admitted them within the meaning of this rule (j). Similarly, where a defendant simply "puts the plaintiff to proof of the several allegations in the plaint," he will be deemed to have admitted the facts alleged in the plaint (k). Where in a suit for the recovery of money the plaintiff relies in his plaint upon a letter written by the defendant to save the bar of limitation, and all that the defendant says in his written statement as to the letter is, "the suit is not saved by the letter put in from the bar of limitation," the letter must be taken as admitted and it need not be proved by the plaintiff (l).

A plaintiff who claims a decree must prove all the material facts on which he relies in support of his claim. The importance of the present rule lies in this that, since facts that have been admitted need not be proved, it is not necessary for the plaintiff to prove facts which have been expressly admitted by the defendant or which must be taken to have been admitted by him within the meaning of this rule (see Evidence Act, 1872, s. 58). The admission itself being a proof, no other proof is necessary. In the case, however, of facts which may be taken to be admitted by the defendant within th

(f) *Thorp v. Holdsworth* (1876) 3 C. D. 637.

(g) *Tildesley v. Harper* (1878) 10 C. D. 403.

(h) *Tildesley v. Harper* (1878) 10 C. D. 393.

(i) *Amir Beg v. Ghulam Nabi* (1917) Punj. Rec.

no. 1, p. 1.

(j) *Ruttler v. Tregent* (1879) 12 C. D. 758.

(k) *Harris v. Gamble* (1878) 7 C. D. 877.

(l) *Laxminarayan v. Chinniram* (1917) 41 Bom. 89.

O. 8,
rr. 5, 6.

meaning of this rule, the Court may in its discretion require any facts so admitted to be proved otherwise than by such admission. That is to say, the Court may require the plaintiff to adduce such proof of the fact as it would have been necessary for him to adduce if no such admission had been made. This power which has been conferred upon the Court by the proviso to the rule is not new. The matter, it will be seen, is one of evidence, and a similar power is contained in the Indian Evidence Act I of 1872. The proviso to the rule, in fact, is a reproduction of the proviso to section 58 of the Evidence Act which runs as follows :—

“ No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings: *Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.*”

The proviso to section 58 as well as the proviso to the present rule indicates the intention of the Legislature that pleadings in India ought not to be construed with the same strictness as in England. Upon this principle, the defendant has been allowed *under special circumstances* to traverse at the hearing allegations in the plaint which he had omitted to traverse in his written statement (*m*). The rule of pleadings in England is very stringent. According to that rule a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse that fact at the hearing. The fact will be taken to be admitted by him, and the Court has no power to require the plaintiff to prove it in any case. Strike out the proviso to the present rule, and you have the rule of English law. In fact, the first paragraph of this rule is a reproduction of O. 19, r. 13, of the English Rules made under the Judicature Acts. The proviso has been added to modify the rigour of that rule.

But though pleadings in India are not to be construed as strictly as in England, neither party will be allowed to set up at the hearing an entirely new and inconsistent case. The plaintiff must be held to the state of facts alleged in his plaint or consistent therewith (*n*). Similarly, the defendant must be held to the state of facts alleged in his written statement or consistent therewith (*o*).

Omission to file written statement.—This rule applies only where a pleading *has been put in* by the defendant. Omission to file a written statement does not amount to an admission of the facts stated in the plaint (*p*).

6. [S. III.] (1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a

Particulars of set-off to be given in written statement.

(*m*) *Madho Persad v. Gajudhar* (1885) 11 Cal. 111, 11 I. A. 186; *Natha Singh v. Jodha Singh* (1884) 6 All. 409.
(*n*) *Bahen Chunder v. Shama Churn* (1866) 11 M. I. A. 7.

(*o*) *Chova v. Isa* (1875) 1 Bom. 209; *Munchershaw v. New Dhurumsey Co.* (1880) 4 Bom. 576.
(*p*) *Ross & Co. v. Scriven* (1916) 43 Cal. 1001, 1009-1010.

written statement containing the particulars of the debt sought to be set off. O. 8, r. 6.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Effect of set-off.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations.

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D; then D sues C for the legacy. C cannot set off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000. C cannot set off a debt due to him by A alone.

(g) A sues B and C for Rs. 1,000. B cannot set off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set off the debt of Rs. 1,000.

Sub-rule (3).—This sub-rule is new. See r. 9.

A defendant may claim a set-off under this rule under the following conditions only :—

I. The suit must be one for the recovery of money.

II. As regards the amount claimed to be set off—

(a) it must be an ascertained sum of money [see illa. (c), (d), and (e), to the rule] which is legally recoverable;

- O. 8, r. 6.
- (b) it must be recoverable by *the defendant* or by *all the defendants* if more than one [see ill. (g)];
 - (c) it must be recoverable by the defendant from *the plaintiff* or *all the plaintiffs* if more than one [see ill. (f)];
 - (d) it must *not exceed the pecuniary limits of the jurisdiction* of the Court in which the suit is brought; and
 - (e) both parties must fill, in the defendant's *claim to set-off*, the same character as they fill in the plaintiff's *suit* [see ills. (a), (b), and (h)].^{*}

The suit must be one for the recovery of money.—In *Nan Karay Ko Htaw* (g), their Lordships of the Privy Council observed that it was doubtful whether a suit for an *account* was a suit for *money*. In a subsequent Allahabad case, it was held that a suit for dissolution of partnership with a prayer that such *balance* as might be found due to the plaintiff upon taking the partnership accounts might be paid to him was a suit for *money*, and that a plea of set-off might therefore be raised by the defendant in such a suit (r).

The amount claimed to be set off must be an ascertained sum of money, and not damages undetermined.—With this read ills. (c), (d), and (e) to the rule. In ills. (d) and (e) the claim is an ascertained sum; not so in ill. (c) where the amount proposed to be set off is for unliquidated damages. In the case mentioned in ill. (c) the defendant may bring a cross-suit against the plaintiff. In ill. (d) the amount proposed to be set off by B is the amount of a decree, and this may be set off against A's claim, though B may not have taken any steps to enforce the decree (s).

A, a clerk, sues B, his employer, for arrears of wages due to him. B alleges that A left his employment without notice and A is therefore liable to pay him damages which he claims to set off. The amount not being ascertained cannot be set off (t).

Equitable set-off.—We now proceed to consider cases in which the defendant may be allowed to set off even an unascertained sum which sounds in damages. Those are cases where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances that they can be looked upon as part of one transaction. In such cases Courts of Equity in England have held that it would be inequitable to drive the defendant to a separate cross-suit, and that he might be allowed to plead a set-off though the amount may be *unascertained*. Such a set-off is called an *equitable* set-off, as it is allowed by Courts of *Equity* as distinguished from a *legal* set-off which is allowed at *common law* in respect only of an *ascertained* sum. It will thus be seen that the present rule is restricted to a *legal* set-off, for it requires that the amount to be set off shall be an *ascertained* sum. The question therefore arises whether an *equitable* set-off can be pleaded in Indian Courts, that is to say, if the defendant's claim is for an *unascertained* sum, but has arisen from the *same transaction* as the plaintiff's claim, can the defendant set off such demand against the plaintiff's claim? It has been held that he can do so, not under the provisions of the present rule which is limited to a *legal* set-off, but in the exercise of the general right of a defendant to plead a set-off whether legal or equitable (u). The provisions of the Code regulate *procedure* only, and they have not the effect of taking away any *right* of set-off which a defendant may have independently of its

(g) (1886) 13 Cal. 124, 13 I. A. 48.
 (r) *Ramjiwan v. Chand Mal* (1888) 10 All. 587.
 (s) *Bharat v. Ramashwar* (1903) 30 Cal. 1066.

(t) *Victoria Mills Co. Ltd. v. Brij Mohan La*
 (1917) 39 All. 382.
 (u) See O. 20, r. 19 (3).

provisions. The leading case on the subject is *Clark v. Ruthnavaloo (v)*. But this right of set-off does not exist when the cross-demand relates to a different transaction (*w*). O. 8, r. 6.

Illustrations.

1. *A* sues *B* to recover Rs. 6,000 due under a contract. *B* admits *A*'s claim, but claims to set off several sums of money alleged to be damages sustained by him by reason of *A*'s breach of some of the terms of the same contract. *B* is entitled to claim the set-off, for the claim arises from the same transaction: *Kistnasamy v. Municipal Commissioner for Madras* (1868) 4 Mad. H. C. 120; *Pragi Lal v. Maxwell* (1885) 7 All. 284.

2. *A* agrees to sell, and *B* agrees to purchase, 200 bales of wool. *B* takes delivery of 170 bales, and is ready and willing to take delivery of the rest, but *A* fails to deliver them. *A* sues *B* for the price of the 170 bales. *B* claims to set off the damages sustained by him by reason of *A*'s failure to deliver the remaining bales. *B* is entitled to claim the set-off, as the claim arises out of the same transaction: *Kishorchand v. Madhowji* (1880) 4 Bom. 407; *Niaz v. Durga* (1893) 15 All. 9; *Nand Ram v. Ram Prasad* (1905) 27 All. 145.

3. *A* sues *B*, his master, for Rs. 800 being arrears of salary. *B* claims to set off Rs. 625, being the loss sustained by him by reason of neglect and misconduct on the part of *A* as his servant. *B* is entitled to claim the set-off, as his claim arises out of the same relation from which *A*'s claim arose, namely, that of master and servant: *Chisholm v. Gopal Chander* (1889) 16 Cal. 711. Contrast (1917) 39 All. 362.

4. *A* (mortgagee) sues *B* (mortgagor) to recover the principal and interest due on a usufructuary mortgage. *B* claims to set off the loss alleged to have been occasioned by *A*'s failure as mortgagee in possession to make repairs to the mortgaged property. *B* is entitled to claim the set-off: *Shiva v. Jaru* (1892) 15 Mad. 290.

5. A washerman sues his employer for his wages. The employer may set off the value of articles short returned to him against the wages: *Maiden v. Bhundu* (1910) Punj. Rec. no. 77, p. 226.

The amount claimed to be set off must be "legally" recoverable.—The words "legally recoverable" clearly show that a time-barred claim cannot be set up by way of set-off under this rule (*x*). But this rule provides only for the case of legal set-off, and it remains to consider whether a claim by way of equitable set-off can be allowed if it is barred by limitation at the date of the suit. It has been laid down that in cases where the plaintiff's claim and the defendant's claim relate both to the same property or estate, the defendant's claim to set-off, though barred by limitation, may be entertained as an equitable set-off. It has thus been held that in a suit by an heir against his co-heirs for his one-sixth share of the estate of the deceased, the latter are entitled to set off one-sixth of the Government revenue paid by them in respect of the estate, though a separate suit by them to recover from the plaintiff the proportionate part of the revenue payable by him would be barred by limitation (*y*). Similarly in mortgage suits sums are allowed to be set off in taking accounts of the mortgage even though barred by limitation (*z*). Upon the same principle it has been held that a trustee in possession of the trust estate is entitled to set up his right to be indemnified out of

(v) (1865) 2 Mad. H. C. 296; *Kishorchand v. Madhowji* (1880) 4 Bom. 407; *Bhagat v. Bamdeb* (1885) 11 Cal. 557. For other cases see the illustrations.

(w) *Ramdeo v. Pokhram* (1894) 21 Cal. 419; *Dobson v. Bengal Spinning Co.* (1897) 21 Bom. 126; *Dhondiraj v. Ganesh* (1894) 18 Bom. 721.

(x) See *Bachchan Lal v. Banarsi Das* (1913) 35

All. 238 [claim barred according to *lex fort*, but not according to *lex loci contractus*].

(y) *Ramdhari Singh v. Permanand* (1918) 19 C. W. N. 1183.

(z) *Parasurama v. Venkatachalam* (1913) 25 Mad. L. J. 561; *Shao Sharan v. Mohabir* (1905) 32 Cal. 576; *Edward v. Ramdin* (1909) 14 C. W. N. 170, 173.

D. 8, r. 6. the trust estate when called upon for an account, although his right to sue for the amount claimed by him by way of indemnity is barred by limitation (a). In a recent case (b), the High Court of Madras held that in a suit by a lessor for rent, it is not open to the lessee to set up by way of equitable set-off an unliquidated claim for damages which was barred at the date of the suit. Seshagiri Ayyar, J., said: "An exception to this rule [namely, that a time-barred claim cannot be pleaded by way of set-off] has been recognized in some cases. Where there is a fiduciary relationship between the parties as in the case of trustee and *cestui que trust* and there is accountability, even barred claims may be taken into account in passing the final accounts. This exception has been extended in some of the decided cases in India to mortgages, presumably on the ground that there is accountability between the parties. See *Parasurama Pattar v. Venkatachallam Pattar* (c), *Chidambara Mudalar v. Krishnaswami Pillai* (d), and *Ramdhari Singh v. Permanund Singh* (e). It is not necessary to say now whether these cases have been rightly decided. I see no reason for extending the exception to suits between a lessor and a lessee." In a later Madras case (f) an agent sued his principal to recover a sum of money that might be found due to him on the taking of agency accounts. The defendant pleaded in his written statement that money would be found due to him on taking accounts and he asked for a decree for such sum as might be found due to him. The defendant's claim was *not barred at the date of the suit*, but it was barred at the date of the written statement. It was held that the defendant's claim should be allowed as an *equitable* set-off to the extent of the plaintiff's claim, but that the defendant was not entitled to a decree for the balance found due to him as his claim was barred at the date of the written statement. To pass a decree for the balance would be, it was said, to enable the defendant to evade the law of limitation. In an Allahabad case (g) it was stated by Oldfield, J., that the claim for the balance should be allowed, but the other learned Judges in that case expressly differed on the ground that although a set-off could be admitted as an equitable protection to the defendant against his being cast in the plaintiff's suit, it could not be allowed in order to obtain a decree in his favour. See notes to O. 20, r. 19, "Decree in case of set-off."

Costs awarded to a tenant in a suit brought against him by the benamidar of the landlord cannot be set off by the tenant in a subsequent suit for rent brought against him by the landlord. The costs having been awarded against the *benamidar*, they are not legally recoverable from the *landlord* (h).

A separate debt cannot be set off against a joint and several debt.—Thus in ill. (g), B cannot set off the debt due to him *alone* by A, for it is a separate debt, while the suit is to recover a *joint* and *several* debt. It has similarly been held that in a suit by a company against its directors, no individual director is entitled to set off the amount due to him alone from the company (i).

The amount claimed to be set off must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought.—A sues B in a Presidency Small Cause Court for Rs. 1,000. B claims to set off a sum of Rs. 2,700, and claims judgment for Rs. 1,700. The Small Cause Court has no jurisdiction to try the question of set-off, the value being above Rs. 2,000 (j).

(a) *Chidambara v. Krishnaswami* (1915) 28 Mad. L. J. 285, 294.

(b) *Pyraseen v. Srinath* (1915) 39 Mad. 939.

(c) (1913) 25 M. L. J. 561.

(d) (1916) 28 M. L. J. 285.

(e) (1913) 19 C. W. N. 1183.

(f) *Panuganti v. Zamindar of Tiruvur* (1919) 42 Mad. 873.

(g) *Pagi Lal v. Maxwell* (1885) 7 All. 284. See

Parmanand v. Jagat Narain (1910) 32 All. 525.

(h) *Tiluk Chandra v. Jasoda Kumar* (1906) 11 O. W. N. 215.

(i) *New Fleming Co. v. Kessowit* (1885) 9 Bom. 373, 403-404 [where set-off was claimed].

(j) *Brojendra v. Budge-Budge Jute Mill Co.* (1893) 20 Cal. 527.

Not only the amount, but also the nature of the set-off, must be within the cognizance of the Court in which the suit is brought. Hence a Court cannot entertain a claim to a set-off unless such claim, if made the subject of a suit, would fall within its jurisdiction (*k*).

Same character.—*Ills.* (a) and (b) are cases in which the parties do not fill the same character (*l*).

A suit is brought by a Hindu son as the heir and representative of his father to recover from *B* certain debt due to the father. *B* claims to set off a debt due to him by *A*'s father. *B* may do so, for both the parties fill the same character as they fill in the plaintiff's suit (*m*). Similarly in a suit by *A* against *B* for an account for goods supplied by *A* to *B*, *B* may claim a set-off of the amount due to him from *A* in respect of wages as *A*'s gumasta (*n*).

Stamp.—A written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off, and must be stamped accordingly (*o*).

Set off in winding-up proceedings—Though a director has no right to set off a debt due to him from the company against a claim made against him by the liquidator under s. 214 of the Indian Companies Act, 1882 [Ind. Cos. Act, 1913, s. 235] which provides a summary remedy (*p*), he is entitled to set off the amount due to him when a regular suit is brought against him by the company in respect of that claim (*q*). In a suit by a liquidator against a debtor of the company, the debtor is entitled to set off the amount of a fixed deposit made by him with the company provided the deposit had matured at the date of the suit, though it had not matured at the date of the order for winding up the company (*r*).

Set-off in insolvency.—See Presidency Towns Insolvency Act, 1909, s. 47 (*s*) and Provincial Insolvency Act, 1907, s. 30.

Solicitor's lien for costs.—A solicitor has at common law a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit (*t*), including costs ordered to be paid to his client (*u*). He is also entitled to a lien on immoveable property recovered for his client in the suit (*v*).

Appeal.—Unless the whole suit is disposed of, an appeal does not lie from an order disposing of a defendant's claim as to set-off made under this rule, though the question as to that claim may have been tried as a preliminary issue. Such an order is not a preliminary decree. See O. 20, r. 19, which shows that there should be only one decree drawn up in a suit in which a set-off is claimed (*w*).

Res judicata.—A defendant is under no obligation to claim a set-off. His omission, therefore, to do so does not preclude him from bringing a separate suit in respect thereof (*x*).

(*k*) *Boni Madho v. Gaya* (1893) 15 All. 404.

(*l*) See also *Abu Hasan v. Zohra* (1883) 5 All. 299; *Lakshman v. Madhav* (1891) 15 Bom. 186; *Madhavrao v. Rama* (1914) 39 Bom. 181.

(*m*) *Chennappa v. Raghunatha* (1892) 15 Mad. 29.
(*n*) *Raghavendra v. Jalurad* (1917) 41 Bom. 163.

(*o*) (1892) 15 Mad. 29, *supra*.

(*p*) *Ex parte Polly* (1882) 21 Ch. D. 492, 502, 507; *Filistoff's case* (1882) 21 Ch. D. 529, 535; *Carriage Supply Association, in re* (1884) 27 Ch. D. 322.

(*q*) *Ahmedabad Advance Spp. and Wg. Co. v. Lakshmishankar* (1905) 30 Bom. 173, 194.

(*r*) *Mehr Chand v. Amritsar Bank* (1915) Punj. Rec. no. 63, p. 275.

(*s*) See *Miller v. National Bank of India* (1892) 19 Cal. 146.

(*t*) *Slater v. Sunderland Corporation* (1863) 33 L. J. Q. B. 37; *Ex parte Morrison* (1868) L. R. 4 Q. B. 153, 156. The Indian cases up to 1915 are collected in *Kumar Krishna v. Hari Narain* (1916) 43 Cal. 676; *Harnandroy v. Gootiram* (1919) 46 Cal. 1070.

(*u*) *Ex parte Bryant* (1815) 1 Maddock 49; *Aspinall v. Stamp* (1824) 3 B. & C. 108; *O'Brien v. Lewis* (1863) 3 De G. J. & Sm. 606.

(*v*) *Kumar Krishna v. Hari Narain* (1916) 43 Cal. 676.

(*w*) *Shoo Parshad v. Indore-Malwa United Mills, Ltd.* (1917) Punj. Rec. no. 62, p. 220.

(*x*) *Amritsar National Banking Co., Ltd. v. Fazl Ilahi* (1919) Punj. Rec. no. 74, p. 185.

O. 8,
rr. 7-10.

7. [*New.* R. S. C., O. 20, r. 7.] Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated as far as may be, separately and distinctly.

Defence or set-off founded on separate grounds.

See notes to rule 1 above. Compare O. 7, r. 8.

8. [*New.*] Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

New ground of defence.

See r. 9 below.

9. [*S. 112.*] No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Subsequent pleadings.

Additional written statement.—The additional written statement should not set up a totally new case, or state facts at direct variance with the original written statement so as completely to change the issue in the case (*y*). See O. 6, r. 7 and notes thereto on p. 407 above.

10. [*S. 113.*] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

Appeal.—An appeal lies from an order under this rule pronouncing judgment against a party [O. 43, r. 1, cl. (b)].

ORDER IX.

Appearance of Parties and Consequence of Non-appearance.

O. 9, r. 1.

1. [*S. 96.*] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders,

Parties to appear on day fixed in summons for defendant to appear and answer.

and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

O. 9,
rr. 1, 4.

2. [S. 97.] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed :

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

Defendant.—The expression “defendant” in this rule does not include the guardian ad litem of a minor defendant (z).

Appeal.—The order of dismissal under this rule is a form of dismissal for default. It is not a decree [s. 2, (2)], and no appeal lies from it. The plaintiff's remedy is under r. 4 of this Order (a).

3. [S. 98.] Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Where neither party appears, suit to be dismissed.

Where neither party appears.—If the plaintiff appears on the date fixed for the hearing, but the defendant does not appear, and the suit is dismissed owing to failure on the part of the plaintiff to adduce evidence in support of his claim, the dismissal is on the merits and not under this rule (b).

“May make an order that the suit be dismissed.”—These words have been substituted for the words “the suit shall be dismissed” [Code of 1882, s. 98] to make it clear that the dismissal under this rule is not a decree, but an order. See s. 2, cl (2).

4. [S. 99.] Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the Court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be.

Plaintiff may bring fresh suit or Court may restore suit to file.

(z) *Gobind Ram v. Muhammad* (1912) Punj. Rec. no. 35, p. 115.
(a) *Lachmi Narain v. Darbari Lal* (1916) 38 All.

357; *Lucky Churn v. Budarr-un-nisa* (1882) 9 Cal. 627.
(b) *Hingu Singh v. Jhuri Singh* (1918) 40 All. 590.

O. 9, the Court shall make an order setting aside the dismissal
rr. 4, 5. and shall appoint a day for proceeding with the suit.

Sufficient excuse for plaintiff's non-appearance.—A *bonâ fide* mistake which is not unreasonable is a sufficient excuse within the meaning of this rule (c).

5. [S. 99 A.] (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may make an order that the suit be dismissed as against such defendant.

Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Period of one year from date of return.—The period of one year is to be calculated from the date of the return *made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers*. The italicized words are new. In the absence of these words in the corresponding section of the Code of 1882, the question arose whether the period of one year was to be calculated from the date of the return made by the serving officer, or from the date of return made by the officer whose duty it is to certify to the Court returns made by the serving officer. It was held that the period was to be calculated from the date of return made by the latter officer, and not that made by the serving officer (d). The words italicized above have been added into the present rule to give effect to that decision. The procedure is this: after the writ of summons is issued, it is delivered by the Court to the proper officer for service on the defendant. The officer then delivers the summons to the bailiff (serving officer) whose duty it is to serve it on the defendant. After effecting service, the bailiff has to endorse on the original summons a "return" stating the manner in which the summons was served. If, for any reason, the summons cannot be served upon the defendant, the bailiff has to make a return to that effect. This "return" is then countersigned by the officer to whom the summons was delivered by the Court, and the summons is then returned by the officer to the Court. It is from the date of the countersignature that the period of one year is to be calculated and not from the date of the return made by the bailiff.

"Make an order that the suit be dismissed."—These words have been substituted for the words "may dismiss the suit" [Code of 1882, s. 99 A] to make it clear that a dismissal under this rule is not a decree, but an order. See s. 2, cl. (2).

(c) *Hardatrat v. Victoria Finance and Bullion Association* (1866) 3 B. H. C. O. C. 604

(d) *Parsotam v. Abdul* (1889) 13 Bom. 500.

6. [S. 100.] (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then— O. 9, r. 6.

Procedure when only plaintiff appears.

When summons duly served.

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte*;

When summons not duly served.

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

When summons served but not in due time.

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

Ex parte decree.—If the defendant does not appear, and it is proved that the summons was duly served upon him, the Court may proceed *ex parte*, that is to say, it may proceed to hear the plaintiff's case in the absence of the defendant. If the plaintiff makes out a *prima facie* case, the Court may pass a decree for the plaintiff. A decree passed against a defendant on his failure to appear at the hearing is called an *ex parte* decree. If the plaintiff fails to make out a *prima facie* case, the Court may dismiss the plaintiff's suit. "Every Judge in dealing with an *ex parte* case should take good care to see that the plaintiff's case is at least *prima facie* proved." The mere absence of the defendant does not of itself justify the presumption that the plaintiff's case is true (c). The Court has no jurisdiction to pass an *ex parte* decree without any evidence being given by or on behalf of the plaintiff (f). It need hardly be stated that there is no power in the Court to pass an *ex parte* decree before the returnable date mentioned in the summons (g).

Does not appear.—As to the meaning of the word "appear," see notes to r. 9 under the head "Meaning of Appearance," on p. 451 below.

Remedies open to a defendant in the case of an *ex parte* decree.—See r. 13 and notes thereto.

(e) *Amir Nath v. Roy Dhunput* (1871) 15 W. R. 503 | (g) *Dhirajlal v. Hormusji* (1908) 32 Bom. 534.
(f) *Ross & Co. v. Scriven* (1916) 43 Cal. 1001.

O. 9,
rr. 7-9.

7. [S. 101.]

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

8. [S. 102.]

Procedure where defendant only appears.

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Non-appearance of parties.—If neither party appears on the day fixed for the hearing of the suit, the procedure laid down in r. 3 is to be followed. If the plaintiff appears and the defendant does not appear, the procedure laid down in r. 6 is to be followed. If the defendant appears and the plaintiff does not appear, the procedure laid down in the present rule is to be followed. All that a defendant is entitled to under this rule is to have the plaintiff's suit dismissed. He is not entitled to call any evidence, even though it be to disprove charges of fraud or the like that may have been made against him in the plaint (*h*).

If the plaintiff does not appear.—See notes to r. 9, "Meaning of Appearance," on p. 451 below. This rule does not apply to the case of non-appearance by reason of death. Where a sole plaintiff dies before the hearing of a suit, and the suit is dismissed for non-appearance under this rule, the fact of his death not being known to the Court, there is inherent jurisdiction in the Court under s. 151 to set aside the dismissal, and thus rectify the mistake which has been inadvertently made. It is then for the legal representative of the plaintiff to apply to be brought on the record under O. 22, r. 3 (*i*).

Remedies of plaintiff on dismissal of suit under this rule.—See notes to r. 9 under the same head, on p. 451 below.

"The Court shall make an order that the suit be dismissed."—These words have been substituted for the words "the Court shall dismiss the suit" [Code of 1882, s. 102]. An order of dismissal under this rule for default of plaintiff's appearance is not a decree, and is not therefore appealable. See s. 2, cl. (2), sub-cl. (b), and notes under the head "Order of dismissal for default," on p. 8 above.

9. [S. 103.]

Decree against plaintiff by default bars fresh suit.

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the

(*h*) *Keert Chand v. National Jute Mills Co.* (1912) 40 Cal. 110.

(*i*) *Debi Baksh v. Habib Shah* (1913) 35 All. 331, 40 I. A. 151.

dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. O. 9, r. 9.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

Additions made into this rule by the Chief Court of the Punjab under s. 122.—See Appendix VII below.

Remedies of plaintiff on dismissal of suit under r. 8.—A plaintiff, whose suit is dismissed under r. 8 for default of appearance on the day fixed for the hearing, cannot appeal from the order of dismissal, as such an order is not a decree [s. 2, cl. (2), sub-cl. (b)], but he may—

- (1) apply for a review of the order under O. 40, r. 1 (j); or
- (2) apply under this rule for an order to set aside the order of dismissal.

The period of limitation for an application for a review of the order is 10 days from the date of the order in the case of an order made by the Provincial Court of Small Causes, 20 days from the date of the order in the case of an order made by any of the High Courts at Calcutta, Madras and Bombay or the Chief Court of Lower Burma in the exercise of its original jurisdiction, and 90 days from the date of the order in other cases (k). The period of limitation for an application under this section is 30 days from the date of the dismissal of the suit (l).

The first remedy is open to any plaintiff whose suit has been dismissed, *whatever the ground of dismissal may be*, whether it is dismissed for default of appearance at the hearing or on the merits after a hearing. But the second remedy, that is, the remedy provided by this rule can only be availed of by a plaintiff who *does not appear* at the hearing (r. 8) and the suit is dismissed for default of appearance. The remedy given by this rule is not open to a plaintiff whose suit is dismissed *on any ground other than default of appearance*; thus if a plaintiff's suit is dismissed on his failure to establish his case by reason of *non-attendance of his witnesses* (m) or for *want of evidence* (n), the dismissal is not one under r. 8 for it is a dismissal for *default of appearance*, and he cannot therefore avail himself of the remedy provided by this rule.

There is a conflict of decisions whether if a defendant does not apply under this rule within the 30 days allowed by law, he is entitled to apply for a review under O. 47, r. 1, after the expiration of that period. The Patna High Court has held (o), following an earlier decision of the Calcutta High Court (p), that he is not; on the other hand, the Calcutta High Court has held in a later decision that he is (q). The ground of the Patna decision is that to allow a review in such a case would be an evasion of the rule of limitation.

Meaning of "appearance."—A plaintiff or a defendant will be deemed to have "appeared" on the day fixed for the hearing of the suit, if he appears—

- (1) in person, or

(j) *Raj Narain v. Ananga* (1899) 26 Cal. 598.
 (k) Limitation Act, 1908, Sch. I, arts. 161, 162 and 173.
 (l) Limitation Act, 1908, Sch. I, art. 163; *Hinga v. Munna* (1904) 31 Cal. 150.
 (m) *Mahomed v. Ali Baksh* (1873) 5 All. H. C. 74.
 (n) *Kartick v. Sridhar* (1886) 12 Cal. 563.

(o) *Deodip Singh v. Gopal Singh* (1916) 1 Pat. L. J. 547.
 (p) *Kailash v. Nabadwip* (1898) 2 Cal. W. N. 318.
 (q) *Lala Chet Narain v. Ramphal* (1912) 16 Cal. W. N. 643 following *Raj Narain v. Ananga*, (1899), 26 Cal. 598.

O. 9, r. 9.

- (2) by a pleader either himself duly instructed and able to answer all material questions relating to the suit, or accompanied by some person able to answer such questions [O. 5, r. 1, sub-r. (2)].

First, as regards Appearance of a party in person.—The mere presence of a party in Court at the hearing is sufficient to constitute "appearance" within the meaning of this Order. It does not matter for what purpose he appears or what action he takes on the appearance. A plaintiff appearing and applying for an adjournment on the ground that his witnesses are not present will be deemed to have "appeared." If the application is refused and the suit is dismissed owing to his inability to establish his case in the absence of witnesses, the dismissal is not one under r. 8 for the plaintiff *did appear*, and he cannot therefore avail himself of the provisions of this rule (r). Similarly a defendant appearing and applying for an adjournment on the ground that he had no time to prepare his case, will be deemed to have "appeared." If the application is refused and a decree is passed against him owing to his *unpreparedness to defend the suit*, the decree is not *ex parte* under r. 6, for he *did appear*, and he cannot therefore avail himself of the provisions of r. 13 (s).

Next, as regards Appearance of a party by a pleader.—Different considerations arise when a party is not personally present in Court but is represented by a pleader. The question then is whether he has "appeared" by his pleader. Appearance by a pleader within the meaning of this Order does not, like appearance by a party in person, mean mere presence in Court: it means appearance by a pleader "duly instructed and able to answer all material questions relating to the suit" or by a pleader "accompanied by some person able to answer all such questions" [O. 5, r. 1]. Hence a party cannot be said to "appear" by a pleader, if the pleader appears at the hearing and states that though he has filed his vakalatnama, he has not received any instructions from his client with regard to the case, and that he is therefore unable to go on with the suit (t). Similarly, a party cannot be said to "appear" by a pleader if the pleader has no instructions other than to apply for an adjournment, and, on the adjournment being refused, withdraws from the suit, stating that he has no further instructions (u). In neither case can it be said that the party appeared by a pleader *duly instructed and able to answer all material questions relating to the suit*. But what if the party himself is also present in Court in such a case? According to the Madras (v) and Patna (w) High Courts, it makes no difference that the party himself is present in Court and he cannot be deemed to have "appeared"; according to the Bombay High Court, he must be deemed to have "appeared," the reason given being that if the pleader is not duly instructed to answer material questions, the Court may, under O. 10, r. 1, ask the party questions relating to the suit and it may examine his witnesses (x). The former view, it is submitted, is the correct one.

A pleader appears at the hearing on behalf of a plaintiff, and applies for an adjournment on the ground that he had no time to prepare himself with the case or on the ground that the papers being left with his senior, he could not proceed with the case. The application is refused, and the pleader being unable to go on with the case, the suit is dismissed. Can it be said under these circumstances that the plaintiff *appeared by a*

(r) *Soonderlal v. Goorprasad* (1899) 23 Bom. 414.

(s) *Woopendra v. Nobin* (1869) 17 W. R. 370.

(t) *Shankar v. Radha* (1898) 20 All. 195.

(u) *Soonderlal v. Goorprasad* (1899) 23 Bom. 414;

Lalla v. Nand Kishore (1900) 22 All. 66;

Cooke v. Equitable Coal Co. (1904) 8 C.

W. N. 621; *Satish Chandra v. Ahara*

Prasad (1907) 34 Cal. 408; *Gopala Rao*

v. Maria Suwaya (1907) 30 Mad. 274;

Ramanuja v. Rungaswami (1908) 18 Mad. L. J. 51; *Ram Kishun v. Jatahari* (1918) 3 Pat. L. J. 481.

(v) *Gopala v. Maria* (1907) 30 Mad. 274.

(w) *Lalji Sahu v. Lachmi Narain* (1918) 3

Pat. L. J. 355; *Shaikh Muhammad v.*

Chulhai Mahto (1919) 4 Pat. L. J. 712.

(x) *Esmai v. Haji Jan Mahomed* (1909) 33 Bom. 475.

pleader? It has been held in the undermentioned cases that the plaintiff must be held to have appeared by a pleader, and that the order of dismissal could not therefore be said to be one made under r. 8 so as to entitle the plaintiff to apply under this rule (y). O. 9, r. 9.

Fresh suit in respect of the same cause of action.—If the plaintiff fails to appear, and the suit is in consequence dismissed under r. 8, he is precluded from bringing a fresh suit in respect of the *same* cause of action. Thus if *A* sues *B* for damages for breach of a contract, and the suit is dismissed for default of *A*'s appearance, *A* cannot bring a fresh suit to recover damages for breach of the same contract. *A*'s proper remedy in such a case is either to apply for a review, or still better to apply under this rule for an order to set aside the dismissal. But if the cause of action in the subsequent suit is *different* from that in the first suit, the subsequent suit will not be barred under the provisions of this rule (z). Thus if *A* sues *B* for the rent of certain lands, and the suit is dismissed for default of *A*'s appearance under r. 8, the order of dismissal will not operate as a bar to a suit by *A* against *B* for possession of the lands (a).

As to the meaning of "cause of action," see notes to s. 20 under the head "Cause of action" on p. 86 above.

Minor plaintiff.—A fresh suit, notwithstanding the provisions of this rule, may be instituted in respect of the same cause of action, where the first suit was brought by a next friend on behalf of a minor, and was dismissed under r. 8 for default of the next friend's appearance *owing to gross want of care and diligence on his part* (b). See notes to r. 13 below, "Ex parte decree against minor defendant", on p. 458 below.

What is sufficient cause.—What is sufficient cause is in each case a question of fact :—

(1) A plaintiff left the Court-house, believing that a part-heard case which preceded his case would occupy some time; he returned in about half an hour, and found that his suit had been called on and dismissed owing to his absence. He then applied to set aside the order of dismissal. *Held*, refusing the application, that the above circumstances did not amount to "sufficient cause" for non-appearance: *Manilal v. Gulam Husain* (1889) 13 Bom. 12.

(2) Where it was the duty of an attorney's clerk to examine every evening the board for the next day, and to inform his master what cases in which he was engaged as attorney were on the board for hearing, and the clerk, neglecting his duty, did not inform the master, and no one appearing for the plaintiff, the suit was dismissed, it was held that the absence was caused by a *bona fide* mistake, and the suit was restored on payment by the attorney of the costs of the hearing: *The Oriental Corporation v. The Mercantile Corporation, Ltd.* (1866) 2 B. H. C. 267.

Inherent power of Court to restore suit dismissed for default.—This rule does not take away the inherent power of a Court to restore a suit dismissed for default, if there be a just and reasonable cause for restoring it, even if no sufficient cause is shown within the meaning of this rule for the plaintiff's non-appearance. The same remarks apply to r. 13 of this Order and to O. 41, r. 19 (c). Thus where a case was called on at 12 o'clock, and the plaintiff's pleader being under the impression that the case would be taken up at 2 o'clock was engaged in other cases in other Courts, and the plaintiff

(y) *Ramchandra v. Madhav* (1892) 16 Bom. 23; *Chitrangit v. Kundan* (1898) 20 All. 294; *Patinhare v. Velur* (1908) 26 Mad. 267. See these cases discussed in *Satish Chandra v. Ahara Prasad* (1907) 34 Cal. 403, 411, 414.
(z) *Shankar v. Daya Shankar* (1888) 15 Cal. 422, 151. A. 66; *Chand Kour v. Partab Singh* (1889) 16 Cal. 98, 151. A. 156.

(a) *Gobind v. Afzul* (1833) 9 Cal. 426.
(b) *Lalla Shoo v. Ramnandan* (1895) 22 Cal. 8; *Cursandas v. Laddkavahu* (1895) 19 Bom. 571, 577; *Hanmantapa v. Jivubai* (1900) 24 Bom. 547, 552.
(c) *Somayya v. Subbamma* (1903) 26 Mad. 599; *Gopala Row v. Maria Susaya* (1907) 30 Mad. 274, 277.

O. 9,
rr. 9-11.

himself was waiting in his pleader's room and neither the plaintiff nor his pleader appearing the suit was dismissed, it was held that though there was no "sufficient cause" for non-appearance within the meaning of this rule, the case was one in which the Court should in the exercise of its inherent powers restore the suit to the file (*d*).

Appeal.—An appeal lies from an order rejecting an application (in a case open to appeal) made under this rule [O. 43, r. 1, cl. (c)] but no appeal lies from an order granting the application (*e*). It has been held by the High Court of Calcutta that O. 43, r. 1, cl. (c), applies also to an order rejecting an application to set aside the dismissal of a suit made by a single Judge sitting on the original side of the High Court; such an order is also a "judgment" within the meaning of cl. 15 of the Letters Patent and it is appealable under that clause also (*f*).

Where an application is made by a plaintiff under this rule, but the application is dismissed for default, no appeal lies from the order of dismissal (*g*).

Execution proceedings.—There is a conflict of decisions whether if an application for setting aside a sale in execution is dismissed for default, it can be restored under this rule, it being held in some cases that it can (*h*), while in others that it cannot be restored under this rule (*i*). According to the Patna High Court, the provisions of this Order do not at all apply to proceedings in execution (*j*).

Application for revival of an application for restoration of suit.—This rule provides for the revival of a suit dismissed for default. Does it apply where an application dismissed for default is sought to be revived? A suit by *A* against *B* is dismissed for *A*'s default. *A* then applies under this rule for restoration and rehearing of the suit. *A* does not appear at the hearing of the application and the application is dismissed for *A*'s default. Can the application be restored under this rule? Yes, according to the Calcutta High Court (*k*). No, according to the Patna High Court (*l*).

10. [S. 105.] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Procedure in case of non-attendance of one or more of several plaintiffs.

11. [S. 106.] Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Procedure in case of non-attendance of one or more of several defendants.

- (*d*) *Lalla Prasad v. Ram Karam* (1912) 34 All. 426, 428; *Bilasirai v. Curoondas* (1919) 21 Bom. L. R. 952.
(*e*) *Hirahamun v. Jinghoor* (1880) 5 Cal. 711; *Fazal v. Hashmati* (1916) Punj. Rec. no. 40, p. 115.
(*f*) *Mithura v. Haran Chandra* (1916) 43 Cal. 857.
(*g*) *Jagdish v. Harbans* (1917) 2 Pat. L.J. 720.
(*h*) *Dejan v. Hemanta* (1915) 19 C. W. N. 758; *Charu Chandra v. Chandl Charan* (1914)

- 19 C. W. N. 25; *Bhuban v. Dharendra Nath* (1916) 20 C. W. N. 1203; *Kali Kanta v. Shyam Lal* (1916) 25 C. L. J. 163, 164.
(*i*) *Bhubaneswar v. Tilakdhari* (1919) 4 Pat. L. J. 135, following *Hari Charan v. Manmatha* (1918) 41 Cal. 1.
(*j*) *Babni v. Alakhdeo* (1919) 4 Pat. L. J. 330.
(*k*) *Bipin Behari v. Abdul Barik* (1917) 44 Cal. 950.
(*l*) *Ramgulam v. Sheo Deonarain* (1919) 4 Pat. L. J. 287.

12. [S. 107.] Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

O. 9,
rr. 12, 13.

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

Where parties directed to appear in person.—This rule applies to all cases where a party has been ordered to appear in person and fails to do so. This is clear from the fact that the words “under the provisions of section 66 or section 436” [now O. 5, r. 3 and O. 29, r. 3, respectively] which occurred in the corresponding s. 107 of the Code of 1882 have been omitted from the present rule (*m*).

Setting aside Decrees ex parte.

13. [S. 108.] In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Setting aside decree *ex parte* against defendant.

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Old section.—This rule corresponds with s. 108 of the Code of 1882. The words “as against him” have been added after the words “shall make an order setting aside the decree.” The proviso to the rule is also new. See as to the effect of these changes notes under the head “Proviso to the Rule,” on p. 458 below.

Remedies in case of *ex parte* decree.—A defendant against whom an *ex parte* decree has been passed under r. 6 for default of appearance at the hearing, has the following courses open to him:—

- (1) he may appeal from the *ex parte* decree under s. 96;
- (2) he may apply for a review of judgment under O. 40, r. 1 (*n*);

(3) he may apply under this rule for an order to set aside the *ex parte* decree, provided the application is made, in cases to which the Limitation Act, 1908, applies, within 30 days from the date of the decree, or where the summons was not duly served, when he has knowledge of the decree (*o*), and in cases to which the Limitation Act, 1877, applies, within 30 days from the date of executing any process for enforcing the judgment (*p*).

(*m*) *Vaiguntathammal v. Valliamman* (1918) 41 Mad. 256, 258.
(*n*) *Bibi Mutto v. Ilahi Begam* (1884) 6 All. 65.

(*o*) Limitation Act, 1908, Sch. I., art. 164.
(*p*) Limitation Act, 1877, Sch. II., art. 164.

O. 9, r. 13. Where the right to make the application is barred under the Act of 1877, the bar arising before the Act of 1908 came into force, the provisions of the Act of 1908 cannot revive the right (*g*). *A* obtains an *ex parte* decree against *B*. In execution of the decree *B*'s property is attached and sold in 1906. No application is made by *B* to set aside the decree within 30 days from the date of sale as provided by Art. 164 of the Limitation Act of 1877. *B*'s right to set aside the decree is therefore barred. In 1910 *B* applies to set aside the decree alleging that he came to know of the decree only a fortnight prior to the application, and contends that his application is not barred in view of the provisions of Art. 164 of the Limitation Act of 1908. *B*'s right having been barred under the Act of 1877, it cannot be revived by the Act of 1908. Save as aforesaid, the law of limitation to be applied to applications under the present rule made after January 1, 1909, is Art. 164 of the Limitation Act of 1908, and not Art. 164 of the Limitation Act of 1877, though the *ex parte* decree may have been passed when the Limitation Act of 1877 was in force. *A* obtains an *ex parte* decree against *B* in 1907. *B* applies for an order to set aside the decree in 1910. The application is made more than 30 days after the date when *B* came to know of the decree, though within 30 days from the date of executing a process for enforcing the decree. The application is governed by the Act of 1908, and it is barred under Art. 164 of that Act (*r*).

A defendant against whom an *ex parte* decree is passed is at liberty, as stated above, to appeal (*s*) or to apply for a review (*t*). If he appeals from the decree, he is not entitled in the appeal to go into any question touching his non-appearance at the hearing. All that he is entitled to do in the appeal is to challenge the decree upon the ground that the evidence which the plaintiff had adduced was not sufficient to justify the decree (*u*). As to review see last para. of notes to O. 9, r. 9, "Remedies of plaintiff on dismissal of suit under r. 8" on p. 451 above.

The first two remedies, that is, the remedies by way of appeal and review, may be availed of by any person against whom a decree is passed, whether the decree is *ex parte* or not. But the third remedy, being the one provided by this rule can only be availed of if the decree is passed *ex parte*, that is to say, it is passed against the defendant for default of appearance under r. 6. The remedy given by this rule is not open to a defendant if the decree is passed on grounds other than his non-appearance.

Where written statement filed.—A defendant against whom a decree is passed *ex parte* for default of appearance is entitled to apply under this rule to set aside the decree, though he may have filed his written statement (*v*).

"Prevented from appearing."—As to the meaning of "appearing," see notes to O. 9, r. 9, "Appearance," on p. 451 above.

Hearing of application pending appeal.—*A* obtains an *ex parte* decree against *B*. *B* applies under this rule to have the decree set aside. At the same time he prefers an appeal from the decree. Has the Court that passed the decree jurisdiction to hear the application, or should the application be heard by the Appellate Court? It has been held by the High Court of Madras that after an appeal is filed from a decree, the power to set aside the decree on an application under this rule becomes vested in the appellate Court by virtue of s. 107, and the original Court has no power to hear the application (*w*). On the other hand, it has been held by the High Court of Calcutta, that the Court that passed the decree has jurisdiction to hear the application notwithstanding the pendency of the appeal, the reason given being that the matter for investigation in a proceeding under this rule is entirely distinct from the matter for determination in the

(*g*) *Nepal Chandra v. Niroda* (1912) 39 Cal. 506.

(*r*) *Hope Mills Ltd. v. Vithaldas* (1910) 12 Bom. L.R. 780; *Jia Bibi v. Iahat Bakh* (1915) 37 All. 597.

(*s*) *Ashrufnessa v. Lahareaux* (1882) 8 Cal. 272;

Karuppan v. Ayyathurai (1886) 9 Mad. 445.

(*t*) *Raj Narain v. Ananga* (1899) 26 Cal. 598.

(*u*) *Hummi v. Aziz-ud-din* (1917) 39 All. 143.

(*v*) *Munipappan v. Balayan* (1908) 31 Mad. 505.

(*w*) *Sankara v. Subraya* (1907) 30 Mad. 535.

appeal from the *ex parte* decree, the one being concerned with the due service of summons, O. 9, r. 13. and the other with the determination of the merits of the controversy between the parties (x).

Suppose now that *A* sues *B* and *C*, that *B* does not appear and an *ex parte* decree is passed against him, and that *C* appears and defends the suit and a decree is passed against him after a hearing. Suppose, further, that *B* applies under this rule to have the *ex parte* decree set aside, and that *C* appeals from the decree passed against him (*C*). Which is the proper Court to hear *B*'s application? The answer is the same as that to the question propounded in the above paragraph, that is, the appellate Court according to the Madras decisions, and the Court that passed the decree according to the Calcutta decisions. It does not make any difference that the application is made by one defendant and the appeal is preferred by another defendant? See the cases cited in the above paragraph.

Hearing of application after disposal of appeal.—Where an appeal is preferred from an *ex parte* decree, and the decree is confirmed or otherwise disposed of in appeal under O. 41, r. 32, the Court which passed the *ex parte* decree has no power to entertain an application under this rule to set aside the *ex parte* decree, even though the application was made before the appeal was filed (y). But it is otherwise where the appeal is dismissed for default under O. 41, r. 11; in such case the Court which passed the *ex parte* decree has power to entertain the application to set aside the decree. The reason is that where the decree of the lower Court is confirmed or otherwise disposed of under O. 41, r. 32, it is merged in the decree of the appellate Court; but an order dismissing an appeal for default is not a decree [s. 2 (2)], and there can therefore be no such merger (z). See notes to s. 36 "Merger of decree," on p. 110 above.

Where a defendant against whom an *ex parte* decree is passed is not joined as a party to the appeal preferred by other parties to the suit, and the appellate Court has not adjudicated upon his case, the *ex parte* decree against him does not merge in the decree of the Court of appeal so as to preclude him from applying under this rule to the Court that passed the *ex parte* decree to set aside the decree. *A* sues *B*, *C* and *D*, and obtains an *ex parte* decree against *B* and a decree after a hearing on the merits against *C* and *D*. *C* and *D* appeal from the decree. *B* is not joined as a party to the appeal. The appellate Court confirms the decree of the Court of first instance passed against *C* and *D*. This does not preclude *B* from applying to the Court of first instance to set aside the *ex parte* decree against him (a).

Where ex parte decree is obtained by fraud.—A regular suit does not lie to set aside an *ex parte* decree on the ground solely of non-service of summons (b). But where an *ex parte* decree is alleged to have been obtained by a plaintiff by fraud, the defendant is entitled, besides the above remedies, to institute a regular suit to set aside the decree on the ground of fraud (c). The suit is maintainable even though the defendant has been unsuccessful in his application made under this rule to set aside the *ex parte* decree (d). But if the very fraud that is set up by the defendant in his suit was set up in his application, and the Court after going into the question of fraud rejected the application, the suit would be barred as *res judicata*, unless the fraud alleged was of such a nature that it could not properly come within the scope of enquiry under this

(x) *Damodar v. Sarat Chandra* (1908) 18 Cal. W. N. 846; *Kumud Nath v. Jotindra Nath* (1910) 38 Cal. 394; *Shajan Bibi v. Saffir-uddin* (1912) 26 Ind. Cas. 412. See also *Mathura v. Ram Charan* (1915) 37 All. 208, 211; *Gajraj v. Swami Nath* (1917) 39 All. 13, 25; *Hummi v. Aziz-ud-din* (1917) 39 All. 143.
(y) *Mathura v. Ram Charan* (1915) 37 All. 208.
(z) *Rifajat v. Bibi Tawaf* (1917) 39 All. 393.

See also *Shyam Mandal v. Satinath* (1916) 44 Cal. 954, 959-960.
(a) *Gajraj v. Swami Nath* (1917) 39 All. 13.
(b) *Nareng Das v. Rafikar* (1909) 37 Cal. 197.
(c) *Abdul v. Mahomed* (1894) 21 Cal. 605.
(d) *Radha Raman v. Pran Nath* (1901) 28 Cal. 475; *Khagendra v. Pran Nath* (1902) 29 Cal. 395, 29 I. A. 99; *Dwarka v. Lachhoman* (1899) 21 All. 289.

- O. 9, r. 13. rule. A** applies under this rule to set aside an *ex parte* decree on the ground of fraud in respect of the service of summons upon him. The Court, after going into the question of fraud, rejects the application. A then institutes a regular suit to set aside the *ex parte* decree, basing his claims on the very fraud that was alleged by him in the application. The suit is barred as *res judicata* (e).

Application by legal representative of deceased defendant.—Under the Code of 1882, it was not settled whether, where a defendant against whom an *ex parte* decree was passed died, his *legal representative* could apply for an order to set aside the *ex parte* decree. The High Court of Calcutta held that he could (f). The High Court of Madras held that he could not (g); and so also the High Court of Allahabad (h). But the latter Court maintained that if the application was made by the defendant, and he died during the pendency of the application, the proceedings could be *continued* by his legal representative (i). Under this Code (s. 146) there is no doubt that such an application can be made by the legal representative of the deceased defendant (j).

Grounds on which ex parte decree may be set aside.—These are stated in the second paragraph of the rule, the one being that the summons was not duly served upon the defendant (k), and the other that though the summons was duly served, the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing (l). When a summons was served upon a *purdanashin* lady, to whom the serving officer was not able to obtain access, by affixing a copy of the summons on the outer door of her dwelling house under O. 5, r. 17, and it appeared that the lady had no knowledge of the suit against her, the Court set aside the *ex parte* decree passed against her on the ground that she was prevented by "sufficient cause" from appearing at the hearing of the suit (m). As to "sufficient cause," see notes to r. 9 above under the head "What is sufficient cause," and notes also under the head "Inherent power of Court to restore suit dismissed for default," on page 453 above.

Ex parte decree against minor defendant.—It is no ground for setting aside an *ex parte* decree passed against a minor defendant, that the Nazir who was appointed guardian *ad litem* of the minor did not appear and defend the suit, where the failure to defend was owing to the fact that the Nazir did not receive instructions from any person to defend the suit. It would be otherwise if fraud, collusion, or gross negligence on the part of the Nazir were proved (n). See notes to r. 9 above, "Minor plaintiff," on p. 453 above.

Proviso to the Rule.—We now proceed to consider cases in which there are two or more defendants, and

- (1) where there is a decree *ex parte* passed against all the defendants, but the application to set aside the decree is made by some of them only, or,
- (2) where against some of the defendants the decree is passed *ex parte*, but against others who have appeared and defended the suit it is passed after a hearing, and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed *ex parte*.

The question is, whether, if the decree is set aside *as against the applicant*, the Court can set aside the decree *as against the other defendants also*, so as to re-open the whole

(e) *Puran Chand v. Sheodat Rai* (1907) 29 All. 212; *Niadar Mal v. Raunak Husain* (1907) 29 All. 608.
 (f) *Ganoda v. Shid Narain* (1902) 29 Cal. 33.
 (g) *Sambasiva v. Veera* (1905) 28 Mad. 361.
 (h) *Janki v. Sukhrant* (1899) 21 All. 274.
 (i) *Beji Joo v. Sham Bihari Lal* (1907) 29 All. 574.
 (j) See *Venkatasubbayer v. Krishnamurthy* (1913)

38 Mad. 442.
 (k) *Fakhr-ud-Din v. Gha-ur-ud-Din* (1901) 23 All. 99; *Bhura Mal v. Har Kishan* (1902) 24 All. 383.
 (l) *Somayya v. Subbamma* (1903) 26 Mad. 599.
 (m) *Kashiroda v. Nabin Chandara* (1915) 19 C. W. N. 1231.
 (n) *Vienu v. Dattu* (1907) 9 Bom. L. R. 1049.

suit, and, if so, in what cases? This is a point of some difficulty, for which there was no provision made in the old section. The present rule expressly provides for these cases. The rule says that where a defendant against whom a decree is passed *ex parte* applies for an order to set it aside, and satisfies the Court that the summons was not duly served upon him, etc., the Court shall make an order setting aside the decree *as against him* [that is the applicant] (o), *provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants*. The rule primarily applies to the case only of the particular defendant who has applied to have the decree set aside. But under certain circumstances it may be necessary, in the interests of justice, to set aside the decree against the other defendants also. For this provision has been made in the proviso to the rule. By virtue of the proviso the Court to which an application is made to set aside a decree *ex parte* may set it aside not only as against the defendant who applies to have it set aside, but as against the other defendants also, where the decree is of such a nature that it cannot be set aside as against the applicant only. As a general rule we may say that a decree may be set aside not only as against the applicant, but as against the other defendants also, if the interests of justice require it (p), *e.g.*—

- (1) where the decree is one and indivisible (q);
- (2) where the suit would result in inconsistent decrees, if the decree were not set aside as against the other defendants also (r);
- (3) where the relief to which the applicant is entitled in the suit could not effectively be given otherwise than by setting aside the decree as against the other defendants also (s);
- (4) where the decree proceeds on a ground common to all the defendants (t).

The cases now under consideration may be divided, as pointed out at the beginning of this paragraph, into two classes.

Class 1.—Where there is a decree *ex parte* passed against all the defendants, but the application to set aside the decree is made by some of them only.

Illustrations.

(a) B, C and D, who constitute a joint Hindu family, execute a mortgage of their joint property in favour of A. A sues B, C and D to enforce the mortgage. B and C are not served with the summons, but D is served. None of the defendants appears at the hearing and a decree *ex parte* is passed against all the defendants for a sale of the mortgaged property. B and C apply for an order to set aside the decree on the ground that the summons was not served upon them. Here the decree being *one and indivisible* the Court may set aside the decree not only as against B and C but also as against D, though he was served with the summons and there was no sufficient cause for his non-appearance: *Ajodhya Pershad v. Sheo Pershad* (1900) 5 C. W. N. 58; *Ashfaq Husain v. Gauri Sahai* (1911) 33 All. 264, 38 I. A. 37.

- (o) See as to the insertion of the words "as against him," the judgment of Stanley, J., in *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383, at p. 387.
 (p) *Dookhee Khan v. Rajessure Ranees* (1871) 15 W. R. 371, per Norman, C. J., and Loch, J.; *Mahomed Hamidulla v. Tohurennissa Bibi* (1898) 25 Cal. 155, 157, 159; *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383, 400.
 (q) *Mahomed Hamidulla v. Tohurennissa Bibi* (1898) 25 Cal. 155, 160; *Monomohini v.*

- Nara Narayan Roy* (1899) 4 C. W. N. 456, 458.
 (r) *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383, 388, 400.
 (s) *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383, 400, 401; *Mahomed Hamidulla v. Tohurennissa Bibi* (1898) 25 Cal. 155, 159.
 (t) *Dookhee Khan v. Rajessure Ranees* (1871) 15 W. R. 371, per Norman, C. J., and Loch, J. See also *Gopala Chetti v. Subbier* (1903) 26 Mad. 604.

O. 9, r. 13. (b) *A* sues *B* and his minor sons *C* and *D* members of a joint Hindu family to recover Rs. 1,000, alleged to have been advanced to *B* as manager of the family. None of the defendants appears at the hearing, and a decree *ex parte* is passed against all the three. All the three defendants, *B*, *C* and *D* apply to have the decree set aside. As to *C* and *D* it is proved that there was no summons served upon them. As to *B* it is proved that the summons was duly served upon him. Here the decree being *one and indivisible* (u) the Court may set aside the decree not only as against *C* and *D*, but also as against *B* though it is found that the summons was duly served upon him and there was no sufficient cause for his non-appearance. Further this is a case where the relief to which the minors *C* and *D* are entitled could not effectively be granted unless the decree was set aside as against *B* also. For if the decree were allowed to stand as against *B*, *B*'s share in the joint family property could be attached and sold though the sons might succeed in showing at the re-trial of the suit that the debt never was incurred or that it had been discharged, or that from its nature the joint family property was not liable. The sale of the father's share in the joint family property would be a manifest injury to the sons, and this could only be avoided by setting aside the decree against the father also, and re-opening the whole suit: *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383, at pp. 400 and 401.

(c) *X* sues *A* and *B* alleging that *A* and *B* are in joint possession of certain immoveable property, and asking for a declaration that he is in joint possession with them. *A* is served with the summons, but *B* is not. Neither defendant appears at the hearing, and a decree *ex parte* is passed against both defendants. *B* applies to have the decree set aside, and it is set aside as against him, but not as against *A*. At the hearing *B* establishes that *X* has no title whatever to the property. There would in such a case be *two absolutely inconsistent decrees*, namely, the *ex parte* decree held by *X* against *A* declaring *X* to be jointly in possession with *A* and *B*, and the decree against *X* passed at the rehearing that *X* was not in joint possession with *A* and *B*. This is therefore a case in which the decree must be set aside not only as against *B*, but as against *A* also: see *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383, at p. 388.

(d) *X* sues *A* and *B* on a promissory note executed by *A*. *B* is *A*'s nephew, and he is joined as a defendant on the ground that the note was for a debt binding on the family. Neither defendant appears at the hearing, and a decree *ex parte* is passed against both defendants. The decree against *A* proceeds on the ground that the note was passed by him, and against *B* on the ground that the debt was incurred for a family purpose. *B* applies for an order to set aside the decree, alleging that the summons was not served upon him and that the debt in respect of which the note was passed by *A* was not incurred for a family purpose. It is not disputed that the amount was actually advanced. Such being the case, the decree may be set aside as against *B*, but it must not be set aside as against *A*. Justice does not require it, for the contention of *B* that the debt was one not binding on him is a defence peculiar to him, and not one common to him and *A*: *Gopala Chetti v. Subbar* (1903) 26 Mad. 604.

(e) *A* sues *B*, *C* and *D* personally and as managers of a devasam to recover Rs. 27, being revenue paid by him for the defendants. None of the defendants appears at the hearing, and a decree *ex parte* is passed against them personally and against the devasam property. If *B* alone applies under this rule and shows sufficient cause for his non-appearance at the hearing, the decree may be set aside so far as it ordered payment by *B* personally and from the devasam property, but it cannot be set aside as against *C* and *D*: *Valia Koni v. Marutha Veera* (1908) 31 Mad. 454.

(u) See *Mahomed Hamidulla v. Tohurennissa Bibi* (1898) 26 Cal. 155, 160, where it was

said of a similar decree that it was *one and indivisible*.

Class II.—Where against some of the defendants the decree is passed *ex parte*, but O. 9, r. 13. against others who have appeared and defended the suit it is passed after a hearing, and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed *ex parte*.—In this case the question arises, whether, if the decree is of such a nature that it cannot be set aside as against the applicant only, but must be set aside also as against the defendants against whom the decree was passed after a hearing, the Court has the power to set aside the decree as against such defendants also. We submit that it has. The words “the decree” in the proviso mean the decree passed in the suit, not only against the defendants who did not appear, but also against the defendants who did appear. The words “other defendants” in the proviso mean defendants other than the applicant against whom the decree is passed, whether as against them it was passed *ex parte* or after a hearing (v).¹

Illustrations.

(a) *X* sues *A* and *B*, alleging that *A* and *B* are in joint possession of certain immoveable property, and asking for a declaration that he is in joint possession with them. *A* appears and defends the suit. *B* does not appear. The Court finds that *A* and *B* are in joint possession, and that *X* is entitled to joint possession with them, and a decree is passed against *A* and *B* declaring that *X* is entitled to joint possession with them. Here the decree, so far as regards *A*, is passed after a hearing, and as regards *B*, it is *ex parte*. But there is only one decree, and the words “the decree” in the proviso could well be referred to that decree. Therefore, if *B* applies for an order to set aside the decree, and the decree is set aside as against him, it must also be set aside as against *A*; otherwise, in the event of *B* succeeding in the suit, this absurd position would arise that *A* and *B* being in joint possession of the property, *X* would be in possession of a decree declaring him to be jointly in possession along with *A* and *B*, whilst *B* would be in possession of a decree in his favour declaring that *X* is not entitled to joint possession with him and *A*: see *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383 at p. 400.

(b) *A* and *B*, both Mahomedans, pass a promissory note to *X*. *B* dies leaving three heirs, *H1*, *H2* and *H3*. *X* sues *A* (surviving maker of the note) and *H1*, *H2* and *H3* as heirs of *B*. *A* and *H1* appear at the hearing and defend the suit. *H2* and *H3* do not appear. A decree is passed against all the defendants, the liability of *H1*, *H2* and *H3* under the decree being limited to the extent of the property of *B* inherited by them as *B*'s heirs. Here the decree, so far as regards *A* and *H1*, is passed after a hearing, and, as regards *H2* and *H3*, it is *ex parte*. *H2* and *H3* apply to have the decree set aside alleging that the summons was not served upon them. The Court is satisfied that the summons was not served. Upon these facts the High Court of Calcutta held under the old section that the decree should be set aside not only as against *H2* and *H3* but also as against *A* and *H1*, the ground of the decision being that the decree was one and indivisible: *Mahomed Hamidulla v. Tohurennissa Bibi* (1898) 25 Cal. 155, 160; *Monomohini v. Nara Narayan Roy* (1899) 4 C. W. N. 456, 458. See the next illustration.

(c) *A* sues *B* and *C*, Native Christians, upon a promissory note jointly passed by them. *B* appears at the hearing and defends the suit. *C* does not appear. A decree is passed against both defendants for the amount of the note. Here the decree so far as regards *B*, is passed after a hearing, and, as regards *C*, it is *ex parte*. *C* applies for an order to set aside the decree, alleging that the summons was not served upon him. The Court finds that the summons was not served upon *C*. Upon these facts the High Court of Bombay held under the old section that if the decree were set aside as against *C*, it would

(v) See the judgment of Bannerjee, J., in *Mahomed Hamidulla v. Tohurennissa Bibi* (1898) 25 Cal. 155, 159, 160, and of Atkman, J.,

in *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383, 400.

O. 9 r. 13. not reopen the case as against *B*, *B* having appeared and defended the suit: *Manaku v. Sitaram* (1894) 18 Bom. 142. It is difficult, indeed, to distinguish this case from the Calcutta case cited in the preceding illustration, for if the decree in the Calcutta case was *one and indivisible*, it must be regarded as such in the Bombay case. If the Bombay decision means that the setting aside of a decree *ex parte* against a defendant does not *ipso facto* revive the suit as against a defendant who has appeared and defended the suit, the decision is still good law; for an *express order* is necessary for that purpose. But if it means that where a decree is passed *ex parte* against *A* and after a hearing against *B*, the Court can set aside the decree only against *A*, and cannot set it aside in *any case* against *B*, the decision is no longer law [see the proviso to the rule]. The Bombay decision, however, may be supported on the ground that the decree could not be said in such a case to be *one and indivisible*.

(d) *A* sues *B* and *C* for a declaration of title to certain lands, and *D* and *E* for possession of the lands. *B* and *C* appear and defend the suit. *D* and *E* do not appear. The Court passes a decree against all the four defendants, as against *B* and *C*, declaring that the lands belong to *A*, and as against *D* and *E*, directing them to deliver possession of the lands to *A*. Here the decree against *D* and *E* is *ex parte*, for they did not appear at the hearing. *D* alone applies for an order to set aside the decree, alleging that the summons was not served upon him. The Court is satisfied that the summons was not served. Should the decree be set aside as a whole or should it be set aside in part, and if so, to what extent? The decree should not be set aside as a whole, for the decree is *not one and indivisible*. The relief granted to *A* as against *B* and *C* is the declaration of *A's* title to the lands. The relief granted to *A* as against *D* and *E* is that they should deliver up possession of the lands to *A*. In fact, the decree, though nominally one, really consists of two decrees each against one set of defendants, the relief granted against each set being separately specified. Hence the Court should not make an order setting aside the decree as against *B* and *C*, for the relief granted against *B* and *C* is distinct from that granted against *D*, who alone applied for an order to set aside the decree. But the decree should be set aside, not only as against *D*, but also as against *E*, for the decree against *D* and *E* is *one and indivisible*, namely, delivery up of possession; *Monomohini v. Nara* (1899) 4 C. W. N. 456.

The fact that an ex parte decree has been satisfied does not preclude the defendant from applying to the Court for an order to set it aside under this rule.—*A* obtains an *ex parte* decree against *B*, and attaches *B's* goods in execution of the decree. *B* pays the amount of the decree under protest, and applies for an order to set aside the decree on the ground that the summons was not served upon him. The Court may make an order setting aside the decree, notwithstanding that the decree has been satisfied (*w*).

Appeal.—Where an application under this rule is rejected, an appeal lies against the order rejecting the application [O. 43, r. 1, cl. (d)]. But where the application is granted, no appeal lies against the order granting the application (*x*).

Limitation.—*A* sues *B* and *C* for a decree against them jointly in respect of a joint mortgage debt. A preliminary decree for sale is passed against *B* and *C* in 1900 and it is made absolute in 1901. As against *B*, however, the decree was *ex parte*, and it is set aside as against him on his application. A decree is then passed on the merits against *B* in 1902. *B* appeals from the decree, but the appeal is dismissed in 1904 and as against him the decree is made absolute in 1905. *A* then applies in 1905 for

(w) *Zendoolal v. Kishorilal* (1899) 23 Bom. 710.
(x) *Shuma Dass v. Hurbuns* (1889) 16 Cal. 1426 *Fazal* |

v. Hashmati (1916) P. R. no. 40, p. 115.

execution both against *B* and *C* by a sale of the mortgaged property. *C* contends that as the decree as against him was made absolute in 1901, the application for execution is barred by limitation, it having been made more than three years from that date. The application is not barred by limitation, for the period of three years must be calculated from 1905 when the decree against *B* was made absolute. The decree of 1905 for the first time justified *A* in applying for the joint execution of the decree against *B* and *C* (*y*).

O. 9,
rr. 13, 14.

Execution proceedings.—There is a conflict of opinion as to whether the present rule applies to *ex parte* orders in execution (*z*). See notes to r. 9 above, “Execution proceedings,” on p. 454 above.

14. [S. 109.] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

No decree to be set aside without notice to opposite party.

ORDER X.

Examination of Parties by the Court.

1. [S. 117.] At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of facts as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

O. 10,
rr. 1, 2.

Ascertainment whether allegations in pleadings are admitted or denied.

2. [S. 118.] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

Oral examination of party, or companion of party.

Object of examination under this rule.—The object of examination under this rule is not to take evidence or ascertain what is to be the evidence in the case but to determine the matters in dispute between the parties (*a*).

(*y*) *Ashfaq Husain v. Gauri Sahai* (1911) 33 All. 284, 38 I. A. 37.

(*z*) *Hari Charan v. Mannatha* (1913) 41 Cal. 1, 3-4 [does not apply]; *Bhubaneswar v. Tilakdhari* (1919) 4 Pat. L. J. 135, 138-139 [does not apply]; *Babui v. Alakhdeo* (1919)

4 Pat. L. J. 330 [does not apply]; *Subbiah v. Ramanathan* (1914) 37 Mad. 402, 473-476 [applies].
(*a*) *Gunga v. Tiluckram* (1898) 15 Cal. 533, 15 I. A. 119.

O. 10,
rr. 3, 4

3. [S. 119.] The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Substance of examination to be written.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (2)].

4. [S. 120.] (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

Consequence of refusal or inability of pleader to answer.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Direct that such party shall appear in person.—Under this rule, an order directing a party to appear in person can only be made if the pleader who represents him has refused or is unable to answer material questions (b).

Appeal.—An appeal lies from an order pronouncing judgment against a party under sub-r., (2) [O. 43, r., cl. (o)]. Where in a suit by *A* against *B*, *C* and *D*, the Court struck off *B*'s defence owing to his failure to appear in person, but ultimately decided the case on the merits and passed a decree against all three defendants, their defences being similar it was held that *B* was not entitled to appeal from the order striking off his defence, but that he was at liberty to appeal from the final decree and to call in question upon that appeal the order striking off his defence [s. 105] (c).

ORDER XI.

Discovery and Inspection.

O. 11, r. 1.

1. [R. S. C., O. 31, r. 1. Cf. S. 121.] In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite

Discovery by interrogatories.

parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

Discovery by way of answers to interrogatories.—Every party to a suit is entitled to know the *nature of his opponent's case* (d), so that he may know beforehand what case he has to meet at the hearing (e). But he is not entitled to know the *facts which constitute exclusively the evidence of his opponent's case*, the reason being that it would enable an unscrupulous party to tamper with his opponent's witnesses, and to manufacture evidence in contradiction, and so shape his case as to defeat justice (f). The *nature* of a plaintiff's case is disclosed in his plaint. The *nature* of a defendant's case is disclosed in his written statement. But a plaint or a written statement may *not sufficiently* disclose the nature of a party's case. In such a case, either party may administer interrogatories in writing to the other through the Court. Interrogatories may also be administered by a party to his opponent *to obtain admissions from him to facilitate the proof of his own case*. The party to whom interrogatories are administered must answer them in writing and on oath (r. 8). This is called *discovery* by way of answer to interrogatories; the party by his answers *discovers* or discloses the *nature* of his case.

Every suit contemplates two sets of facts, namely, (1) facts which constitute a party's case, and (2) facts by which a party's case is to be proved (see O. 6, r. 2). The first set of facts discloses the *nature* of a party's case. The second set forms the evidence of his case. Thus if *A* sues *B* for damages for breach of a contract, *A* must prove (1) the contract, and (2) breach of the contract. These two facts *constitute A's case*, and it is to these facts that one should turn to determine the *nature* of *A's case*. Hence *B* may administer interrogatories to *A* for information as to the particulars of (1) the contract and (2) the breach thereof. He may also interrogate *A* to obtain admissions from him *to facilitate the proof of his own case*. But he is not entitled to administer interrogatories seeking information as to the *evidence by which A will prove these two facts*. Thus in the above case it is not permissible to *B* to ask who was present at the time when the alleged contract was made, in other words, it is not permissible to ask the names of *A's* witnesses (g). But if the name and address of a person is itself a relevant fact, an interrogatory as to that name and address is not rendered inadmissible merely by the fact that the answer will disclose a witness's name (h). In a suit for the recovery of the amount of a hundi alleged to have been drawn by the defendant in consideration of Rs. 5,000 advanced to him by the plaintiff, and to have been dishonoured by non-payment, the defendant is entitled to discovery of the form in which the loan is alleged to have been made, and of the time and place the hundi was drawn and accepted and

(d) *Saunders v. Jones* (1877) 7 C. D. 435.

(e) *Marriott v. Chamberlain* (1886) 17 Q. B. D. 154.

(f) *Bendow v. Low* (1880) 18 C. D. 98, 95; *Re*

Strachan [1895] 1 Ch. 439, 445, 447-48.

(g) *McColla v. Jones* (1887) 4 Times Rep. 12;

Eade v. Jacobs (1877) 3 Ex. D. 335;

Marriott v. Chamberlain (1886) 17 Q. B.

D. 154; *Nash v. Layton* [1911] 2 Ch. 71.

(h) *Marriott v. Chamberlain* (1886) 7 Q. B. D. 154, 164, 166.

O. 11, r. 1. the time and place and the names and addresses of the persons by whom it was presented. All these are *material facts* which constitute the plaintiff's case (i). See notes to O. 6, r. 4, "Object of particulars," on p. 401 above, and "Interrogatories relating to names of persons," on p. 467 below.

What interrogatories may be allowed.—In England, interrogatories are allowed for the following purposes :—

1. To ascertain the "nature" of your opponent's case or the material facts constituting his case (j).

We have dealt with this proposition in the preceding paragraph.

2. To support your own case, either

- (a) directly, by obtaining admissions, or
- (b) indirectly, by impeaching or destroying your adversary's case (k).

Illustration of Case 2.—A sues B to recover Rs. 5,000 for making model machinery for exhibition. The defence is that the machinery was defective and unworkable. A may interrogate B whether the machinery did not obtain a prize at the exhibition. If it did, it is clear that the answer would tend to destroy B's case, and support A's case (l). Moreover, the answer will serve as an admission from B, and the getting of admissions by interrogatories is always allowed, for it supports the party's case (m).

There is one *exception* to the rule in Case 2 (b). A sues to eject B from a piece of land, alleging that the land belongs to him and that B is wrongfully in possession thereof. This is an action of ejectment. A is plaintiff in ejectment, and B is defendant in ejectment. In an action of ejectment, the plaintiff must prove his own title affirmatively. It is not enough for him to impeach or destroy the defendant's title. If he does not establish his own title to the land, he will not be entitled to a decree, though he may succeed in impeaching or even destroying the defendant's title. The reason is that the defendant being in *possession*, he cannot be dispossessed of the land except by proof of *title* on the part of the claimant. Hence it is clear that it is perfectly useless to allow the plaintiff in ejectment to interrogate the defendant for the purpose *merely* of destroying or impeaching the defendant's title (n). And this is the *Exception* above referred to. But the plaintiff in ejectment is entitled to interrogate the defendant as to any matter relating to the defendant's title that may support his case *directly* (o). The same principles apply in the case of discovery by production of documents.

The High Court of Calcutta has expressed the opinion that interrogatories in India should not be allowed for the first of the above purposes, that is, to ascertain the nature of your opponent's case but that they may be allowed for the second, that is, to support your own case (p). The opinion is based on the ground that where a party has not sufficiently disclosed his case, it is the *Court* that has to determine the exact nature of his case by procedure under O. 8, r. 7, and O. 14, rr. 1-2, and that it is not therefore permissible to the *opposite party* to get that information by *discovery*. But the provisions of the said rules are, it is conceived, intended not to supersede, but to supplement the provisions for discovery to ascertain the case of a party to a suit. It is submitted with respect that there is

(i) *Baijnath v. Raghunath* (1913) 41 Cal. 6.
 (j) *Eade v. Jacobs* (1877) 3 Ex. D. 335, 337;
Attorney General v. Gaskill (1882) 20 C.
 D. 519, 529; *Marriott v. Chamberlain*
 (1886) 17 Q. B. D. 154.
 (k) *Grumbrecht v. Parry* (1884) 32 W. R. (Eng.)
 558; *Hennessey v. Wright* (1890) 24 Q. B. D.
 446, 447; *Attorney General v. Newcastle-*
upon-Tyne Corporation [1897] 2 Q. B. 384,

394; *Bidder v. Bridges* (1885) 29 C. D. 29.
 (l) *Hall v. Lizardet* (1883) W. N. p. 175.
 (m) *Attorney General v. Gaskill* (1882) 20 C. D.
 519, 528.
 (n) *Eyre v. Rodgers* (1891) 20 W. R. [Eng.] 137;
Lyell v. Kennedy (1883) 8 App. Cas. 217;
Morris v. Edwards (1890) 15 App. Cas. 309
 (o) *Müller v. Kirwin* [1908] 2 J. R. 120.
 (p) *Ali Kader v. Gobind Dass* (1890) 17 Cal. 840.

no reason whatever why any distinction should be drawn between the English and **O. 11, r. 1.** the Indian practice. Assuming that there was a distinction between the two systems under the Code of 1882, there is no such distinction now. The present Order XI is in terms similar to Order XXXI of the Rules of the Supreme Court (q).

What interrogatories may not be allowed.—These may be divided into three classes :—

1. *A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case or title (r).*
2. *A party is not entitled to interrogate as to any confidential communications between his opponent and his legal advisers.*
3. *A party is not entitled to exhibit interrogatories which would involve disclosures injurious to public interests.*

For fuller information on the above rules, see notes to r. 12 below, under the head "Grounds of objection to production of documents," p. 474 below.

Interrogatories relating to names of persons.—Interrogatories relating to the names of persons not already parties to the action are only allowable where the object is either to make the proceedings complete and effective for all purposes or to enable the plaintiff more effectively to substantiate the case which he makes against the existing defendant (s). Such interrogatories are not allowable in any other case. Thus in a suit by the vendor against the purchaser for specific performance of a contract for sale, the plaintiff is not entitled to interrogate the defendant for the purpose of discovering whether he was acting as agent for an undisclosed principal. The only object of such an interrogatory is to give the plaintiff the opportunity, if he is so minded, of releasing the defendant from all liability under the contract, and of securing for the plaintiff some other person liable under the contract in substitution for, and not jointly with, the defendant (t).

As to interrogatories as to names of witnesses, see notes "Discovery by way of answers to interrogatories," p. 465 above, and notes to o. 6, r. 4, "Object of particulars," on p. 401 above.

Time for delivery of interrogatories.—A plaintiff may, under this rule, deliver interrogatories to a defendant even before the filing of the written statement. But there is this difference, if the English practice is to be followed here, that in what are called *common law actions* interrogatories, if delivered before filing the written statement, will as a rule be struck out under r. 7 as unnecessary and vexatious unless sufficient reasons are given by the plaintiff why the interrogatories are necessary at that stage of the suit (u); while in suits of the nature of *chancery actions* (v), the will, as a rule, be allowed though no written statement has been filed (w).

A defendant, as a rule, is not allowed to deliver interrogatories to the plaintiff before he has filed his written statement (x).

Leave of the Court.—The application for leave to administer interrogatories is, as a rule, made *ex parte*. In considering whether leave should be granted, the Court

(q) *Bajjnath v. Raghunath* (1913) 41 Cal. 6, at p. 9.
 (r) *Benbow v. Low* (1880) 16 C. D. 93, 95; *Plummer v. May* (1750) 1 Ves. 426; *Bray on Discovery*, pp. 444, 465; *Wigram on Discovery*, p. 261.
 (s) *Thol v. Leask* (1855) 10 Ex. 704; *Hancocks v. Leblache* (1878) 3 C. P. D. 197, 202.
 (t) *Sebright v. Hanbury* (1916) 2 Ch. 245.
 (u) *Mercier v. Cotton* (1876) 1 Q. B. D. 442; and

see *Strong v. Tappin* (1876) W. N. [Eng.] 22.
 (v) That is, actions assigned by the Judicature Act, 1873, s. 34, to the Chancery Division.
 (w) *Harbord v. Monk* (1878) 9 C. D. 616; *Union Bank of London v. Manley* (1879) 13 C. D. 239, 241.
 (x) *Disney v. Longbourne* (1876) 2 C. D. 704. See *Hawley v. Reade* (1876) W. N. [Eng.], 64.

O. 11,
rr. 1, 2.

has to determine whether it is a fit and proper case for administering interrogatories so that no leave will be granted if the interrogatories are scandalous or are an abuse of the process of the Court. But it is not the duty of the Court, when granting leave, to consider what particular questions the party interrogated should be compelled to answer. The proper time for considering that question is after the party interrogated has made his affidavit in answer [r. 8] (y). See r. 2 below.

"Opposite party."—These words do not include solely the relation of plaintiff and defendant; thus one defendant may administer interrogatories to another defendant, provided there is *some right to be adjusted in the action between them* (z).

Where opposite party is a minor or a lunatic.—Where a party to a suit is a minor or a lunatic, interrogatories may be administered to his next friend or guardian *ad litem*, as the case may be; see r. 23 below.

Points of distinction between interrogatories and cross-examination:—

(1) Not every question which could be asked a witness in the box may be put as an interrogatory. Thus questions which are put only to test the credibility of a person will not be allowed, although of course they may be asked in cross-examination (a).

(2) Interrogatories may be administered only to a *party* to a suit, and not to a witness (b).

Impleading party for discovery.—A person cannot be made a party to a suit solely for the purpose of discovery (c).

Distinction between pleadings and interrogatories.—Interrogatories are not like pleadings confined to the *material* facts on which the parties rely in support of their claim or defence; for interrogatories may be administered not only to ascertain the nature of your opponent's case but to *obtain admissions* from him of everything which is material on the pleadings, so as to facilitate the proof of your own case, and thus save yourself the expense of proving facts admitted by your opponent in answer to the interrogatories (d).

Probate proceedings.—The present order applies by virtue of s. 53 of the Probate and Administration Act, 1881, to proceedings in probate (e).

2. [New. R. S. C., O. 31, r. 2.] On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court.

Particular interrogatories
to be submitted.

In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such

(y) *Sham Kishore v. Shoaibhoosun* (1880) 5 Cal. 707; *Prem Sukh v. Indro Nath* (1891) 18 Cal. 420.
(z) *Molloy v. Kirby* (1880) 15 C. D. 162; *Shaw v. Smith* (1897) 18 Q. B. D. 193; *Birch v. Birch, Crisp & Co.* [1913] 2 Ch. 375.
(a) *Alhussen v. Labouchere* (1878) 9 Q. B. D. 654; *Kennedy v. Dodson* [1895] 1 Ch. 334, 338; *Bhagwandas v. Burjorji* (1912) 37

Bom. 347.
(b) *Attorney-General v. Gaskill* (1882) 20 C. D. 519, 530.
(c) *Karimbhoy v. Turner* (1893) 17 Bom. 341; *Burchard v. Macfarlane* [1891] 2 Q. B. 241, 247.
(d) *Attorney-General v. Gaskill* (1882) 20 C. D. 519, 528.
(e) *Anilabala v. Rajendranath* (1916) 43 Cal. 300.

O. 11,
rr. 2-5.

only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

Power of Court under this rule.—It is to be noted that the Judge has not any power under this rule to settle interrogatories, but to state only what interrogatories should be administered (*f*). Further, the allowance by a Judge of interrogatories to be administered to a party does not amount to a decision that the party is bound to answer them but leaves him at liberty to take any objection to answering which he might otherwise have taken (*g*). See rr. 6-7 below.

3. [R. S. C., O. 31, r. 3. *Cf.* S. 123.] In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court either with or without an application for inquiry that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answer thereto shall be paid in any event by the party in fault.

Costs of interrogatories.

4. [*New.* R. S. C., O. 31, r. 4.] Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

Form of interrogatories.

5. [R. S. C., O. 31, r. 5. *Cf.* S. 124.] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

Corporations.

Delivery of interrogatories to an officer of a corporation.—A corporate body cannot answer for itself, and it is necessary that some officer should answer for it. His answer is the answer of the Company, and can be read against the Company. Such being the case, he is only bound to answer as to his knowledge *acquired in the course of his employment* by the Company, and as to the result of inquiries made by him of the other officers and agents of the Company with regard to their knowledge *acquired in the same way*. He is not bound to answer as to *his own knowledge*, or to make inquiries of the other officers or agents of the Company as to their knowledge *acquired accidentally or in some other capacity* (*h*).

(*f*) *Antilabala v. Rajendranath* (1916) 43 Cal. 300.
(*g*) *Peck v. Ray* [1894] 3 Ch. 282.

(*h*) *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.* [1900] 2 Ch. 1.

O. 11, r. 6. 6. [R. S. C., O. 31, r. 6. Cf. S. 125.] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Objections to interrogatories by answer.

Scandalous interrogatories.—"Certainly nothing can be scandalous which is relevant" (i). Interrogatories which tend to incriminate a party are not scandalous if they are relevant (j).

Irrelevant interrogatories.—The discovery by interrogatories, as distinguished from cross-examination, must be *directly relevant* to the matters in issue (k). Thus in an action for damages against the defendant for seducing the plaintiff's daughter, the defendant cannot be asked how rich he is, as it is perfectly irrelevant in such cases whether the defendant is rich or poor, the true measure of damages being the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter. But interrogatories as to whether the defendant had had sexual intercourse with the daughter, and whether he had stated that he believed that she had not had such intercourse with any other man, are allowable (l). Similarly interrogatories will not be allowed if the defence at which they aim would be no defence in law to the suit (m).

Where a party seeks discovery of documents, and the opposite party alleges that the documents are *not relevant*, the procedure to be followed is that laid down in r. 18, sub-r. (2) below. A party should not be compelled to give discovery of documents by means of interrogatories, the relevancy of which is denied (n).

"Not exhibited bona fide for the purpose of the suit."—Though an interrogatory may be relevant, it may be objected to on the ground that it is put with a view to serve an ulterior object beyond that of helping the suit.

"Not sufficiently material at that stage."—Thus an interrogatory may be perfectly relevant to a suit, further it may be put *bona fide* for the purposes of the suit, but it may be premature, in which case it will not be allowed (o). This may be illustrated by the following cases:—

- (1) A sues B for breach of an alleged trust and for profits made by B by such breach. B denies the alleged trust. A is not entitled to interrogate B so as to require from him an account of profits of the alleged trust fund unless the trust is proved (p); but it is otherwise if the breach of trust is admitted (q).
- (2) In *Fennessy v. Clark* (r), the plaintiffs' interrogatories to prove the amount of damages were held premature, as it was not yet decided whether the plaintiff was entitled to any damages at all. Cotton, L. J., said

(i) *Fisher v. Owen* (1878) 8 C. D. 645. 653, per Cotton, L. J.
 (j) *Allhusen v. Labouchere* (1878) 3 Q. B. D. 654; (1878) 8 C. D. 645, *supra*.
 (k) *Re Howell Morgan* (1888) 39 C. D. 316;
Kennedy v. Dodson [1895] 1 Ch. 334, 338, 340.
 (l) *Hodgson v. Taylor* (1873) L. R. 9 Q. B. 79.

(m) *Rogers & Co. v. Lambert & Co.* (1890) 24 Q. B. D. 573.
 (n) *Nittomoye v. Soobul* (1896) 23 Cal. 117.
 (o) *Neckram v. Bank of Bengal* (1887) 14 Cal. 703.
 (p) *Parker v. Wells* (1881) 18 C. D. 477.
 (q) *Whitham v. Whitham* (1884) 28 Sol. Jo. 456.
 (r) (1888) 37 C. D. 134 [Infringement of trade-mark].

"The Court is always unwilling before the right to relief is established, to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief."

O. 11,
rr. 6, 7.

"Or any other ground."—Besides the three specific grounds mentioned the rule, a party interrogated may object to answer an interrogatory on the ground that it is prolix, oppressive, unnecessary or scandalous (r. 7), or on the grounds specified in the notes to r. 1 under the head "What interrogatories may not be allowed," p 467 above.

"Fishing" interrogatories not allowed.—The questions asked must not be "fishing," that is to say, they must refer to some definite and existing state of circumstances, and must not be put merely in the hope of discovering something which may help the party interrogating to make out some case (s).

See Odgers on Pleading, 6th Ed., p. 275. For instances of "fishing interrogatories," see *Ali Kader v. Gobind Das* (t).

Wagering contracts.—In cases where the defence of wagering is set up the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit, the reason being that it is manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case (u).

Defamation.—Where a statement of claim in an action for slander alleges publication to one named person, and publication also to various other persons unnamed, it is not generally permissible to ask the defendant whether he uttered the words complained of to any person or persons other than the person named, and the names of the other persons if any. Such an interrogatory is a fishing interrogatory, the object being to find out some cause of action against the defendant other than the specific cause of action alleged in the plaint (v).

7. [*New. R. S. C., O. 31, r. 7.*] Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

Setting aside and striking out interrogatories.

Setting aside and striking out interrogatories.—*A*, as trustee in the bankruptcy of *C*, sues *B* for a declaration that a piece of land purchased by *B* and *C* in 1883 was purchased by *B* and *C* in partnership. *B* denies the partnership. *A* exhibits interrogatories to *B* asking for particulars of purchases of land by *B* and *C* previous and subsequent to 1883 to prove that they had been co-partners in various other purchases similar to that of 1883. The interrogatories are irrelevant and oppressive,

(s) *Gowley v. Plimsoll* (1873) L. R. 8 C. P. 362;
Hennessy v. Wright (No. 2) (1890) 24 Q. B.
D 45.

(t) (1890) 17 Cal. 840, 842-843.

(u) *Bhagwandas v. Burjorji* (1912) 37 Bom. 347.

(v) *Barham v. Huntingfield* [1913] 2 K. B. 198.

O. 11, rr. 7-11. and must be struck out. "To ask the defendant to take the trouble to go through his books and papers for so many years is vexatious and oppressive (w)."

This rule does not apply where the interrogatories are merely irrelevant. An objection that an interrogatory is irrelevant must be taken in the affidavit in answer (r. 6), and is no ground for setting aside the interrogatory under this rule (s).

"There is no foundation for the opinion that a person who has a ground for refusing to answer [an interrogatory] is precluded from availing himself of that ground because he has not applied to have the interrogatory struck out (y).

8. [R. S. C., O. 31, r. 8, S. 126.] Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

Affidavit in answer, filing.

Answers as to matters done by agent or servant of party interrogated.—A party to a suit is not excused from answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within such party's knowledge, but are only within the knowledge of his agents or servants, *if derived in the ordinary course of their employment*; and he is bound to obtain the information from such agents or servants, unless he shows that it would be unreasonable to require him to do so, as that, either such agents or servants have left his employment, or it would occasion unreasonable expense or an unreasonable amount of delay or the like (z). A party's banker or solicitor is his agent within the meaning of the above rule (a). But a party is not bound to disclose matters that have come to the knowledge of his agents or servants otherwise than in the ordinary course of their employment (b).

9. [New. R. S. C., O. 31, r. 9.] An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

Form of affidavit in answer.

10. [New. R. S. C., O. 31, r. 10.] No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

No exception to be taken.

11. [R. S. C., O. 31, r. 11, S. 127.] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring

Order to answer or answer further.

(w) *Kennedy v. Dodson* [1895] 1 Ch. 334.
 (x) *Dalglish v. Lowther* [1899] 2 Q. B. 590.
 (y) *Fisher v. Owen* (1878) 8 C. D. 645, 654.
 (z) *Belkrow, Vaughan and Co. v. Fisher* (1882) 10 Q. B. D. 161; *Rasbotham v. Shropshire Union Railways and Canal Co.* (1888)

24 C. D. 110, 113.
 (a) *Allott v. Smith* [1895] 2 Ch. 111.
 (b) *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.* [1900] 2 Ch. 1, 10-11.

him to answer, or to answer further, as the case may be. And **O. 11,** an order may be made requiring him to answer or answer **rr. 11, 12,** further, either by affidavit or by *viva voce* examination, as the Court may direct.

Application for further answer to interrogatories.—An application for a further answer to interrogatories ought to specify the interrogatories or parts of interrogatories to which a further answer is required (c).

“Answers insufficiently.”—“With regard to an answer to interrogatories, what the Court has to consider is this simply whether the answer is insufficient, not to go into the question of the truthfulness of the answer, but to see whether it is sufficient or not, and if it is insufficient, then only can it require a further answer” (d). “When an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks for it from using it without having thrust upon him irrelevant matters as part of it, the answer is insufficient, and the proper course to pursue is to ask that a further answer shall be made (e).

Privilege.—Where in an answer to interrogatories the party interrogated declines to give further information on the ground of privilege and the privilege is properly claimed in law, the Court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject-matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred as to become part of the answer, that the claim for privilege cannot possibly be substantiated. *The mere existence of reasonable suspicion* which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified (f). See notes to r. 12 under the head “*Conclusiveness of affidavit of documents,*” on p. 476 below.

Consequence of failure to answer interrogatories.—See r. 21 below.

12. [R. S. C., O. 31, r. 12, S. 129.] Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

Application for discovery of documents.

(c) *Anstey v. North and South Woolwich Subway Co.* (1879) 11 C. D. 439.
(d) *Lyell v. Kennedy* (1884) 27 C. D. 1, 21.

(e) *Ib.*, p. 28.

(f) *Lyell v. Kennedy* (1884) 27 C. D. 1.

O. 11, r. 12. Discovery and production of documents.—Having dealt with discovery by way of answer to interrogatories, we now proceed to consider another species of discovery called *discovery of documents*. The parties to a suit may have in their possession or power documents relating to the matters in question in the suit. These documents may be divided into two classes :—

- (i) those which the adversary is entitled to inspect, and
- (ii) those which he is not entitled to inspect.

Documents which belong to class (ii) are described and classified below, under the head “Grounds of objection to production of documents.” As to class (i) of documents we may say that the adversary is entitled to inspection of all documents which do not come within class (ii). Speaking generally, we may say that the adversary is entitled to inspection of all documents which do not of themselves constitute *exclusively* the party’s evidence of his case or title. But how is inspection to be obtained? If *A* wants to inspect documents in the possession of *B* which he is entitled to inspect, it is clear that he cannot inspect them unless they are produced by *B*. *A* must therefore call upon *B* to produce the documents. But how can *A* do this, unless he knows what documents are in the possession or power of *B*? To enable him to obtain this information, *A* is entitled to *discovery* from *B* of the documents in his possession or power. For this purpose, *A* may apply to the Court for an order requiring *B* to make an affidavit, called *affidavit of documents*, stating what documents are in his possession or power relating to the matters in dispute in the suit. On the order being made *B* is bound to make his affidavit of documents. If he fails to do so, he will be subjected to the penalties specified in r. 21 below.—After the affidavit of documents is made by *B* disclosing the documents, *A* may require *B* to produce for his inspection such of the documents as he is in law entitled to inspect.

Contents of affidavit of documents.—A party who is ordered to make his affidavit of documents, should *set forth* in the affidavit all documents which *are or have been* in his possession or power relating to all matters in question in the suit. As to documents which *are not, but have been*, in his possession or power he must state what has become of them and in whose possession they are, in order that the opposite party may be enabled to get production from the persons who have possession of them. For the same reason, if there are any documents in which he has a *joint* property with other persons not before the Court, he must state the names of those persons. Rule 13 provides that every affidavit of documents should also specify which of the documents therein *set forth* the declarant objects to produce for the inspection of the opposite party together with the grounds of such objection [see App. C, Form No. 5]. These grounds are three in number and are given below. The Court will go into these grounds when it is called upon to make an order for production of the documents in a party’s possession for the inspection of the opposite party (r. 14).

Grounds of objection to production of documents.—There are three grounds on which production of documents can be resisted as of right, (1) as disclosing the party’s evidence, (2) as being within the doctrine of legal professional privilege and (3) as being injurious to public interests. We proceed to consider these grounds in detail.

1. *A party is not bound to produce for the inspection of his opponent documents which “of themselves evidence exclusively” the party’s own case or title (g).*—Documents

(g) *Budden v. Wilkinson* [1893] 2 Q. B. 432;
Frankenstein v. Garvin Co. [1897] 2 Q. B.

B. 62; *Attorney-General v. Mayor of Newcastle-upon-Tyne* [1899] 2 Q. B. 478.

constituting evidence of the party's case or title are not protected, unless they are solely **O. 11, r. 12.** or exclusively evidence of it. Where a document is or may be evidence for the adversary as well as the party, the party cannot withhold inspection of it from the adversary (h), although his own evidence may be thus disclosed (i). It is not enough for a man to say such and such documents are the title deeds of his property: it is no ground for refusing their production, if they are necessary to support the adversary's case (j). But a document is protected from production and inspection if it exclusively evidences a party's own case, and does not support the adversary's case (k). To entitle the party to this protection, the privilege must be properly claimed, that is, he must state in his affidavit that the documents constitute evidence of his own case or title, that they contain nothing supporting or tending to support the adversary's case or title, and that they contain nothing impeaching his own case or title (l). As to discovery in actions of ejectment, see notes to r. 1, "What interrogatories may be allowed," on p. 466 above.

2. *A party is not bound to produce any confidential communications between him and his legal adviser (m).*—The reason of the rule is to enable persons to obtain legal advice safely and effectually (n). The following are amongst the confidential communications between a client and his legal adviser that are protected from production and inspection: (1) statement of facts drawn up by the client for submission to his solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information to conduct his case (o); (2) advice given by the solicitor with reference thereto (p); (3) entries in the solicitor's diary of communications between himself and his client (q); (4) memoranda or minutes made by the client of the communications between himself and the solicitor (r); (5) communications between solicitor and counsel with reference to the client's case (s); (6) draft pleadings (t); (7) case laid before counsel for his opinion and other briefs for counsel (u); (8) solicitor's bill of costs, it being virtually the solicitor's history of the transaction in which he was concerned (v). But the communication, to be privileged must be of a confidential nature (w). And, further, it must have been made to the legal adviser with a view to obtain professional advice (x). It is not necessary that the communication should be made either during an actual or even an expected litigation. A communication with a legal adviser is protected, though it relates to a transaction which is not the subject of litigation provided it be a communication made to him for the purpose of obtaining professional advice (y). But confidential communications between a principal and an agent who is not a legal agent (e.g., a commercial agent) are not privileged, whether they are made after litigation has become imminent and after legal

- (h) *Bray on Discovery*, p. 478. *Burrell v. Nicholson* (1833) 1 M. & K. 680; *Smith v. Beaufort* (1842) 1 Ph., p. 220; *Combe v. Corp. London* (1845) 15 L. J. Ch., pp. 82, 83.
 (i) *London Gas Light Co. v. Chelsea* (1859) 6 C. B. N. S., pp. 425, 426; *Statton v. Chadwick* (1851) 3 M. & G. 575.
 (j) *Attorney-General v. Thompson* (1849) 8 Ha. p. 118; *Sutherland v. Singhee Churn* (1884) 10 Cal. 808.
 (k) *Egremont Burial Board v. Egremont Iron Ore Co.* (1880) 14 C. D. 158; *Morris v. Edwards* (1890) 15 App. Cas. 809.
 (l) *Attorney-General v. Emerson* (1882) 10 Q. B. D. 191; *Minet v. Morgan* (1873) L. R. 8 Ch. 861; *Attorney-General v. Newcastle* [1899] 2 Q. B. 478; *Balamoney v. Ramasami* (1907) 30 Mad. 280, 281.
 (m) *Ryrie v. Shivshankar* (1891) 15 Bom. 7. See Evidence Act, ss. 126 and 129.
 (n) *Wheeler v. LeMarchant* (1881) 17 C. D. pp. 681, 682; *Re Strachan* [1895] 1 Ch. p. 444; *R. v. Bullivant* [1901] A. C., p. 200.

- (o) *Southwark Co. v. Quick* (1878) 3 Q. B. D. 315; *Birmingham and Midland Motor Omnibus Co., Ltd. v. London and North Western Ry. Co.* [1913] 3 K. B. 850; *Fewerherd v. London General Omnibus Co.* [1918] 2 K. B. 505.
 (p) *Ryrie v. Shivshankar* (1891) 15 Bom. 7.
 (q) *Ward v. Marshal* (1888) 3 Times Rep. 578.
 (r) *Wooley v. N. L. R. Co.* (1869) L. R. 4 C. P. 604.
 (s) *Mostyn v. West Mostyn Co.* (1876) 34 L. T. 531.
 (t) *Lamb v. Orton* (1853) 22 L. J. Ch. 713.
 (u) *Walsham v. Stainon* (1863) 2 H. & M. 1; *Munchershaw v. New Dhurumsey Co.* (1880) 4 Bom. 578.
 (v) *Turton v. Barber* (1874) L. R. 17 Eq. 329; *Chant v. Brown* (1851) 9 Ha. 790.
 (w) *Hajes Haroon v. Abdul Karim* (1879) 3 Bom. 61; *Framji v. Mohansing* (1894) 18 Bom. 263, 271; *Emperor v. Rodrigues* (1903) 5 Bom. L. R. 122.
 (x) *Framji v. Mohansing* (1894) 18 Bom. 263; *Foakes v. Webb* (1885) 28 C. D. 288.
 (y) *Wheeler v. Le Marchant* (1881) 17 C. D. 675.

O. 11, r. 12. advice has been taken, or even after litigation has commenced (z). See Evidence Act, 1872, ss. 126, 129.

3. *A party is not bound to produce any public official document if its production would be injurious to public interests (a).*—This head of privilege applies as a rule when a party to a suit is a public officer. See Evidence Act, 1872, ss. 123-124.

In all the three heads of privilege mentioned above, the privilege must be claimed in the affidavit of documents, and the grounds of privilege must be sufficiently disclosed. If the affidavit of documents does not sufficiently raise the claim of privilege, the party may be allowed to put in a further affidavit in support of that claim (b).

Is a party bound to give discovery of documents which will tend to criminate him or expose him to a penalty or forfeiture? No, according to the English law (c). Yes, it would seem, according to the Indian law. See Evidence Act, s. 132, where the term "witness" obviously includes a party to a suit.

Conclusiveness of affidavit of documents: Further affidavit.—If a party states in his affidavit of documents that he has no documents relating to the matters in question in the suit other than those set forth in the affidavit, his oath is conclusive, and the other party cannot cross-examine upon it, nor adduce evidence to contradict it, nor administer interrogatories asking whether he has not in his possession or power documents other than those set forth in his affidavit (d). The oath of the party being conclusive, the Court will not order him to make a further affidavit of documents, though the opponent may state on oath that the party has got other documents in his possession (e), the reason being that in all questions of discovery the oath of the party giving the discovery is conclusive as against the oath of the party claiming the discovery (f). The only case in which the Court may require a party to make a further affidavit is where there is a reasonable probability or presumption or even ground for suspicion, derived from certain sources, that he has other relevant documents in his possession (g). The sources into which the Court may look for this purpose are (1) the affidavit of documents itself, (2) the documents therein referred to, and (3) the pleadings (h). Unless the affidavit is shewn from any of these sources to be insufficient, the general rule is that no further affidavit can be ordered. But this rule is qualified where the basis on which the affidavit has been made turns out to be wrong. Thus if the party making the affidavit has misconceived his case so that the Court is practically certain that if he had acted on a proper view of the law he would have disclosed further documents, then the Court will refuse to recognise the affidavit as conclusive and order a further affidavit (i).

The affidavit of documents is also conclusive as to the facts constituting the ground of objection to production. Thus if a party sets forth five documents in his affidavit, and objects to produce two of them on the assertion that they relate exclusively to his own title, and that they contain nothing tending to support the adversary's title, the Court will not go behind the affidavit (j), and will not order production, unless the Court

- (a) *Wallace v. Jefferson* (1878) 2 Bom. 453; *Bippro Doss v. Secretary of State for India* (1885) 11 Cal. 655; *Ryrie v. Shivshankar* (1891) 15 Bom. 7; *Umbica Churn v. Bengal S. & W. Co.* (1895) 22 Cal. 105.
 (a) *Wadeer v. E. I. Co.* (1856) 8 De G. M. & G., p. 191; *Jehangir v. Secretary of State* (1904) 6 Bom. L. R. 131, 160.
 (b) *Umbica Churn v. Bengal S. & W. Co.* (1895) 22 Cal. 105.
 (c) *Bray on Discovery*, 311-349; *Steph. Dig.*, art. 120.
 (d) *Hall v. Truman* (1885) 29 C. D. 307; *Nichol v. Wheeler* (1886) 17 Q. B. D. 101.

- (e) *Reynell v. Sprye* (1852) 1 De G. M. & G. 656.
 (f) *Lyell v. Kennedy* (1884) 27 C. D., p. 19.
 (g) *Hall v. Truman* (1885) 29 C. D., p. 319; *Lyell v. Kennedy* (1884) 27 C. D., p. 20; *Comp. Financiere v. Peruvian Guano Co.* (1882) 11 Q. B. D. 55.
 (h) *Jones v. Monte Video Co.* (1880) 5 Q. B. D., 558; *Kent Coal Concessions v. Duguid* [1910] 1 K. B. 904; and cases cited in last note.
 (i) *British Association of Glass Bottle Manufacturers v. Nettleford* [1912] A. C. 709.
 (j) *Vinayakrao v. Narotam* (1893) 17 Bom. 581.

is *reasonably satisfied or reasonably certain* from the sources specified in the preceding paragraph that the nature of the documents as described by the party has been misconceived by the party, or that the documents are of such a character that the party cannot properly make such an assertion (*k*). *Mere suspicion* that the documents are not of the character described by the party, though it is sufficient to justify the Court in ordering the party to make a further affidavit of documents (see preceding paragraph), does not entitle the Court to order their production (*l*).

In a suit for the price of materials supplied to the defendant in which the defence was that the materials were defective, the defendant objected to produce his engineer's report on the ground that it formed evidence of his own case *exclusively*, but the Court ordered production on the ground that the defendant *had set forth the nature of the report in his written statement*, and the statement showed that the report was not of the character described by the defendant (*m*).

Inspection by Court of documents for which privilege is claimed.—Where on an application for an order for inspection privilege is claimed for any document, the Court may inspect the document for the purpose of deciding as to the validity of the claim of privilege. See r. 19, sub-r. (2).

Sufficient description of documents.—It being one of the objects of the affidavit of documents to enable the Court to make an order for production of the documents mentioned therein, the affidavit ought to contain a sufficient description of the documents. A description will be held sufficient, if it is of such a character that if an order for production is made, the Court can determine whether the very documents that were ordered to be produced have actually been produced (*n*). Where there are numerous documents, the practice is to tie them up in bundles, to schedule the bundles and number the documents, or otherwise ear-mark them in such a way that the other party may ask for those which he wants to see (*o*).

When a party claims to withhold certain documents from production, although some description may be necessary, he need not give such a description as would enable the adversary to know their contents (*p*). Thus where privilege is claimed for letters, it is not necessary to state the dates or the names of the writers, nor such other particulars as might enable the opponent to discover indirectly the contents (*q*).

"Not necessary at that stage of the suit."—See notes to r. 6 under the head—"Not sufficiently material at that stage," on p. 470 above.

Relating to any matter in question in the suit.—Every document which will *throw any light* on the case is a document relating to a *matter in dispute* in the suit (*r*), though it may not be *admissible in evidence* (*s*). A document may not be admissible in evidence, and yet it may contain information which may either directly or indirectly enable the party seeking discovery either (1) to advance his own case or (2) damage that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences (*t*). Every such document must be included in the affidavit of documents, and the opposite party is entitled to inspection of such

(*k*) *Attorney-General v. Emerson* (1882) 100 Q. B. D. 191; *Frankenstein v. Gavins Co.* [1897] 2 Q. B. 62; *Roberts v. Oppenheim* (1884) 26 C. D. 724.
 (*l*) *Bray on Discovery*, 508.
 (*m*) *Umbros Churn v. Bengal S. & W. Co.* (1895) 22 Cal. 105.
 (*n*) *Taylor v. Batten* (1878) 4 Q. B. D. 85.
 (*o*) *Hill v. Hart-Davis* (1884) 26 C. D., 470, 475;
Cooke v. Smith [1891] 1 Ch. 509; *Price*

v. Price (1879) 48 L. J. Ch. 215.
 (*p*) *Kain v. Farrer* (1877) L. T. 470.
 (*q*) *Gardner v. Irvin* (1878) 4 Ex D. 53.
 (*r*) *Hutchinson v. Glover* (1875) 1 Q. B. D. 141.
 (*s*) *Bustros v. White* (1876) 1 Q. B. D. 425;
Hutchinson v. Glover (1875) 1 Q. B. D. 141.
 (*t*) *Compagnie Financiere v. Peruvian Guano Co* (1882) 11 Q. B. D. 63.

- O.11, r. 12.** document. Thus a plaintiff may be required to *produce* for inspection of the defendant correspondence containing mere matter of opinion by a non-legal agent as to the prospect of the plaintiff's success in the case, though the correspondence *may not be admissible in evidence* (u).

Non-disclosure of documents.—"It is open to a litigant to refrain from producing any document that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. . . . It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so, no inference in his favour can be drawn as to the contents thereof" (v). But where an *order for discovery* is made upon a party, and it is alleged by him as to some of the documents that they may have been destroyed or may have perished, it is incumbent on him to give evidence of diligent search and of failure to find them; if no such evidence is given, the presumption arises that the contents of the documents not accounted for are, as regards the issue in dispute, unfavourable to that party (w).

Several plaintiffs or several defendants.—Where there are several plaintiffs or several defendants, *all* must join in making the affidavit of documents unless some specific reasons to the contrary are shown. The fact that some of the parties reside in England is no reason why they should be excused from making such affidavit (x).

Affidavit of documents from a minor or lunatic.—The next friend or guardian *ad litem* as the case may be of a minor or lunatic may now be required to make an affidavit of documents (r. 23).

Affidavit of documents from a co-defendant.—An affidavit of documents may be required by a defendant from a co-defendant, if there is an issue joined between them, but not otherwise (y). See notes to r. 1 "Opposite party", on p. 468 above.

Affidavit of documents from Advocate-General.—No order can be made against the Advocate-General, whether he be plaintiff or defendant, requiring him to give discovery on *oath*. Hence no affidavit of documents can be required from the Advocate-General. But an affidavit of documents may be required from the relators (z). See s. 92.

Affidavit of documents from Official Liquidator.—The Official Liquidator, being an officer of the Court, should not in the absence of special circumstances be required to make an affidavit as to documents in his possession, though he is bound to produce to the adverse litigant the documents which the latter requires to see (a).

Sealing up parts of documents.—Where one part of a document relates to matters in dispute in the suit and another part does not, the latter may be sealed up and so concealed from inspection. Similarly where protection from discovery can be claimed for one part of a document and not for another part, the part which can be

(u) *Bustros v. White* (1876) 1 Q. B. D. 423.
 (v) *Bilas Kunwar v. Desraj* (1915) 37 All. 557.
 566, 42 I. A. 202, 206. Distinguish *Murugesam v. Manickavasaka* (1917) 44 I. A. 98, 108, 40 Mad. 402, 408-409.
 (w) *Moti Lal v. Kundan Lal* (1917) 19 Bom. L. R. 471, 476.

(x) *Ryrie v. Shivehankar* (1897) 15 Bom. 7.
 (y) *Anand Rao v. Budra* (1893) 17 Bom. 384.
 (z) *Advocate-General v. Adamji* (1906) 8 Bom. L. R. 565. See Bray on Discovery, pp. 68-69.
 (a) *Mutual Society, in re* (1883) 22 Ch. D. 714.

protected may be sealed up (b). In some cases the Judge has ordered the sealed parts to be unfastened in order that he might inspect them himself (c). See r. 19, sub-r. (2).

O. 11,
rr. 12-14

Inspection of property which is the subject-matter of the suit.—See O. 39, r. 7 (1) (a). '

13. [R. S. C., O. 31, r. 13, S. 129, 2nd para.] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

Affidavit of documents.

See notes to r. 12 of this Order, "Grounds of objection to production of documents," on p. 474 above.

14. [R. S. C., O. 31, r. 14, S. 130] It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Production of documents.

Production of documents.—Under this rule the Court has no discretion to refuse an order for production unless the documents are privileged (d). As to the three heads of privilege, see notes to r. 12 "Grounds of objection to production of documents," on p. 474 above. See also notes to the same rule under the head "Conclusiveness of affidavit of documents," on p. 476 above and "Sealing up parts of document," on p. 478 above.

Indian Evidence Act, ss. 163-164.—Under s. 163 if A calls for a document which he has given B notice to produce, and the document is produced in Court and inspected by A, B can compel A to put the document in evidence. Under s. 164 a party refusing to produce a document cannot use it in evidence without the consent of the other side or the order of the Court.

Waiver of privilege.—Where a document is privileged, the fact that a portion of it has been read out by the plaintiff's solicitor to the defendant's solicitor does not amount to a waiver of privilege on the part of the plaintiff as regards the part not read (e).

Partner.—One partner of a firm represents the other partners for the purpose of production of documents (f).

(b) *Bray on Discovery*, p. 238; *Jadub v. Kanai* (1893) 20 Cal. 587; *Heeralal v. Ram Suran* (1879) 4 Cal. 835.
(c) *Lafone v. Falkland Islands Co.* (1858) 27 L. J. Ch. 25; *Caton v. Lewis* (1853) 1 W. R. [Eng.] 118; *Gumuk Roy v. Tularam*

(1901) 28 Cal. 424.
(d) *Wallace v. Jefferson* (1878) 2 Bom. 453; *Balamoney v. Ramasami* (1907) 30 Mad. 230.
(e) *Kay v. Poorunchand* (1880) 4 Bom. 631.
(f) *Jakaria v. Casim* (1876) 1 Bom. 496.

O. 11,
rr. 14, 15.

Revision.—The High Court will not in revision interfere where a lower Court, in the exercise of its discretion, refuses inspection of documents produced before it under this rule (g).

Right to take copies.—The inspecting party is entitled to take copies of documents produced for inspection (h). In a proper case, as where a document is alleged to be forged, the Court may allow a party to a suit to take photographs of documents in the possession of the other party (i).

15. [R. S. C., O. 31, r. 15, S. 131.] Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

Inspection of documents referred to in pleadings or affidavits.

Inspection of documents referred to in pleadings and affidavits.—Rules 15 to 18 are confined to documents mentioned in the pleadings or affidavits. They are intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings (j).

The machinery for the production of documents is of two kinds. We have first rule 12 of this Order which enables a party without filing any affidavit to apply for an order directing any other party to the suit to make discovery on oath of the documents in his possession or power relating to any matter in question in the suit. Under that rule, a defendant is not, as a rule, entitled to discovery before he has filed his written statement (k). Rule 15 provides for immediate inspection of any documents which a party has referred to in his pleadings or affidavits. Under this rule, a defendant is entitled to inspection of documents referred to in the pleadings, although he has not filed his written statement (l). But he is not entitled, as a rule, to inspection of documents that are not referred to in the pleadings unless he has filed his written statement (m).

A party who is required under this rule to produce documents referred to in his pleadings for the inspection of the opposite party may claim privilege for the document. It is not to be supposed that where a document is referred to in the pleadings, all privilege with regard to it is gone. The rule only says that "if a party will not produce a

(g) *Balamoney v. Ramasami* (1907) 30 Mad. 230.

(h) *Ormerod Grierson & Co. v. St. George's Iron Works, Ltd.* [1905] 1 Ch. 505.

(i) *Louis v. The Earl of Londesborough* [1893] 2 Q. B. 191.

(j) *Quilter v. Healty* (1888) 23 C.D. 42, 50.

(k) *Mercier v. Cotton* (1875) 1 Q. B. D. 442.

(l) *Quilter v. Healty* (1883) 23 C. D. 42; *Ram Dyal v. Nurhurry* (1894) 18 Bom. 368.

(m) *Quilter v. Healty* (1883) 23 C. D. 42; *Khetsidas v. Narokunddas* (1908) 32 Bom. 152.

document to which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence. That is the penalty. He may prefer to lose part of his claim rather than produce the document. [This] rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced " (n).

O. 11,
rr. 15-17.

Documents referred to in pleadings or affidavits.—Where a plaintiff by his pleadings refers to letters written by himself, he is not bound to produce copies of those letters for the inspection of the defendant, there being no reference to copies in the pleadings (o).

As regards exhibits to an affidavit, it has been held that "any one who has a right to see an affidavit has also a right to see an exhibit referred to in the affidavit so as to be made part of it, just as if it were annexed to the affidavit" (p).

A party is entitled under this rule to inspection of letters referred to in an affidavit of the opposite party, though the affidavit has not been filed, provided it is sworn and a copy thereof is furnished to him (q).

Inspection by party or his pleader.—No one is entitled under this rule to inspection except a party or his pleader. The term "party" includes the authorised agent of the party (r). But if such agent was formerly in the employ of the opposite party and in charge of his books, the Court ought not to permit inspection to be taken by him (s).

16. [R. S. C., O. 31, r. 16.] Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

Notice to produce.

17. [R. S. C., O. 31, r. 17, s. 132.] The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

Time for inspection when notice given.

"Documents."—This rule applies to all documents mentioned in r. 15; it is not confined to cases where there has been an affidavit of documents under rr. 12 and 13 (t).

(n) *Roberts v. Oppenheim* (1884) 26 Q. D. 724.

(o) *Quilter v. Healy* (1888) 23 C. D. 42.

(p) *Re Hinchiffe* [1896] 1 Ch. 117.

(q) *Re Fenner and Lord* [1897] 1 Q. B. 667.

(r) *Williams v. Prince of Wales*, *The Co.* (1857)

23 Beav. 338.

(s) *Enamul v. Ekramul* [1898] 25 Cal. 294.

(t) *Re Fenner and Lord* [1897] 1 Q. B. 667, 669, 670.

O. 11, rr. 17, 18. **Bankers' books.**—See notes to O. 7, r. 17, under the head "Bankers' Books Evidence Act, 1891," on p. 436 above.

Business books.—See r. 19 below.

Usual place of custody.—*A*, who owns a ginning factory at Broach, agrees with *B* in Bombay to gin *B*'s cotton in his factory at Broach. *B* sues *A* in Bombay for damages for breach of the contract, and requires inspection of *A*'s books in Bombay. *A* offers to give inspection at Broach where the books are kept. *B* is not entitled to inspection in Bombay, for Broach is the place where the books are kept (*u*).

18. [R. S. C., O. 31, r. 18, Ss. 133, 134.] (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

"Served with notice."—No order for inspection can be made under this rule unless notice has been served under r. 15 (*v*).

Sub-rule (2).—This sub-rule provides for the inspection amongst others of documents not disclosed in the affidavit of documents, and the Court may under this sub-rule direct a party to give inspection of such documents. The principle that an affidavit of documents is conclusive as to the documents set forth therein [see p. 476 above] is no answer to an application under this sub-rule for inspection of documents not disclosed therein (*w*).

Appeal.—No appeal lies under the Code from an order for inspection. Nor does an appeal lie under cl. 15 of the Letters Patent, for an order directing inspection to be given is not a judgment within the meaning of that clause (*x*).

(*u*) See *Kevaldas v. Pestonji* (1881) 5 Bom. 467.
 (*v*) *Mohendro v. Ishun Chunder* (1884) 10 Cal. 56;
Dhapt v. Ram Pershad (1887) 14 Cal. 768.
 (*w*) *Basanta Coomarr v. Kumudini* (1911) 38

Cal. 428.
 (*x*) *Sonbai v. Ahmedbhai* (1872) 9 Bom. H. C. 398, 409; *Ahmed v. Ayeshabai* (1909) 11 Bom. L. R. 248.

19. [New. R. S. C., O. 31, r. 19A.] (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

O. 11,
rr. 19, 20.

Verified copies.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

Specific documents.—To justify an application under sub-r. (3), the party making the application must in his affidavit *name and specify*, so that they can be identified, the particular documents of which he desires discovery. It is not sufficient to make a general affidavit based on a *priori* reasoning that certain classes of documents must be in his opponent's possession or power (y).

20. [R. S. C., O. 31, r. 20, S. 135.] Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to

Premature discovery.

- O. 11, the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.
- r. 20-22.

Determination of issue to decide upon right to inspection.—The object of the rule is to enable the Court to decide an *issue* in a suit, as distinguished from the suit itself, for the purposes of discovery (z). See notes to r. 6. "Not sufficiently material at that stage," p. 470 above.

21. [R. S. C., O. 31, r. 21, S. 136.] Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.
- Non-compliance with order for discovery.

Dismissal of suit.—This rule cannot be applied unless there has been an order for discovery or inspection (a). And even where such an order has been made, it is only when the default is wilful, and as a last resort, that the Court should dismiss the suit or strike out the defence (b). If the parties concerned are *purda-nashin* ladies, this should be taken into account before making the order (c).

Additional consequence of failure to answer or give inspection.—Besides the consequences laid down in this rule, a party before a High Court who has failed to answer or give inspection is liable to be committed for contempt by that Court. This power has been conferred on Chartered High Courts by their Letters Patent (d). An order of *committal for contempt* is appealable according to the Bombay decisions (e), but not according to the Allahabad decisions (f).

Appeal.—An appeal lies from an order under this rule [O. 43, r. 1, cl. (f)].

22. [New. R. S. C., O. 31, r. 24.] Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such
- Using answers to interrogatories at trial.

(z) *Ahmedbhai v. Valleebhai* (1882) 6 Bom. 572.
 (a) *Kishan Lal v. Sultan Singh* (1916) 38 All. 5.
 (b) *Assenoolia v. Abdool* (1883) 9 Cal. 923; *Sham Kishore v. Shashibhoorun* (1880) 5 Cal. 707; *Danviller v. Meyers* (1883) W. N. 58;

Haigh v. Haigh (1886) 31 C. D. 478.
 (c) *Behari Lal v. Habiba Bibi* (1886) 8 All. 267.
 (d) *Haasanbhai v. Cowasji* (1883) 7 Bom. 1.
 (e) *Nayirahoo v. Narotam* (1883) 7 Bom. 5.
 (f) *Godu v. Suraj Mal* (1905) 27 All. 380.

answer : Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in. O. 11,
rr. 2, 23.

23. [*New.* **R. S. C., O. 31, r. 29.**] This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

Order to apply to minors.

Prior to this rule the practice of the different High Courts as to discovery from minors and persons of unsound mind was not uniform. It is useless to note the decisions under the old code.

ORDER XII.

Admissions.

1. [**R. S. C., O. 32, r. 1.**] Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. O. 12,
rr. 1, 2.

Notice of admission of case.

Different kinds of admissions.—The object of obtaining admissions is to do away with the necessity of proving facts that are admitted [see Evidence Act, 1872, s. 58]. Admissions are of three kinds, namely,—

I. Admissions in pleading—

- (1) *actual*, that is, those contained in the pleadings (O. 7, r. 5), or in answer to interrogatories (O. 11, r. 22).
- (2) *constructive*, that is, those which are merely the consequence of the form of pleading adopted (O. 8, rr. 3, 4, 5).

II. Admissions by agreement.

III. Admissions by notice.

Admissions by notice are dealt with in this Order.

The importance of admission consists in the fact that either party may, at any stage of the suit, move for judgment on the admissions made by the other side (r. 6).

2. [**R. S. C., O. 32, r. 2, S. 128.**] Either party may call upon the other party to admit any document saving all just exceptions ; and in case of refusal or neglect to admit, after such

Notice to admit documents.

O: 12, rr. 2-6. notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

Admissions between co-defendants.—Admissions between co-defendants, to which the plaintiff is not a party, cannot be entered as evidence against the plaintiff (g).

3. [New. R. S. C., O. 32, r. 3.] A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances from of Notice. may require.

4. [New. R. S. C., O. 32, r. 4.] Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

5. [New. R. S. C., O. 32, r. 5.] A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances Form of admissions. may require.

6. [New. R. S. C., O. 32, r. 6.] Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such Judgment on admissions.

judgment or order as upon such admissions he may be entitled **O. 12, r. 6.** to, without waiting for determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Scope of the rule.—This rule is new. It is a reproduction of O. 32, r. 6, of the English Rules. It enables either party at any stage of the suit to move for judgment on the admissions which have been made by the other side. Either party may, by availing himself of this rule, get rid of so much of the suit as to which there is no controversy (*h*). The rule, however, is permissive; it does not preclude a party, who does not avail himself of it and proceeds to trial in the ordinary way, from relying at the trial on the admissions made by the opposite party (*i*).

"The Court may make such order or give such judgment as the Court may think just."—A judgment on admissions is not a matter of right, but is in the discretion of the Court. If a case involves questions which cannot be conveniently disposed of on a motion under this rule, the Court may, in the exercise of its discretion, refuse the motion (*j*).

There is no hard and fast rule that where the defendant admits part of the plaintiff's claim and denies the rest of the claim, the Court should, if it gives judgment under this rule for the plaintiff as to the portion of the claim admitted by the defendant, refuse to allow the plaintiff to proceed with the suit as to the remainder of his claim. If there is a clear and unambiguous admission by the defendant as to part of the plaintiff's claim, the Court has jurisdiction to enter judgment as to that part of the plaintiff's claim, and it is in its discretion, having regard to the nature of the case and the allegations contained in the pleadings and the admissions made in Court, whether it should allow the plaintiff to proceed to prove the remainder of his claim (*k*). *A* sues *B* for Rs. 6,800. *B* admits that only Rs. 4,500 are due, and alleges as to the rest of *A*'s claim that it was in respect of goods as to which there was a separate arrangement between the parties. The issue as to the balance of *A*'s claim being an issue independent of the other part of the claim, the Court may pass judgment for *A* for Rs. 4,500, and give leave to *A* to prove his claim to the balance. It is clear that even if the issue as to the balance of *A*'s claim were decided in *B*'s favour, it would not, having regard to *B*'s admission, reduce *A*'s claim below Rs. 4,500 (*l*).

In the *United Telephone Co. v. Donohoe* (*m*), the plaintiffs sued the defendant for infringement of a patent, claiming injunction and damages. The defendant admitted ten instances of infringement, but denied he had committed any others. The plaintiffs thereupon moved for judgment upon the admissions in the pleadings. In the Court of first instance the Vice-Chancellor granted an injunction against infringement by the defendant of the plaintiff's patent, but he refused an enquiry as to damages. The Court of Appeal held that the plaintiffs were entitled to an enquiry as to damages, but that it must be limited to the instances of infringement admitted; and that the judgment having been obtained upon a motion for judgment upon the pleadings, the plaintiffs

(*h*) *Thorp v. Holdsworth* (1876) 3 C. D. 637, 640.

(*i*) *Tildesley v. Harper* (1877) 7 C. D. 403.

(*j*) *Mellor v. Sidenbottom* (1877) 5 C. D. 342; *Re Wright, Kirkee v. North* [1895] 2 Ch. 747, 750.

(*k*) *Premasuk Das v. Udairam* (1918) 45 Cal. 138, 144; *Andrews v. The Patriotic Assurance Co. of Ireland* (1886) L.R. 18 Ir. 115.

(*l*) *Premasuk Das v. Udairam* (1918) 45 Cal. 138.

(*m*) (1896) 31 C. D. 399

O. 12, r. 6. were bound to take the negative as well as the affirmative allegations therein. Referring to this case, Sanderson, C.J., said in the Calcutta case cited above (n) that the question whether the Judge, who in the first instance heard the application, would have had jurisdiction to give judgment on the admissions and to allow the plaintiffs to proceed to prove the rest of their claim as to the other alleged infringements, if such an application had been made, was not before the Court.

Admissions on pleadings.—Under this rule either party may move for judgment upon admissions of fact made on the pleadings or otherwise. Admissions in pleadings are either actual or constructive. Actual admissions consist of facts expressly admitted either in pleadings or in answer to interrogatories [O. 11, r. 22]. The patent case cited in the preceding paragraph is an instance of actual admissions. Constructive admissions, on the other hand, are admissions which are *inferred or implied* from pleadings as a consequence of the form of pleading adopted [O. 8, rr. 3, 4, 5]. Constructive admissions usually arise where a defendant has not specifically dealt with some allegation of fact in the plaint of which he does not admit the truth [O. 8, r. 3], for as we have seen, every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the written statement, will be taken to be admitted except as against persons under disability [O. 8, r. 5]. Constructive admissions also arise where a defendant denies an allegation of fact in the plaint evasively and does not answer the point of substance [O. 8, r. 4].

Illustrations.

1. *A*, alleging that he and *B* having agreed to carry on certain business in partnership, draft articles of partnership were prepared and approved by *B*, and that they both thereupon proceeded with the partnership undertaking, sues *B* for a declaration that he and *B* were partners and claims that the partnership may be dissolved. *B* in his written statement admits that he agreed to enter into partnership as alleged, but adds that "the terms of the arrangement between himself and the plaintiff were *not definitely agreed upon* as alleged." This is an evasive denial of the fact of partnership (O. 8, r. 4), and it will therefore be construed as an admission by *B* of the partnership. *A* is therefore entitled under this rule to a decree for dissolution of partnership, without adducing any evidence to prove the partnership. But though the written statement will be construed as an admission of the fact of partnership, it will not be construed as an admission of the terms of the partnership. *B* may therefore claim an inquiry by the decree as to the terms of the arrangement of partnership, and if such inquiry is claimed, the Court will direct it by its decree (o).

2. A defendant, by his written statement, simply "puts the plaintiff to proof of the several allegations in the plaint." The denial not being specific (O. 8, r. 3), the defendant will be deemed to have admitted the facts alleged in the plaint (O. 8, r. 5), so as to entitle the plaintiff to a decree under this rule without adducing any evidence in support of his case (p).

In applying the present rule in India, it is to be noted that, where a plaintiff applies for a decree upon *constructive admissions* in a written statement, the Court may in its discretion refuse to pass the decree, if it thinks, in the special circumstances of the case, that the defendant must not be held to have admitted facts not specifically denied in his written statement (q). See the proviso to r. 5 of O. 8, and notes thereto, p. 439.

(n) *Premshank Das v. Udayram* (1918) 45 Cal. 138.

(o) *Thorp v. Holdsworth* (1876) 3 O. D. 637.

(p) *Harris v. Gamble* (1878) 7 O. D. 877; *Rutter v. Tregent* (1879) 12 O. D. 758. See also

Green v. Sevin (1879) 13 C. D. 589.

(q) See for instance *Madho Persad v. Gajudhar* (1885) 11 Cal. 111, 11 I. A. 186; *Naiha v. Jodha* (1884) 6 All. 406.

An order on admissions on the pleadings will not be made, unless the admissions are **O. 12, r. 6.** *clear and unequivocal* (r). Further, a plaintiff moving for judgment on admissions in the defendant's written statement must have a clear case, and the mere admission by the defendant of a right asserted by the plaintiff, but which has in fact *no existence in law*, is not sufficient to entitle the plaintiff to a judgment establishing his right (s).

Judgment upon admissions made otherwise than on pleadings.—A judgment may be given under this rule not only upon admissions made on the pleadings, but upon admissions *otherwise* made. The words "or otherwise" in this rule are not confined to admissions made under r. 1 or r.4 of this Order, but are of general application, and justify the giving of an immediate judgment when an admission is made by letter of facts which show that the defendant has no defence to the action (t). A judgment may be given under this rule even upon a verbal admission where the same is clearly proved (u).

Orders which may be made under this rule.—This rule "was framed for the express purpose, that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plain that the plaintiff was entitled to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for, whether it be in the nature of a decree, or a judgment, or anything else. The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitled the plaintiff to an order, then the intention was that he should not have to wait, but might at once obtain any order which could have been made on an original hearing of the action" (v). An order amounting to what is called a preliminary decree in this Code may appropriately be made under this rule upon a simple motion. Where such an order was applied for under the corresponding English rule by a plaintiff in a suit for partition, and the defendant contended that that would be giving a *decree* to the plaintiff, and that the plaintiff should wait until the action was set down for trial, the Court held that the plaintiff was entitled to an order directing the usual inquiries upon the admissions of the defendant, and that he was not bound to wait (w) [O. 20, r. 18]. Such orders have also been made in administration actions (x) [O. 20, r. 13], in actions for dissolution of partnership (y) [O. 20, r. 15], in actions for partnership accounts (z) [O. 20, r. 15], in actions for accounts between principal and agent (a) [O. 20, r. 16], and in actions for the execution of the trusts of a settlement (b).

Practice.—Motions in England under the corresponding English rule are brought on upon an ordinary motion day after notice to the other side. As to form of application, see Daniell's Ch. Forms, 270 The practice in England is, when an order is made amounting to what is called a preliminary decree in this Code, to adjourn the further hearing of the case without requiring any further prior hearing, the words generally used in the order being, "and without requiring any further prior hearing than this motion of the said cause, the further hearing of the said cause is adjourned" (c). See Seton on Decrees, Vol. I, p. 399, Form No. 5.

(r) *Landergan v. Feast* (1886) 34 W. R. (Eng.) 691; *Hughes v. London, Edinburgh and Glasgow Assurance Co.* (1891) 8 Times Rep. 81; *Gilbert v. Smith* (1876) 2 C. D. 686.

(s) *Chilton v. Corporation of London* (1878) 7 C. D. 735.

(t) *Ellis v. Allen* [1914] 1 Ch. 904.

(u) *Re Beeny* [1894] 1 Ch. 499 [order directing payment into Court].

(v) *Gilbert v. Smith* (1876) 2 C. D. 686, 688-689,

per Mellish, L. J.

(w) *Gilbert v. Smith* (1876) 2 C. D. 686; *Burnell v. Burnell* (1879) 11 C. D. 213.

(x) *Re Barker, Hetherington v. Longrigg* (1878) 10 C. D. 162.

(y) *Thorp v. Holdsworth* (1876) 3 C. D. 637.

(z) *Turquand v. Wilson* (1875) 1 C. D. 85.

(a) *Rumsey v. Reade* (1876) 1 C. D. 643.

(b) *Bennett v. Moore* (1876) 1 C. D. 692.

(c) *Bennett v. Moore* (1876) 1 C. D. 692, 693; *Gilbert v. Smith* (1876) 2 C. D. 686, 688-690.

O. 12, rr. 6-9. “**At any stage.**”—A plaintiff may move for judgment upon admissions in the written statement *at any stage of the suit*, and notwithstanding that he has joined issue on the defence (d).

Co-plaintiffs.—An application under this rule for an order against a defendant on admissions of fact must be made by all the plaintiffs, and not merely by some of them. If the application is made by some of the plaintiffs only, it must be refused (e).

Withdrawal of admission.—Where it is shown that an admission was made by mistake, the party may be allowed to amend his pleading under O. 6, r. 17, for the purpose of withdrawing it upon such terms as to the Court may appear just (f).

7. [New. R. S. C., O. 32, r. 7.] An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

Affidavit of signature.

8. [New. R. S. C., O. 32, r. 8.] Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

Notice to produce documents.

Notice to produce documents.—It is always desirable, when a document is in the possession or power of the opposite party, to give him notice to produce the same, for unless such notice is given, secondary evidence of the document cannot be given : see Indian Evidence Act, 1872, s. 65, cl. (a), and s. 66.

9. [New. R. S. C., O. 32, r. 9.] If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

Costs.

See rr. 2 and 8 above.

ORDER XIII.

Production, Impounding and Return of Documents.

O.13, r. 1. 1. [Ss. 138, 140] (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power,

Documentary evidence to be produced at first hearing.

(d) *Brown v. Pearson* (1882) 21 C. D. 716.
(e) *Re Wright Kirke v. North* [1895] 2 Ch. 747.

[(f) *Hollis v. Burton* [1892] 3 Ch. 226.

on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced. O. 13,
rr. 1-3.

(2) The Court shall receive the documents so produced; provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

“Shall produce at the first hearing.”—This rule does not exclude the discretion of the Court to receive documentary evidence at a subsequent stage of the proceedings (*g*). See r. 2 below.

Form of list of documents produced by parties.—See App. H, Form no. 5.

2. [S. 139.] No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

Effect of non-production of documents.

“Unless good cause is shown.”—This rule has been enacted to prevent fraud by the late production of suspicious documents. But no suspicion can attach to certified copies of public documents, such as records of Government or records of judicial proceedings. Such copies therefore may be received in evidence though they have not been produced at the first hearing (*h*). The rule, however, is not confined to public documents only. The Court may, in its discretion, admit other documents also at a subsequent stage of the proceedings (*i*). See notes to r. 1 above.

Appeal.—The fact that further documentary evidence is admitted *after* the first hearing is not a good ground of appeal (*j*). Nor can an appellate Court reject evidence admitted by the Court of first instance simply on that ground (*k*).

3. [S. 140.] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Rejection of irrelevant or inadmissible documents.

Rejection of inadmissible documents.—Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given (*l*).

(*g*) *Imambandi v. Mutsaddi* (1918) 45 I. A. 73, 80-81, 45 Cal. 878, 888-889.
(*h*) *Ranchhod v. Secretary of State* (1898) 22 Bom. 173; *Talewar Singh v. Bhagwan Das* (1908) 12 C. W. N. 312.
(*i*) See *Imambandi v. Mutsaddi* (1918) 45 I. A.

73, 81, 45 Cal. 878, 889.
(*j*) *Goshain v. Rickmunes* (1869) 12 W. R. P. C. 32.
(*k*) *Minakshi v. Velu* (1895) 8 Mad. 373.
(*l*) *Jadu v. Bhabotoran* (1890) 17 Cal. 173; *Ramjibun v. Oghore Nath* (1898) 25 Cal. 401.

O. 13. When a Court is doubtful as to whether a document is admissible or not, and its
rr. 3-5. decision is open to appeal, it is better to admit than to exclude the document (*m*).

4. [S. 141.] (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :—

Endorsements on documents admitted in evidence.

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted ;

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

“ Or initialled. ”—These words which occur after the word “ signed ” in sub-rr. (1) and (2), are new.

“ Shall be endorsed. ”—The rule as to endorsement of documents admitted in evidence must be strictly followed. In *Sadik Husain Khan v. Hashim Ali Khan* (*n*), where some of the documents were not so endorsed, the Judicial Committee said : “ Their Lordships, with a view of insisting on the observance of the wholesome provisions of this rule, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not indorsed in the manner required.”

5. [S. 141A.] (1) Save in so far as is otherwise provided by the Bankers’ Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

Endorsements on copies of admitted entries in books, accounts and records.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer,

(*m*) *Kali Kishore v. Bhushan* (1891) 18 Cal. 201, | (*n*) (1916) 43 I. A. 212, 237, 38 All. 627, 664.
 17 I. A. 159.

or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

O. 13,
rr. 5-7

- (a) where the record, book or account is produced on behalf of a party, then by that party, or
- (b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

Bankers' Books Evidence Act.—See notes to O. 7, r. 17, p. 436 above.

Stamp.—A copy or extract from an entry in an account book filed under the provisions of this rule and rule 7, does not require any stamp (c).

6. [S. 142.] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Endorsements on documents rejected as inadmissible in evidence.

“ Or initialled.”—These words are new.

7. [S. 142A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

Recording of admitted and return of rejected documents.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

O. 13,
rr. 8-10.

8. [S. 143.] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

Court may order any document to be impounded.

9. [S. 144.] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same.

Return of admitted documents.

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of :

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so :

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

The words "and undertakes to produce the original if required to do so" are new.

10. [S. 137.] (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice. O. 13,
rr. 10, 11.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

11. [S. 145.] The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

Provisions as to documents applied material objects.

Additional rules framed by the Allahabad High Court, under s. 122.—See Appendix V below.

ORDER XIV.

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon.

1. [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. O. 14, r. 1.

Framing of issues.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed

O. 14, r. 1. to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

Of the framing of issues.—The plaint and written statement in a suit are called *pleadings* (O 8, r. 1). Section 58 of the Evidence Act enacts that no fact need be proved at the hearing which a party has admitted by his pleadings, unless the Court requires proof thereof. Admissions on pleadings may be either actual or constructive (O. 8, rr. 3, 4, 5). *Issues* are to be framed in respect only of those facts which have been denied or not admitted. Issues, however, are not to be framed on all points in dispute between the parties, but on those points only on which the right decision of the case depends. The practice of raising issues which do not state the main questions in the suit, but only various *subsidiary* matters of fact upon which there is not agreement between the parties, is embarrassing, and must be avoided (p). When an issue is framed as to a proposition of fact, it is said to be an issue of fact; when an issue is framed as to a proposition of law, it is said to be an issue of law. Thus if A sues B for damages for breach of a contract, and B pleads by his written statement (1) that the contract is void as being against public policy, (2) that no damages have been sustained by A by reason of the breach, (3) that the Court has no jurisdiction to try the suit, and (4) that the claim is time-barred, the following issues will be framed :—

- (1) whether the agreement is a valid and binding contract ?
- (2) whether A has sustained any damages by reason of the breach of the contract ?
- (3) whether the Court has jurisdiction to entertain the suit ? and
- (4) whether the claim is barred by limitation ?

Of the above issues, the first is an issue of mixed law and fact, the second is an issue of fact, and the third and fourth are issues of law. No issue should be framed as regards the breach of the agreement, for the breach is not denied by B.

In a recent case Scott, C.J., said : " In my opinion issues should be confined to questions of law arising on the pleadings and such questions of fact as it would be necessary for the Judge to frame for decision by the jury in a jury trial at *nisi prius* in England " (q).

Object of framing issues.—The object of framing issues is to direct the attention of the parties to the principal questions on which they are at variance, as also to bring such questions clearly before the Court, so that the Court may know which questions it has to determine to decide the case. Besides this, there is another advantage that attaches to the system of framing issues, namely, the exclusion of irrelevant evidence. As stated by their Lordship of the Privy Council, " Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues " (r). All evidence must be relevant to the issues. No evidence should be admitted that is foreign to the issues. Hence great care should be taken in framing issues. They must not be too general

(p) *West End Watch Co. v. Berna Watch Co.* (1910) 35 Bom. 425.
 (q) (1910) 35 Bom. 425, *supra*.

(r) *Sayad Muhammad v. Fattah Muhammad* (1896) 22 Cal. 324, 380, 22 I. A. 4; *Muttayan v. Sangli* (1882) 12 C. L.R. 169, 174.

and they must be framed in such a way that the attention of the parties may be sufficiently directed to the main questions of fact necessary to be decided, so that it may not be open to them to say that they were prevented from adducing evidence by the form of issues (s).

Where a material fact in the plaint is "not denied either specifically or by necessary implication" in the written statement.—A material fact alleged in a plaint may either be (1) admitted, or (2) not admitted, or (3) denied in the written statement, or (4) it may neither be admitted nor denied. If it is admitted no issue is to be framed on it. If it is not admitted or if it is denied, the Court must frame an issue upon it. If it is neither admitted nor denied, it shall, by virtue of the provisions of O. 8, r. 5, be taken to be admitted (t). But the rigour of O. 8, r. 5, is considerably relaxed by the proviso to that rule, and the Court may in special cases require the plaintiff to prove it in the ordinary way (u), in which case an issue must be framed.

"The duty of raising issues rests under the Code of Civil Procedure on the Court, and it would be unsafe to presume from the failure of the Court to raise the necessary issues an intention of the defendant to admit the facts which the plaintiff was bound to prove" (v).

Where a material allegation in the plaint is "denied" in the written statement, but no issue is framed in respect thereof.—Where a material fact stated in the plaint is denied in the written statement, the Court must frame an issue on the fact denied. What is the consequence if no issue is framed on the fact? The answer depends on the following considerations. If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the Court, and the Court decides the point, *as if there was an issue framed on it*, the decision will not be set aside in appeal on the ground merely that no issue was framed on the fact. The reason is that mere omission to frame an issue is not fatal to the trial of a suit (w). But if the point denied in the written statement is not tried at all, or where it is tried, it is tried imperfectly so as to cause failure of justice, the case will in appeal be remanded for a re-trial after framing the necessary issue (x). In other words, omission to frame an issue is an *irregularity* which may or may not affect the disposal of a suit on the merits. If it does, the appellate Court should remand the case for a new trial to the lower Court after framing the necessary issue. If it does not, the appellate Court should not remand the case (s. 99). In *Mitna v. Syud Fuzl* (y) their Lordships of the Privy Council said:—

"In this case the omission to raise the issues was brought before the notice of the appellate Court; the appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret, that the Principal Sudder Ameen had omitted to settle the issues. The [appellate] Court, however, nevertheless conceived that it was not under any positive obligation to remand the case: but seeing that *the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the appellate Court correctly drawn from that evidence*, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th section [now O. 41, r. 25]

(s) *Oolagappa v. Arbutnot* (1875) 14 B. L. R. 115, 1 I. A. 268.

(t) See *Apaji v. Apa* (1902) 26 Bom. 735.

(u) *Natha v. Jodha* (1884) 6 All. 406; *Anund-moyee v. Sheeb Chunder* (1862) 9 M. I. A. 301; *Madho Persad v. Gajudhar* (1885) 11 Cal. 111, 118, 11 I. A. 186.

(v) *Ganoo v. Shri Dev Sidheswar* (1902) 26 Bom.

380.

(w) *Mitna v. Syud Fuzl* (1870) 13 M. I. A. 573; *Katchekalejana v. Kachinjaya* (1869) 12 M. I. A. 495; *Balmakund v. Dalu* (1903) 25 All. 498; *Chandra Kumwar v. Narpal Singh* (1907) 29 All. 184, 34 I. A. 27.

(x) *Rewan v. Jankee* (1866) 11 M. I. A. 25.

(y) (1870) 13 M. I. A. 573, 583.

O. 14,
rr.1-3

of the Civil Procedure Code. *Their Lordships think that, under all the circumstances of the case, substantial justice having been done, there has not been that fatal mis-trial of the cause which vitiates all the proceedings and renders a new trial necessary."*

Wrong issue.—If the first Court frames and tries wrong issues, the appellate Court should lay down the proper issues, and remand the case for a new trial (2). It is, however, different where the first Court frames a wrong issue for decision, but it appears from the judgment that there is a finding on the point which would have been raised if the correct issue had been framed. In such a case the appellate Court may not remand the case (a).

Issue where case disclosed in evidence is different from that disclosed in plaint.—If a case not alleged by the plaintiff in his plaint is disclosed in the evidence, the Court ought not to allow the plaintiff to set up that case without raising a specific issue on it, and giving the defendant an opportunity of meeting it (b).

2. [S. 146, 6th para.] Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

The words "or any part thereof" are new.

3. [S. 147.] The Court may frame the issues from all or any of the following materials :—

Issues of law and of fact.
Materials from which issues may be framed.

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;
- (c) the contents of documents produced by either party.

Issues must not be inconsistent with pleadings.—It is a fundamental rule of law that the decision in a suit "should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made." And since the decision in a suit proceeds upon the *findings of issues* in that suit, it follows that the issues must in all cases be consistent with the pleadings. Where issues are framed from the pleadings, there is no danger of their being inconsistent with the pleadings (c). It is in framing issues from the other materials indicated in the rule that care should be taken that the issues are not inconsistent with the pleadings (d). Thus if A

(2) *Beer Chunder v. Tarinee* (1869) 11 W. R. 20.

(a) *Yashu v. Ganesh* (1897) 21 Bom. 325.

(b) *Parashram v. Miraji* (1896) 20 Bom. 569.

(c) *Eshen Chunder v. Shama Churn* (1866) 11 M. I. A. 7 ; *Joytara v. Mahomad* (1884) 8 Cal. 975.

(d) *Modhe v. Dongre* (1881) 5 Bom. 609 ; *Nehoru v. Radha* (1880) 5 Cal. 64.

O. 14,
rr. 3-5.

sues *B* to set aside a document on the ground that it was *not executed* by him and that it is a forgery, the Court should not raise an issue as to whether the document was *executed under coercion or undue influence*. The latter issue pre-supposes that the document was executed, while the plaintiffs case as set up in the plaint is that it was *not executed* by him at all (*e*). But the plea that the document in suit was obtained by the defendant by fraud is not inconsistent with the plea that it was obtained by undue influence. Therefore where fraud is pleaded in the plaint, and the plaintiff's counsel alleges at the hearing that the plaintiff was subjected to undue influence, the Court may allow issues both as to fraud and undue influence (*f*).

Appeal.—No appeal lies from an order refusing to frame an issue asked for by a party to a suit (*g*).

It was held by the High Court of Madras in one case that an appeal lies under ci. 15 of the Letters Patent from an order made at the settlement of issues fixing a distant date for the hearing of the suit (*h*). But this decision has been disapproved in later cases (*i*).

4. [s. 148.] Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

Court may examine witnesses or documents before framing issues.

5. [s. 149.] (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

Power to amend and strike out issues.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Sub-rule (1).—The first part of sub-rule (1) leaves it to the discretion of the Court to amend the issues or frame additional issues as appears from the word "may," while the latter part makes it imperative on the Judge to amend the issues and frame additional issues as appears from the word "shall" (*j*).

(e) *Wali-ul-lah v. Muhammad* (1888) 10 All. 627; *Mahomed Baksh v. Hoossein* (1888) 15 Cal. 684, 15 I. A. 81.

(f) *Muhammad Ibrahim v. Umatullah Jan* (1917) Punj. Rec., no. 90, p. 860. In this case not only no amendment of the pleadings was directed, but one consolidated issue was allowed to be raised comprising pleas both of fraud and undue influence—a

highly objectionable procedure indeed.

(g) *Ebrahim v. Fackhrunnissa* (1878) 4 Cal. 531; *Tuljaram v. Alagappa* (1910) 35 Mad. 1.

(h) *R. v. R.* (1891) 14 Mad. 88.

(i) *Durga Prasad v. Mallikarjuna* (1901) 24 Mad. 368, 359; *Tuljaram v. Alagappa* (1910) 35 Mad. 1, 8, 19.

(j) *Shamu Patter v. Abdul Kadir* (1912) 35 Mad. 607, 39 I. A. 218.

O. 14,
rr. 5. 6. **May amend the issues or frame additional issues.**—A Judge *may*, under the first part of sub-rule (1), amend an issue or frame an additional issue, even if the issue proposed to be added or amended relates to a matter not disclosed by the pleadings. This, however, can only be done under special circumstances, when no injustice would be done to either party (*k*). It follows from this that a Judge should not frame any additional issue so as to make for either party a case which he had no intention of making for himself (*l*). Nor should he frame an additional issue so as to convert a suit or defence of one character into a suit or defence of a different and inconsistent character. Thus if *A* sues *B* for damages for wrongful occupation of his land, treating *B* as a trespasser, he should not be allowed to raise an additional issue claiming rent of the land from *B*, treating him as his tenant (*m*). But if a suit is brought on a mortgage, and it transpires at the hearing that the witnesses to the mortgage deed were not present at its execution, but had put their names on the document on the acknowledgment by the executant of his signature, it is perfectly competent to the Judge to frame an additional issue as to whether the deed of mortgage was valid under s. 59 of the Transfer of Property Act, though the invalidity of the deed is not set up as a defence in the written statement. Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties (*n*).

At any time before passing the decree.—An additional issue may be raised even after the close of the arguments on the case (*o*).

6. [S. 150.] Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that upon the finding of the Court in the affirmative or the negative of such issue,—

Questions of fact or law
may by agreement be
stated in form of issues.

- (a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

(k) *Nehora v. Radha* (1880) 5 Cal. 64.
(l) *Naro Hari v. Anpurnabai* (1874) 11 Bom. 160, 164.
(m) *Narayan v. Hari* (1899) 18 Bom. 664.

(n) *Shamu Patter v. Abdul Kadir* (1912) 35 Mad. 607, 39 I. A. 218.
(o) *Shamu Patter v. Abdul Kadir* (1912) 35 Mad. 607, 611-612, 39 I. A. 218.

Form.—As to form of agreement for issues to be tried, see App. H, form No. 1.

O. 14,
rr. 6, 7.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. [S. 151.] Where the Court is satisfied, after making such inquiry as it deems proper,—

- (a) that the agreement was duly executed by the parties,
- (b) that they have a substantial interest in the decision of such question as aforesaid, and
- (c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

ORDER XV.

Disposal of the Suit at the first hearing.

O. 15,
rr. 1-3.

1. [S. 152.] Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the

Parties not at issue.

Court may at once pronounce judgment.

2. [S. 153.] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once

One of several defendants not at issue.

pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

Admission of claim by one of several defendants.—A sues B and C upon a promissory note jointly passed by them. B appears and admits the claim, and a decree is passed against him. The decree against B is no bar to the further prosecution of the suit against C (p). See notes to O. 1, r. 8, "Joint liability on a contract," p. 345 above.

3. [S. 154.] (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further

Parties at issue.

O. 15, rr. 3, 4. argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

4. [S. 155.] Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

Failure to produce evidence.

ORDER XVI.

Summoning and Attendance of Witnesses.

O. 16, r. 1. 1. [S. 159.] At any time after the suit is instituted the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

Summons to attend to give evidence or produce documents.

Difference between the old section and the present rule.—This rule corresponds with s. 159, C. P. C., 1882, except as to the time for application for witness-summons, for which see next paragraph.

O. 16,
rr. 1, 2.

Time for application for witness-summons.—Under s. 159 of the Code of 1882, the application for summonses to witnesses was to be made *after* the summons was delivered or sent for service on the defendant *and before* the day fixed in the summons for the appearance of the defendant. Under the present rule, the application may be made *at any time after the institution of the suit*.

Whether witness-summons can be refused—A party is entitled as of right to summonses to witnesses (g). So long as the application is made after the institution of the suit, the Court is bound to issue the summons. It does not matter that the party had himself originally undertaken to bring his witnesses and has failed to do so (r). Nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal on the suit (s). The Court may in either of these cases refuse to *adjourn the hearing* for the attendance of the witnesses, but it has no power to refuse to *issue summonses* (t). The only case in which the Court has power to refuse to issue summonses is where the application is not made *bona fide*, as where a decree-holder attaches property belonging to a *muth*, and, on the head of the *muth* objecting to the attachment, applies to summon him as his own witness with the sole object of putting pressure upon him, by requiring his personal attendance in Court, to relinquish his claim. In such a case the Court may, in the exercise of its inherent power to prevent the abuse of its own process [s. 151], refuse to issue the summons (u).

Remedy of party when witness-summons refused.—Where a party applies for summonses to witnesses, but the application is refused, he cannot appeal from the *order of refusal*. He must wait until the suit is disposed of, and if the decree in the suit goes against him, he may appeal from the *decree*, and set forth the refusal of the lower Court to issue summonses as a ground of objection in the memorandum of appeal (s. 105). If the appellate Court finds that the refusal *has* injuriously affected the decision of the case, it may set aside the decree, and direct the lower Court to issue the summonses; but if it finds that the refusal has not injuriously affected the decision, it should not interfere with the decree (v) [see s. 99].

Form of summons to witnesses.—See Schedule I, App. B, No. 13.

2. [S. 160.] (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Expenses of witness to be paid into Court on applying for summons.

(2) In determining the amount payable under this rule the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in

Experts.

(g) *Bai Kal v. Alarakh* (1891) 15 Bom. 86.
(r) *Pandurang v. Keshavji* (1882) 6 Bom. 742.
(s) *Krishna v. Protap Chunder* (1881) 7 Cal. 560.
(t) *Bhagwat v. Debi* (1894) 16 All. 218; *Kaji-*

Ahmad v. Kaji Mahamad (1885) 9 Bom. 308.
(u) *Veerabadran v. Nataraja* (1904) 28 Mad. 28.
(v) *Bhagwat v. Debi* (1894) 16 All. 218.

O 16, giving evidence and in performing any work of an expert
rr. 2-4. character necessary for the case.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

Scale of expenses.

Sub-rule (2) is new.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (3)].

Travelling and other expenses.—A witness is entitled under this rule only to travelling expenses and other expenses of a similar nature, but he is not entitled to compensation for loss of time (*w*). The right to claim travelling expenses is not lost merely because the witness did not apply for them before giving his evidence. The reason is that a witness is entitled to demand his travelling expenses at any time even after he has given his evidence (*x*). And if a witness is summoned by the plaintiff, he is entitled to claim his travelling expenses from the plaintiff, though he may not be examined by the plaintiff, and is examined by the defendant as his witness (*y*).

Remedy of witness if travelling expenses not paid.—The only remedy is by an application to the Court that heard the case; no separate suit will lie to recover such expenses (*z*).

3. [S. 161.] The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness.

4. [S. 162.] (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Procedure where insufficient sum paid in.

(w) *Nasim v. Prosononarain* (1865) 2 Hyde, 236.
(z) *London, Bombay and Mediterranean Bank v. Mahomed* (1880) 4 Bom. 619.

(y) *In re Bullock* (1904) 28 Bom. 647.
(z) *Dubois v. Hurriah Chunder* (1866) 5 W. R. Ref. 6.

O. 16,
rr. 4-8.

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Expenses of witnesses detained more than one day.

5. [S. 163.] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Time, place and purpose of attendance to be specified in summons.

Where hearing is postponed.—When a witness attends Court in pursuance of a summons on the day specified in the summons, but the case is not reached on that day, it is not necessary to issue a fresh summons. He need only be warned that his attendance will be required on the day to which the hearing may be postponed (a).

6. [S. 164.] Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Summons to produce document.

7. [S. 165.] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

Power to require persons present in Court to give evidence or produce document.

8. [S. 166.] Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of

Summons how served.

O 16, service shall apply in the case of all summonses served under
rr. 8-10. this rule.

9. [S. 167.] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Time for serving summons.

10. [S. 168.] (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

Procedure where witness fails to comply with summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.

Appeal.—An appeal lies from an order under this rule for the attachment of property [O. 43, r. 1, cl. (g)].

If witness appears attachment may be withdrawn.

11. [S. 169.] Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

O. 16,
rr. 11-13.

- (a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and
- (b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

12. [S. 170.] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Procedure if witness fails to appear.

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

Order releasing property from attachment.—In a case under the Code of 1882 the Court accepted the fine and costs even after sale of the property attached and refused to confirm the sale, the price realised at the sale being absurdly low. The auction purchaser appealed from the order, but it was held that no appeal lay from the order (b). If a similar case arises under the new Code, it will have to be considered in the light of rule 13 of this Order and of O. 21, r. 89 [which cannot apply unless the Crown is regarded as a decree-holder], r. 90 and r. 92.

13. [New.] The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are

Mode of attachment.

O. 16, applicable, be deemed to apply to any attachment and sale
rr. 13-17. under this Order as if the person whose property is so attached
were a judgment-debtor.

14. [S. 171.] Subject to the provisions of this Code as
to attendance and appearance and to any
law for the time being in force, where the
Court at any time thinks it necessary to
examine any person other than a party to
the suit and not called as a witness by a party to the suit
the Court may, of its own motion, cause such person to be
summoned as a witness to give evidence, or to produce any
document in his possession, on a day to be appointed, and
may examine him as a witness or require him to produce such
document.

Court may of its own
accord summon as witness
strangers to suit.

15. [S. 172.] Subject as last aforesaid, whoever is
summoned to appear and give evidence in
a suit shall attend at the time and place
named in the summons for that purpose
and whoever is summoned to produce a
document shall either attend to produce it, or cause it to be
produced, at such time and place.

Duty of persons sum-
moned to give evidence or
produce document.

16. [S. 173.] (1) A person so summoned and attend-
ing shall, unless the Court otherwise directs,
attend at each hearing until the suit has
been disposed of.

When they may depart.

(2) On the application of either party and the payment
through the Court of all necessary expenses (if any) the Court
may require any person so summoned and attending to furnish
security to attend at the next or any other hearing or until
the suit is disposed of and, in default of his furnishing such
security, may order him to be detained in the civil prison.

Sub-rule (2),—This sub-rule is new.

17. [Ss. 174-175.] The provisions of rules 10 to 13
shall, so far as they are applicable, be
deemed to apply to any person who having
attended in compliance with a summons
departs. without lawful excuse, in contravention of rule 16.

Application of rules 10
to 13.

18. [S. 174, 5th para.] Where any person arrested **O. 16,**
under a warrant is brought before the Court **rr. 18-21.**

Procedure where witness apprehended cannot give evidence or produce document.

in custody and cannot owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

19. [S. 176.] No one shall be ordered

No witness to be ordered to attend in person unless resident within certain limits.

to attend in person to give evidence unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

20. [S. 177.] Where any party to a suit present in

Consequence of refusal of party to give evidence when called on by Court.

Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Appeal.—An appeal lies from an order under this rule pronouncing judgment against a party [O. 43, r. 1, cl. (h)].

21. [S. 178.] Where any party to a suit is required

Rules as to witnesses to apply to parties summoned.

to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

Duty of suitors to give evidence on their own behalf.—In *Lal Kunwar v. Chiranjil Lal* (c), their Lordships of the Privy Council severely condemned the practice

O. 16, r. 21. followed in some parts of India of advocates omitting to call their own client as a witness in the hope of forcing their opponents to call him as their witness in order that they themselves may have the opportunity of cross-examining their own client when called by the other side. Referring to this practice, their Lordships said: "It is a vicious practice, unworthy of a high-toned or respectable system of advocacy. It must embarrass and perplex judicial investigation, and, it is to be feared, too often enables fraud, falsehood, or chicane to baffle justice."

Additional rule framed by the Allahabad High Court under s. 122.—
Appendix V below.

ORDER XVII.

Adjournments.

O. 17,
rr. 1, 2.

1. [S. 156.] (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Court may grant time
and adjourn hearing.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Costs of adjournment.

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

2. [S. 157.] Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Procedure if parties fail
to appear on day fixed.

"One of the modes directed by Order IX."—The effect of this rule is to assimilate the procedure in cases where there is default of appearance at an adjourned hearing with that in cases where there is such default at the first hearing. The result is that though a party may have appeared at the first hearing, but fails to appear at an

adjourned hearing, the procedure laid down in Order 9 will apply, that is to say, where a plaintiff fails to appear at an adjourned hearing, the Court may make an order dismissing the suit under this rule and O. 9, r. 8, and the plaintiff may, if so advised, then apply under this rule and O. 9, r. 9, for an order to set the dismissal aside (d); and where a defendant fails to appear at an adjourned hearing the Court may pass a decree *ex parte* under this rule and O. 9, r. 6, and the defendant may, if so advised, then apply under this rule and O. 9, r. 13, for an order to set it aside (e). If both parties fail to appear at the hearing, the Court may make an order dismissing the suit under this rule and O. 9, r. 3, and the plaintiff may then, if so advised, either bring a fresh suit, or apply for an order to set the dismissal aside under this rule and O. 9, r. 4 (f).

Or make such other order as it thinks fit.—It has been held by the High Court of Bombay that the words “*may proceed*” show that it is *not obligatory* on the Court to proceed in the manner directed by Order 9: rather, the Court should in each case exercise its *discretion* as to whether it should proceed under that Order or make some other order. Thus it will be a bad exercise of discretion if an order is made dismissing the suit under this rule and O. 9, r. 8, when the plaintiff has at the first hearing made a case which, if uncontradicted, would entitle him to a decree, but neither he nor his pleader appears at an adjourned hearing. The Court should in such a case proceed to decide the case *on its merits*, and not dismiss it for *default of appearance* (g). On the other hand, it has been held by the High Court of Allahabad that the words “*or make such other order as it thinks fit*” do not empower the Court to dispose of the suit *on the merits*, but enable the Court merely to grant a *further adjournment*, and if the Court is not inclined to grant a further adjournment, the only course left open to the Court is to dismiss the suit under this rule and O. 9, r. 8 (h).

“Adjourned” hearing.—It has been held by the High Court of Calcutta that the word “adjourned” in this rule refers to an adjournment *upon the application of parties* granted under r. 1, and not an adjournment necessitated by the rules of the Court relating to the regulation of its own business (i).

“Fail to appear.”—See notes to O. 9, r. 9, “Meaning of appearance,” on p. 451 above. It cannot be said that a decree passed against a defendant is an *ex parte* decree within the meaning of O. 9, r. 6, where at an adjourned hearing of a part-heard suit the plaintiff's case being closed, and the defendant's case being partially entered, the defendant's pleader applies for an adjournment, and on the application being refused he withdraws from the case, and a decree is passed against the defendant *on the merits*. It is not open to the defendant in such a case to apply to have the decree set aside under this rule and O. 9, r. 13 (j).

Remedy.—See notes to the next rule under the head “Remedy.”

3. [s. 158.] Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the

Court may proceed notwithstanding either party fails to produce evidence, etc.

- (d) *Ryall v. Sherman* (1877) 1 Mad. 287; *Ramaya v. Rangayya* (1884) 7 Mad. 411; *Marianissa v. Ramkalpa* (1907) 34 Cal. 235; *Nagendra Kumar v. Nabin Mandal* (1909) 86 Cal. 189.
(e) *Bhagwan v. Hira* (1897) 19 All. 355; *Hildreth v. Sayaji* (1896) 20 Bom. 380; *Jonardan v. Ramdhons* (1896) 23 L. J. 38, followed

- in *Enatulla v. Jiban* (1914) 41 Cal. 956.
(f) *Atwar v. Seshamma* (1887) 10 Mad. 270.
(g) *Ningappa v. Gowdappa* (1905) 7 Bom. L. R. 261. See also *Pichamma v. Sreeramulu* (1918) 41 Mad. 280, 291.
(h) *Phul Kuar v. Hashmatullah* (1915) 37 All. 460.
(i) *Sreemutty v. Sreemutty* (1898) 2 C. W. N. 490.
(j) *Kader Khan v. Juggeswar* (1908) 35 Cal. 1023.

O. 17,
rr. 2, 3.

- O. 17, r. 3. suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Scope of the rule.—The provisions of this rule do not apply unless—

(1) the hearing is adjourned on the application of a party to the suit, as distinguished from an adjournment by the Court of its own motion (k);

(2) the adjournment is granted to enable the party to produce his evidence or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit; and

(3) the party fails to perform any of the acts for which the adjournment was granted within the time allowed by the Court.

"Any other act."—A sues B to recover possession of certain lands. B contends that the suit is not properly valued. The Court thereupon appoints a commissioner, on the application of A, to value the land, and directs A to pay into Court Rs. 100, being the commissioner's fee, within a specified time. If A fails to make the payment within the prescribed time, the Court may proceed under this rule. The payment of the commissioner's fee is an act necessary to the further progress of the suit within the meaning of this rule (kk).

Procedure to be followed under this rule.—Rule 2 applies to cases where the hearing is adjourned, *no matter for what purpose*, and the parties or any of them fail to appear at the adjourned hearing. The present rule contemplates cases where the hearing is adjourned at the instance of a party for some one or other of the purposes specified in the rule, and the party fails to perform the specified act or acts for which the adjournment was granted within the time allowed by the Court. In such a case, the rule says, "the Court may, notwithstanding such default, proceed to decide the suit forthwith." These words do not mean that the Court may dismiss the suit if the plaintiff is in default, or pass a decree against the defendant if the defendant is in default. What the words mean is that the Court may further adjourn the hearing, or, it may, without granting any further adjournment, proceed to try the suit and take such evidence as may be tendered by the parties and decide the suit on the merits (l). Thus where an adjournment is granted to the plaintiff to amend the plaint, but the plaintiff fails to amend the plaint, the Court should not dismiss the suit, but decide it on the merits (m). The word "forthwith" means "without granting any further adjournment." Contrast the words "at once pronounce judgment" in O. 15, r. 4.

Remedy.—Where a suit is disposed of under the first part of r. 2 above, it is open to the party aggrieved by the order to proceed under O. 9, r. 9 or O. 9, r. 13, as the case may be [see notes to r. 2 under the head "One of the modes directed by Order 9"]. But where a case is decided under the present rule, the decision amounts to a decree, and the remedy of the party aggrieved is by way of appeal (n) or by way of review (o). As to what points may be taken in appeal and what on the application for review, see the undermentioned case (p).

- (k) *Pearee v. Shama Churn* (1872) 19 W. R. 35.
 (kk) *Shaik Sahab v. Mahomed* (1890) 13 Mad. 510. Cf. *Virabhadrapa v. Chinnamma* (1898) 21 Mad. 403.
 (l) *Stara v. Tulshi* (1901) 23 All. 462; *Ram Narain v. Jagdeo* (1911) 33 All. 690. See, however, *Nagendra Kumar v. Nabin Mandal* (1909) 36 Cal. 189, 191-92; *Pichamma v. Sreeramulu* (1918) 41 Mad. 286, 292. See also *Naturang v. Bhakhoni* (1919) 4 Pat. L. J. 277; *Shaikh Muhammad v. Chulhai Mahlo* (1919) 4 Pat.

- L. J. 712.
 (m) (1919) 4 Pat. L. J. 277, *supra*.
 (n) *Lalla Prasad v. Nand Kishore* (1899) 22 All. 66; *Gaura Bibi v. Ghasita* (1911) 34 All. 123; *Pichamma v. Sreeramulu* (1918) 41 Mad. 286, 292; *Sukku v. Ram Lotan* (1919) 41 All. 663.
 (o) *Pichamma v. Sreeramulu* (1918) 41 Mad. 286, 292.
 (p) *Pichamma v. Sreeramulu* (1918) 41 Mad. 286 292-293.

Case where "default under this rule" is coupled with "default of appearance under rule 2."—If the hearing of a suit is adjourned on the application of the plaintiff to enable him to *produce his evidence*, and if on the date to which the hearing is adjourned the plaintiff *does not appear*, should the Court proceed under this rule or under rule 2? It has been held by the High Court of Allahabad that the Court should in such a case proceed under this rule, on the ground, it would appear, that time was granted to the plaintiff to *produce his evidence* and that this was sufficient to bring the case within this rule though the plaintiff *had failed to appear* (g). On the other hand, it has been held by the High Court of Madras that the Court should in such a case proceed under rule 2 and dismiss the suit *for default of appearance* on the part of the plaintiff, in which case the plaintiff will have an opportunity to apply to the Court under O. 9, r. 9, to set aside the dismissal (r). This view is in accordance with the earlier decisions of the Calcutta and Bombay High Courts (s). In recent cases, however, the latter Courts have held that where an adjournment is granted at the instance of a party for any of the purposes stated in r. 3, and either party fails to appear at the adjourned hearing, the Court should, if there are materials enabling it to decide the suit, act under this rule and not rule (2)(t). If the Court does not do so, and dismisses the suit for default of appearance, then according to the Patna High Court the dismissal must be treated as one under r. 2 of this Order (u). If there be no sufficient materials on the record to enable the Court to proceed to judgment as required by this rule, the Court, according to the Chief Court of Punjab, should proceed under r. 2 above and not under the present rule (v).

"To whom time has been granted."—Where a party has paid the process fee for summoning witnesses, but the witnesses are not served, and the Court adjourns the hearing to enable its officer to serve the summonses, the adjournment does not amount to granting of time within the meaning of this rule and the rule does not apply (w).

Execution proceedings—The provisions of this Order do not apply to execution proceedings (x).

ORDER XVIII.

Hearing of the Suit and Examination of Witnesses.

1. [S. 179, Expln.] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

- (g) *Badam v. Nathu* (1903) 25 All. 194; *Sukhu v. Ram Ratan* (1919) 41 All. 663.
 (r) *Chandramathi v. Narayanasami* (1900) 33 Mad. 241; *Pichamma v. Sreeramulu* (1918) 41 Mad. 100 [F. B.], overruling *Naganada v. Krishnamurti* (1910) 34 Mad. 97.
 (s) *Marian v. a v. Rampaka* (1907) 34 Cal. 236; *Shrimant Sagajirao v. Smith* (1890) 20 Bom. 736.
 (t) *Enatulla v. Jiban* (1914) 41 Cal. 956, 962; *Ningappa v. Gowdappa* (1905) 7 Bom. L.

- R. 261.
 (u) *Shaikh Muhammad v. Chulhai Mahlo* (1919) 4 Pat. L. J. 712.
 (v) *Hargopal v. Harish Chander* (1919) Punj. Rec. no. 48, p. 120; *Sher Ali v. Mangu* (1919) Punj. Rec. no. 150, p. 395.
 (w) *Haryas Rai v. Narain Singh* (1915) Punj. Rec. o. 51, p. 234.
 (x) *Tirthasami v. Annappayya* (1895) 13 Mad. 131.

O. 18,
rr. 1-3.

Right to begin.—The right to begin is to be determined by the rules of evidence. As a general rule the party on whom the burden of proof rests should begin. Sections 101-114 of the Indian Evidence Act I of 1872 deal with burden of proof. Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side. Thus if *A* sues *B* for the recovery of a piece of land of which *B* is in possession, the burden of proof lies on *A*, for if no evidence were given on either side, *B* would be entitled to retain his possession.

“Unless the defendant admits the facts alleged by the plaintiff.”—“Facts” mean “all material facts.” Thus where a defendant admits only *some* of the facts alleged by the plaintiff, it does not give him the right to begin (*y*).

Preliminary issue raised by defendant that suit does not lie.—Where the defendant raises a preliminary issue that the suit is barred as *res judicata*, the defendant has the right to begin (*z*).

Preliminary issue raised by respondent that appeal does not lie.—In such a case, according to the Bombay High Court, the appellant has the right to begin. The decision was put on the ground of established practice in the Bombay High Court (*a*).

2. [s. 179, 1st para., s. 180, 1st and 2nd paras.] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

“The other party shall then state his case.”—Where there are two sets of defendants and their interests are practically the same, the rule is that after the plaintiff has closed his case, both the defendants should state their case before any evidence is given by either defendant (*b*).

Some of the defendants supporting plaintiff's case.—Where there are several defendants and some of them support the plaintiff's case, the rule is that the plaintiff and such of the defendants as support his case, wholly or in part, must address the Court and call their evidence in the first place, and then “the other party,” that is, the other defendants, should address the Court and call their evidence (*c*).

3. [s. 180, 3rd para.] Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce

(y) *Aghore v. Prem Chund* (1880) 7 C. L. R. 274.
(z) *Fatmabai v. Aishabai* (1888) 12 Bom. 454.
(a) *Rustomji v. Kesavaji* (1884) 8 Bom. 287, 299.

(b) *Re Dukshina* (1902) 29 Cal. 32.
(c) *Haji Bibi v. Sultan Mahomed Khan* (1908) 32 Bom. 599.

his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

O. 18,
rr. 3-5.

4. [S. 181.] The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

Witness to be examined in
open Court.

Evidence of witnesses.—It is the duty of the Judge to examine every witness tendered, unless it appears clearly that the object of summoning a large number of witnesses is to obstruct or delay justice (*d*). It is not right for the Judge to select a certain number of witnesses and send away the rest, because he thinks that they would only prove the same facts as those already deposed to (*e*), or because he is satisfied on the evidence already recorded (*f*). If he does so, the appellate Court may remand the case with a direction to him to take the evidence of the witnesses tendered by the party, but not examined by the Judge (*g*).

Evidence shall be taken "in open Court."—As to the examination of witnesses "on commission," see Order 26 below.

5. [S. 182.] In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

How evidence shall be
taken in appealable cases.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

Presence of parties.—Where evidence is taken in the absence of the opposite party, it will be rejected by the Court of appeal, if the objection to the reception of the evidence was taken before the Court trying the suit. If no such objection was taken the appellate Court would not remand the case especially if the other evidence in the case is sufficient to support the decision of the lower Court (*h*). See Indian Evidence Act, 1872, s. 167.

(*d*) *Raddhan v. Rajballab* (1870) 6 B. L. R. App. 10.

(*e*) *Jeswant v. Jet Singjee* (1841) 2 M. I. A. 427.

(*f*) *Brj Soondur v. Kinoonnissa* (1874) 23 W.

R. 63.

(*g*) *Khuda Baksh v. Inam Ali* (1887) 9 All. 339.

(*h*) *Bommarauze v. Rangasamy* (1855) 6 M. I. A. 232.

O. 18,
rr. 5-8.

"Shall be read over."—There is a difference of opinion whether, if the deposition is not read over to the witness as required by this rule or interpreted to him as required by r. 6 below, it is admissible in evidence in trials for perjury and forgery, it being held in some cases that the deposition is not admissible in evidence (i), while in others that it is (j). The former class of decisions proceed on the ground that the deposition not being read over or interpreted to the witness, it does not prove itself under s. 80 of the Evidence Act, 1872, and that it cannot be proved in any other way having regard to the provisions of s. 91 of that Act. The latter class of decisions proceed on the ground that though the deposition does not in such a case prove itself under s. 80 of the Evidence Act, it may be proved in any other way, e.g., by the Judge who took it down, and that s. 91 of the Act is no bar to such proof.

Where a witness understands English and the deposition is read over by him instead of being read over to him, it is a substantial compliance with the rule (k).

Signature of witness.—The rule does not require a witness to sign his evidence (l).

Signature of Judge.—A prosecution for perjury cannot be sustained if the deposition is not signed by the Judge. The signing of the deposition by the Judge is made essential to the application of s. 80 of the Evidence Act, 1872, by the section itself (m).

6. [S. 183.] Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

When deposition to be interpreted.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

"Shall be interpreted."—See notes to r. 5 above, "Shall be read over."

7. [New.] Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

Evidence under section 138.

8. [S. 184.] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum when evidence not taken down by Judge.

(i) *Empress v. Mayadeb* (1881) 6 Cal. 782 [deposition not even signed by the Judge];
Kamatchinathan v. Emperor (1904) 28 Mad. 308; *Emperor v. Jogendra Nath* (1914) 42 Cal. 240; *Naluri v. King-Emperor* (1919) 42 Mad. 561.
(j) *Elaki Bakh v. Emperor* (1918) 45 Cal. 825;

Bogra v. Emperor (1910) 84 Mad. 141;
Meango v. Baviah (1918) Mad. W. N. 237.
(k) *Ramesh Chandra v. Emperor* (1919) 46 Cal. 895, 901.
(l) 46 Cal. 895, 900, *Supra*.
(m) *Empress v. Mayadeb* (1881) 6 Cal. 782.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)]. **O. 18, rr. 8-12.**

9. [S. 185.] Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

When evidence may be taken in English.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

10. [S. 186.] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

Any particular question and answer may be taken down.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

11. [S. 187.] Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Questions objected to and allowed by Court.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

Where no objection is taken.—If evidence has been admitted *without objection* in the Court of first instance, it must not be rejected by the appellate Court (n).

12. [S. 188.] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Remarks on demeanour of witnesses.

O. 18,
rr. 13-16.

13. [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum of evidence
in unappealable cases.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

14. [S. 190.] (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

Judge unable to make
such memorandum to record
reasons of his inability.

(2) Every memorandum so made shall form part of the record.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

15. [S. 191.] (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

Power to deal with evi-
dence taken before another
Judge.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

Chartered High Courts.—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

16. [S. 192.] (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction

Power to examine witness
immediately.

of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided. O. 18,
rr. 16-18.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same and shall sign it, and it may then be read at any hearing of the suit.

Chartered High Courts.—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (4)].

Notice.—For form of notice, see App. H, form No. 6.

17. [S. 193.] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

Court may recall and examine witness.

18. [New.] The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

Power of Court to inspect.

View by Judge.—This rule does not entitle a Judge to put a view *in the place* of evidence. Thus in an action of deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's, the conclusion of the Judge, on a view by him of the two articles—such as two rival omnibuses, that the defendant's article is calculated to deceive, is not sufficient by itself to support an injunction. The Judge must be satisfied by *independent evidence* that there is at least a reasonable probability of deception (o).

ORDER XIX.

Affidavits.

1. [S. 194.] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may

Power to order any point to be proved by affidavit.

O. 19, r. 1.

O. 19, rr. 1-3. be read at the hearing, on such conditions as the Court thinks reasonable :

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. [S. 195.] (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

Power to order attendance of deponent for cross-examination.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

3. [S. 196.] (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted : provided that the grounds thereof are stated.

Matters to which affidavits shall be confined.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

Grounds of belief.—The grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief (p).

ORDER XX.

Judgment and Decree.

O. 20, r. 1. 1. [S. 198.] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

Judgment when pronounced.

See s. 33 above.

O. 20,
rr. 1-2.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (5)].

General rule.—As a general rule, judgment must be given upon evidence taken by the Judge before himself, and not upon evidence taken before another person (q).

Exceptions to the above rule.—In the three following cases the Judge may give judgment upon evidence recorded by some other Judge or person :—

- (1) Under O. 18, r. 15, when the Judge taking down evidence is prevented by death, transfer or other cause from concluding the trial of the suit.
- (2) Under O. 26, r. 1, where the evidence has been taken by a *commissioner* of a witness residing *within* the jurisdiction who is exempted under the Code from attending the Court or is unable to attend from sickness or infirmity.
- (3) Under O. 26, r. 4, where the evidence has been taken by a *commissioner* of a witness residing *beyond* the jurisdiction and of other persons specified in the rule.

Judgment not pronounced.—A judgment not pronounced in Court does not operate as a judgment at all; it operates only as minutes or memoranda made by the Judge who wrote it (r).

Non-compliance with rules 1, 2 and 3.—Where a judgment is not pronounced, dated, or signed in conformity with the requirements of the Code, it constitutes a mere irregularity within the meaning of s. 99; it affords no ground for reversal of the decree based on it (s).

Power to pronounce judgment written by Judge's predecessor

2. [S. 199.] A Judge may pronounce a judgment written but not pronounced by his predecessor.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (5)].

Written by his predecessor.—It does not matter that the judgment was written by the Judge's predecessor after he had taken leave or left the judicial post which he occupied when he heard the case or after he had been transferred (t). The fact that the transferred officer himself pronounces the judgment does not make any difference (u).

May pronounce.—The word "may" leaves a Judge the option to pronounce a judgment according to his own view of the case, though it may be different from the judgment written by his predecessor who heard the case (v).

(q) *Naranbhai v. Naroshankar* (1867) 4 B. H. C. A. C. 102.

(r) *Mahomed Akil v. Asadunissa* (1867) 9 W. R. 1 (F. B.).

(s) *Fort Gloster Jute Manufacturing Co. v. Chandra* (1919) 46 Cal. 978.

(t) *Sundar Kuar v. Chandreshwar* (1907) 34 Cal. 298; *Satyendra Nath Ray v. Kastura Kumari* (1908) 35 Cal. 756; *Girja Shanker v. Gopalji*

(1905) 7 Bom. L. R. 951; *Basant v. Secretary of State* (1913) 35 All. 368; *Daya Ram v. Jatti* (1916) Punj. Rec. no. 80, p. 248; *Kishni Bai v. Buihu Ram* (1919) Punj. Rec. no. 80, p. 199.

(u) *Daya Ram v. Jatti* (1916) Punj. Rec. no. 80, p. 248.

(v) *Lachman Prasad v. Ram Kishan* (1910) 33 All. 236.

O. 20, rr. 2-5. **Non-compliance with rules 1, 2 and 3.**—See notes to r. 1 above under the same head.

8. [S. 202.] The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

Judgment to be signed.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (5)].

“Shall not afterwards be altered.”—Where a District Judge delivered a judgment in open Court, but suspended the issue of the decree pending the production by the plaintiff of a certificate of succession, it was held that it was not competent to the Judge to cancel the judgment and deliver another judgment inconsistent with the first (*w*).

Amendment.—S. 152 enables the Court to correct clerical or arithmetical mistakes or errors arising from accidental slips in judgments, decrees or orders. See p. 327 above.

Review.—See s. 114, and O. 47, r. 1.

Non-compliance with rules 1, 2 and 3.—See notes to r. 1 above under the same head.

4. [S. 203.] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of Small Cause Courts

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Judgments of other Courts.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (5)].

Court invested with Small Cause Court powers.—A Court invested with Small Cause Court powers is governed by sub-r. (1), and not sub-r. (2) (*x*).

5. [S. 204.] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding

Court to state its decision on each issue.

upon any one or more of the issues is sufficient for the decision of the suit.

O. 20,
rr. 5-7.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (5)].

Object of judgment.—The proper object of a judgment is to support by the most cogent reasons that suggest themselves the final conclusion at which the Judge has conscientiously arrived. That object is defeated by the Judge elaborately recording the fluctuations of his mind from day to day in reference to the witnesses, the evidence, and the arguments. It is a substantial objection to a judgment that it does not dispose of the question as it was presented by the parties, *e.g.*, when it finds a particular signature to be a forgery which both sides admit to be genuine (*y*).

6. [S. 206, 1st and 2nd paras., S. 221.] (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

Contents of decree.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (5)].

Sub-rule 3.—This sub-rule corresponds to s. 221 of the Code of 1882.

Power to amend decree.—See s. 152 and notes thereto.

7. [S. 205.] The decree shall bear date the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree.

Date of Decree.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (5)].

O. 20,
rr. 8-11.

8. [New.] Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Procedure where Judge
has vacated office before
signing decree.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl. (5)].

9. [S. 207.] Where the subject-matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries by numbers in a record of settlement of survey, the decree shall specify such boundaries or numbers.

Decree for recovery of
immovable property.

Decree for possession of land.—A decree for possession of land carries with it possession of account books and other papers relating to the management of the land (z).

10. [S. 208.] Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Decree for delivery of
movable property.

Decree for delivery of movable property.—This rule contemplates suits for the recovery of *specific* movable property, referred in arts. 48 and 49 of the Limitation Act (a).

11. [S. 210.] (1) Where, and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree, order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Decree may direct pay-
ment by instalments.

(2) After the passing of any such decree the Court may, **O.20, r. 11.**

Order, after decree, for
payment by instalments.

on the application of the judgment-debtor
and with the consent of the decree-holder,
order that payment of the amount decreed
shall be postponed or shall be made by instalments on such
terms as to the payment of interest, the attachment of the
property of the judgment-debtor, or the taking of security
from him, or otherwise, as it thinks fit.

Old section.—This rule corresponds with s. 210 of the Code of 1882 except in the following particulars : —

- (1) The words “shall be postponed” in sub-rules (1) and (2) are new.
- (2) The words “notwithstanding anything contained in the contract under which the money is payable” in sub-rule (1) are also new; see notes below under those words.

“In so far as the decree is for the payment of money.”—This rule applies to money-decrees only and not to mortgage decrees (b).

“Notwithstanding anything contained in the contract under which the money is payable.”—Those words are new. They have been added to over-ride the ruling of the Bombay High Court in *Ragho v. Dipchand* (c). In that case it was held that if A executed a bond to B payable by instalments, with a proviso that if default was made in payment of any one of the instalments, the whole amount should become due and payable forthwith, and if on default being made by A in payment of any one instalment B sued A to recover the whole of the balance due, the Court could not, at the time of passing the decree, order the amount decreed to be paid by instalments, for to do so, it was said, would be inconsistent with the terms of the bond. Under the present rule the Court has the power to order payment of the amount decreed by instalments, notwithstanding the terms of the bond.

Interest.—Where a decree is made payable by instalments under sub-rule (1), the rate of interest is in the discretion of the Court (d).

Sub-rule (2).—After decree, no order can be made for payment by instalments nor can payment be postponed except with the consent of the decree-holder.

Limitation.—An application by a judgment-debtor under this rule for payment of the amount of a decree by instalments should be made within 6 months from the date of the decree [Limitation Act, 1908, Sch. I, art. 175].

Execution of decree payable by instalments.—In the case of an ordinary instalment decree, that is a decree payable by instalments on certain specified dates, the period of limitation as regards each instalment (which is 3 years) runs from the date on which the instalment becomes due (e). In the case of a decree payable by instalments, with a proviso that if default be made in payment of any one of the instalments, the whole of the decretal amount should become due and recoverable in execution, limitation runs from the date of the first default (f). But if the judgment-debtor pays

(b) *Shankarappa v. Danappa* (1881) 5 Bom. 604.

(c) (1880) 4 Bom. 96.

(d) *Carvalho v. Nurbibi* (1879) 3 Bom. 202

(e) Limitation Act, 1908, Sch. 1, art. 182 (7).

(f) *Sitab Chand v. Hyder* (1897) 24 Cal. 281.

O. 20, the over-due instalment and the decree-holder accepts it without protest, limitation
rr. 11-12. will run from the date of the *next* default. Strictly speaking, the *first* default being waived it ceases to be a "default *in law*", and the *next* default then becomes the *first* default" (g).

12. [Ss. 211, 121.] (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

Decree for possession and mesne profits.

- (a) for the possession of the property ;
- (b) for the rent of mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—
 - (i) the delivery of possession to the decree-holder.
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
 - (iii) the expiration of three years from the date of the decree,
 whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

Old section.—The provisions relating to mesne profits in the Code of 1882 were contained in ss. 211, 212 and 244. Those provisions have now been re-cast. The definition of mesne profits is relegated to s. 2, cl. 12. At the same time an important alteration has been made as regards procedure in determining the amount of mesne profits. Under the Code of 1882, the amount of mesne profits was to be determined in execution proceedings [see C.P.C., 1882, s. 244, cls. (a) and (b)]. Under the present rule the amount must be determined by the decree and not in execution.

Decree for possession and mesne profits.—In a suit for the recovery of possession of immovable property, the plaintiff may claim mesne profits which have accrued due during a period *prior to the institution of the suit*. He may also claim mesne

(g) *Kashiram v. Pandu* (1908) 27 Bom. 1; *Mon Mohun v. Durga* (1888) 15 Cal. 502; *Budhu Lal v. Rakkhab* (1889) 11 All. 482; |

Karakavalasa v. Karanam (1881) 3 Mad. 256.

profits which have accrued due *subsequent to the institution of the suit* [see s. 11, p. 80, O.20, r. 12. para. (2)]. The decree to be passed in such a case will now be as follows :—

1. That the defendant do put the plaintiff in *possession* of the property specified in the schedule annexed to the decree. [To this extent the decree is *final*].
2. { That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due *prior to the institution of the suit*. [To this extent the decree is *final*].
Or [where accounts have to be taken of the mesne profits]—
That an inquiry be made as to the amount of mesne profits which have accrued due *prior to the institution of the suit*. [To this extent the decree is *preliminary*: see s. 2, Expln].
3. That an inquiry be made as to the amount of mesne profits *from the institution of the suit* until the point of time specified in cl. (c) of the section. [To this extent the decree is *preliminary*]. See Sch. I, App. D, Form No. 23.

The inquiry referred to above will be held before an officer of the Court appointed in that behalf, who must report to the Court the result of the inquiry. After that is done, and the parties have been heard on the report, a *final* decree will be passed in respect of the mesne profits. It is important to note that where a preliminary decree under this rule has either intentionally or inadvertently omitted to direct an enquiry into future mesne profits, the Court has no power to direct such enquiry by its final decree (h).

Application of the rule.—This rule applies not only where the plaintiff sues for possession of the *whole* of an immovable property, but also where he sues for possession of a *portion* thereof. But the portion must be a *specified* portion, that is, a portion to the profits whereof the plaintiff is *exclusively* entitled. Hence the provisions of this rule do not apply to a suit for partition by a member of a joint Hindu family, for until partition no member is entitled to a *specific* share of the property (i). This does not mean that a member of a joint Hindu family is not entitled in a suit or partition to claim his share of the rents and profits of the joint property from which he may have been wrongfully excluded. He *is* entitled to such share (j), but the Court in deciding upon his claim is to be guided, not by the provisions of this rule, but by the rules of Hindu law relating to partition.

Mesne profits.—The expression “mesne profits” is defined in s. 2, cl. (12), as meaning those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

The claim for mesne profits is virtually a claim for damages. Hence there is no rigid rule for determining the amount of mesne profits, and the amount must be assessed in every case by a proper exercise of judicial discretion (k). “Mesne profits are in the nature of damages which the Court may mould according to the justice of the case.”

(h) *Ghulusam v. Ahmadsa* (1919) 42 Mad. 296, 297.
(i) *Pirith Pal v. Jovahtr* (1887) 14 Cal. 493, 509, 14 I. A. 37; *Shankar v. Hardro* (1889) 16 Cal. 397, 405, 16 I. A. 71.

(j) *Bhivray v. Sitarum* (1895) 19 Bom. 532.
(k) *Grish Chunder v. Shosh* (1900) 27 Cal. 951, 27 I. A. 110; *Surja v. Reid* (1902) 29 Cal. 622.

- O. 20, r. 12. Hence in calculating mesne profits, payments of revenue and cesses made by the defendant should be deducted (l). But the costs of collecting the rents or profits should not be allowed to the defendant, unless he entered on the property in the exercise of a *bona fide* claim of right (m).

Where a defendant has been in wrongful possession for a certain period, and is subsequently *dispossessed* by a third party, the defendant can only be charged with mesne profits for the period for which he was in wrongful possession. He cannot be charged with mesne profits that have accrued due subsequently to his dispossession, though the person who dispossessed him may not have done anything to recover the rents or profits (n). The reason is that if a defendant is dispossessed by a third party, he cannot be said to have even impliedly received the profits, nor could he with ordinary or extraordinary diligence have received them. But where a defendant who has been in wrongful possession *abandons* the land without giving notice to the plaintiff, he will be held liable for mesne profits (o).

Where a person buys immovable property from a defendant pending a suit against him for recovery of the property and for mesne profits, and a decree is eventually passed against the defendant, the plaintiff is entitled to recover the mesne profits not only from the defendant, but from the purchaser *pendente lite* (p).

Interest forming part of mesne profits.—It will be seen from the definition of mesne profits, that mesne profits consist of *two* items, namely, (1) profits of the property and (2) *interest* on such profits. Hence if a decree awards mesne profits, but says nothing about interest, that is, interest on the profits, it must be construed as including not only the profits, but the interest on such profits. It has been so held by their Lordships of the Privy Council in *Grish Chunder v. Shoshi Shikhareswar* (q). If the profits were payable from month to month, the interest thereon would be calculated month by month, and if they were payable from year to year, the interest would be calculated year by year. Calculating in this manner, the interest on the profits must be allowed up to the date of ascertainment of the aggregate amount of mesne profits (r); but in no case should it be allowed for a period longer than three years from the date of the decree (s). The reason is that the item of interest we are now considering forms an integral part of "mesne profits," and since mesne profits cannot be allowed for a period longer than three years from the date of the decree, the interest forming part thereof also cannot be allowed for a longer period. It must not, however, be supposed that because "mesne profits" are defined as meaning "profits" *plus* "interest on such profits," therefore the Court must always allow interest on such profits. Mesne profits, it must be remembered, are in the nature of *damages* which the Court may award according to the justice of the case. And since the item of interest now under consideration forms part of mesne profits, it is equally in the discretion of the Court whether to allow such interest or not (t). For the same reason, the Court may, while allowing the claim for interest, direct the interest to be calculated not month by month or year by year as stated above, but in a manner less advantageous to the plaintiff. The mode of calculation indicated in the beginning of this paragraph applies only to those cases where the decree is silent as to the mode in which interest is to be calculated.

(l) *Dakhina v. Saroda* (1894) 21 Cal. 142, 20 I. A. 160; *Kachar v. Oghadkhai* (1898) 17 Bom. 85.
 (m) *Dungar v. Jai Ram* (1902) 24 All. 376.
 (n) *Abbas v. Fasih-ud-din* (1897) 24 Cal. 413.
 (o) *Kishnanand v. Pratap Narain* (1884) 10 Cal. 785, 11 I. A. 88.
 (p) *Midnapore Zemindari Co., Ltd. v. Naresch Narain* (1911) 89 Cal. 220.

(q) 27 Cal. 951, 967, 27 I. A. 110.
 (r) *Narpat v. Har Gayan* (1908) 25 All. 275; *Kadharaman v. Surnomaji* (1903) 30 Cal. 508.
 (s) *Grish Chunder v. Shoshi Shikhareswar* (1900) 27 Cal. 951, 969, 27 I. A. 110.
 (t) *Grish Chunder v. Shoshi Shikhareswar* (1900) 27 Cal. 951, 969, 27 I. A. 110.

After the aggregate amount of mesne profits is ascertained, the plaintiff may apply to the Court for a final decree for the amount so ascertained, and for interest on that amount, and the Court may award interest at such rate as it thinks fit (u). This rate is usually 6 per cent. (v). See s. 34. O. 20,
rr. 12, 13.

"Three years from the date of the decree."—"Decree" means final decree. Thus if an appeal is preferred from a decree for mesne profits, and the decree is confirmed in appeal, the period of three years is to be computed from the date of the appellate decree (w). Similarly, if a decree for mesne profits is taken to the Privy Council and is confirmed, the period of three years is to be counted from the date of the King's order in Council (x). See notes to s. 36, "What decree may be executed?"

When a decree awards possession with mesne profits to be ascertained in an inquiry, but specifies no time down to which mesne profits are to be computed, the decree cannot be construed as giving mesne profits for a period longer than three years from the date of the decree (y). The plaintiff therefore is not entitled to mesne profits for more than three years from the date of the decree, though the possession was not delivered to him until after the expiration of the three years. Note the words "whichever event first occurs" in sub-r. (1), ol. (c).

Limitation.—As regards mesne profits accrued due prior to the institution of the suit, the defendant is only liable for the mesne profits accrued due during the three years before the date of the suit. A claim for mesne profits during a period proceeding the three years next before the date of the suit is barred under the Limitation Act, 1908, sch. I, art. 109 (z).

Appeal.—Under the Code of 1882 [s. 244], the amount of mesne profits was determined in execution proceedings, and the decision determining mesne profits, being an order in execution proceedings, was appealable as a decree. Under the present rule the amount of mesne profits is to be determined by the decree itself, and a party aggrieved by the determination as to mesne profits may now prefer an appeal from the decree itself (a).

Mesne profits and jurisdiction.—See notes to s. 6 on p. 15 above, and notes to s. 38, under the head "Rule IV," on p. 114 above.

For an additional sub-rule made by the Madras High Court.—See Appendix VII below.

13. [S. 213.] (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

Decree in administration
suit.

(u) *Girish Chunder v. Sati Sekharswar* (1906) 33 Cal. 329, 334, 335.

(v) *Iqbalulla Bhuyan v. Chandra Mohan* (1908) 12 C. W. N. 285, 34 Cal. 954.

(w) *Radha Naih v. Chandis Charan* (1903) 30 Cal. 660.

(x) *Bhup Indor v. Bijai* (1901) 28 All. 152, 27 I. A. 209; *Nandkumar v. Bilas Ram* (1918) 3 Pat. L. J. 116.

(y) *Uttamram v. Kishordas* (1900) 24 Bom. 149;

Narayan v. Sono (1900) 24 Bom. 345; *Trailokya Nath v. Jogendra Nath* (1908) 35 Cal. 1017.

(z) *Kishanand v. Pratap Narain* (1884) 10 Cal. 785, 11 I. A. 83; *Abbas v. Fasih-ud-din* (1897) 24 Cal. 413.

(a) *Bhup Indor v. Bijai* (1901) 23 All. 152, 27 I. A. 209; *Nandkumar v. Bilas Ram* (1918) 3 Pat. L. J. 116, 118; See also 2 Pat. L. J. 394.

O. 20, r. 13. (2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the Court in which the administration-suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons, who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

Judicature Act, 1875, s. 10.—The words of the present rule are almost the same as s. 10 of the Judicature Act of 1875.

Administration-suit.—Where a person dies leaving a will, it is his executor that administers his estate, and where he dies intestate, it is his administrator that administers his estate. The administration of the estate of a deceased person consists, first, in paying his funeral expenses, next his debts, and then the legacies under his will (if any). The residue of his estate is then to be divided among the *residuary legatees* under his will (b), or amongst his heirs if he has left no will. In an administration-suit, it is the Court that takes upon itself to a large extent the functions of an executor or administrator, and administers the estate of the deceased.

The following persons may maintain an administration-suit :—

(1) A creditor of the deceased, when his claim is not paid off by the legal representatives of the deceased. But though a creditor may bring an administration-suit, he must bring the suit on behalf of *himself and the other creditors* (c).

(2) A legatee, whether specific or pecuniary, where the legacy is not paid to him by the legal representatives of the deceased.

(3) Next-of-kin of the deceased, for their share in the estate of the deceased.

(4) An executor or administrator, when there are disputes amongst the legatees or next-of-kin as to the amount of the property left by the deceased and the amount to which the legatees or next-of-kin are entitled (*Walker and Elgood on Administration Actions*, pp. 24-31).

Forms of plaint in an administration-suit.—See Sch. I, App. A, forms Nos. 41 to 43.

Preliminary decree.—This rule provides that in an administration-suit, the Court shall pass a *preliminary decree* before passing the final decree, directing accounts to be taken and enquiries to be made. For forms of preliminary decree, see Sch. I, App. D, forms Nos. 17 and 19, and for forms of final decree, see forms Nos. 18 and 20.

(b) Indian Succession Act, 1885, ss. 279-285; Probate and Administration Act, 1881, | (c) *Worraker v. Fryer* (1876) 2 O. D. 109.

Insolvent estate.—Sub-rule (2) provides that when it appears in an administration-suit that the estate of the deceased is insolvent, the rules laid down in the Presidency-Towns Insolvency Act, 1909, as to Presidency Towns, and in the Provincial Insolvency Act, 1907, as to the rest of British India, shall apply so far as regards (1) the respective rights of secured and unsecured creditors, (2) debts and liabilities proveable, and (3) the valuation of annuities and future and contingent liabilities. Note that this sub-rule does not apply *all* the rules and principles of bankruptcy to insolvent estates, but only the rules in respect of the three heads enumerated above (d).

Rights of secured creditors under the Presidency-Towns Insolvency Act.—See s. 48 of the Act, and cls. 9 to 17 of Sch. II to the Act.

Rights of secured creditors under the Provincial Insolvency Act.—See S. 31 of the Act.

Debts and liabilities proveable under the Presidency-Towns Insolvency Act.—See sections 46 and 48 and Schedule II of the Presidency-Towns Insolvency Act, 1909.

Debts and liabilities proveable under the Provincial Insolvency Act.—See ss. 28 and 29 of the Act.

Suit to recover assets improperly paid by the Administrator-General.

This section does not apply to a suit brought by a creditor of the deceased against the Administrator-General (to whom letters of administration have been granted) and against other creditors of the deceased to recover assets alleged to have been improperly paid by the Administrator-General to such creditors in priority to the plaintiff (e).

14. [S. 214.] (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

Decree in pre-emption suit.

- (a) specify a day on or before which the purchase-money shall be so paid and
- (b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

(d) *Re D'Epineuil* (1882) 20 C. D. 217; *Navajee v. Adm.-Gen. of Madras* (1913) 38 Mad. 500, 503. | (e) *Navajee v. Adm.-Gen. of Madras* (1913) 38 Mad. 500.

O. 20, r.14.

- (a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,
- (b) if and so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

Difference between the old section and the present rule.—This rule corresponds with s. 214, C. P. C., 1882, except in the following particulars :—

1. The words “ whose title thereto shall be deemed to have accrued from the date of such payment ” are new. See notes below under those words.

2. Sub-rule (2) is also new. See notes below under the head “ Sub-rule (2) : Rival pre-emptors.”

Pre-emption.—The right of pre-emption can only be exercised in respect of *immovable* property. *A* and *B*, both Mahomedans, are co-sharers of a house. If *B* sells his share to *X* for Rs. 500, *A* is entitled to pre-empt *B*'s share on payment of Rs. 500, that is to say, *A* as co-sharer may require *B* to sell his share to him *in preference* to *X*. The same rule applies if *A* and *B* are owners of *adjoining* houses. If *B* refuses to sell his share to *A*, *A* may institute a suit for pre-emption against *B* and *X*. It has been held by the High Court of Allahabad, that if the sale by *B* to *X* has been completed before the date of the suit, *B* having no longer any interest in the property, he is not a necessary party to the suit (*f*). If a decree is passed for *A*, and if he has not paid the amount of purchase-money into Court, the decree should specify a day on or before which the purchase-money should be paid into Court. If the amount is paid within the time fixed by the Court, *A* will be entitled to enter into possession of *B*'s share. But if he fails to pay the amount within that time, he will lose the benefit of the decree (*g*). The original Court has no power to extend the time for payment (*h*), but it is competent to the appellate Court to extend the time (*i*).

It is important to note that the right of pre-emption is a *personal* right. This gives rise to the following consequences :—

1. If the pre-emptor, that is, the person entitled to pre-emption, transfers the right to a third party, the right is lost and the transferee cannot maintain a suit for pre-emption (*j*).

(*f*) *Ram Sarup v. Sital* (1904) 26 All. 549.
 (*g*) *Jat Kishn v. Bhola Nath* (1892) 14 All. 529;
Jaggur Nath v. Jokhu (1896) 18 All. 228.
 See also *Balmukund v. Paneham* (1880)
 10 All. 400; *Bhagwara v. Goru* (1910) Punj.

Rec. no. 56, p. 178.

(*h*) *Suranjan v. Ram Bahal* (1913) 35 All. 582.

(*i*) *Parshadi v. Ram Dial* (1880) 2 All. 744; *Kodai Singh v. Jai Sri Singh* (1891) 13 All. 376

(*j*) *Rajjo v. Lalman* (1888) 6 All. 180, 188.

2. It is not settled whether if the pre-emptor dies during the pendency of the **O.20, r. 14.** suit for pre-emption, the right, according to Sunni Mahomedan Law, is extinguished (*k*), or whether it survives to his heirs or to his legal representatives (*l*).
3. If the pre-emptor transfers the right of pre-emption *during the pendency* of the suit for pre-emption, the right of pre-emption is lost, and the suit will be dismissed. And even if he obtains a decree and transfers the *decree*, the right of pre-emption will be lost, and the Court will not allow execution of the decree. But if he obtains a decree, and transfers not the *decree*, but the *property* which is the subject of pre-emption, the right of pre-emption is not lost and *he* may execute the decree, though execution will not be allowed to the *transferee* (*m*).

"Whose title thereto shall be deemed to have accrued from the date of such payment."—These words have been added to make it clear that the title to the property vests in the plaintiff on payment of the purchase-money, and that it is not necessary to complete the title that there should be any document in writing and registered as required by the Transfer of Property Act in the case of a sale of immovable property. The object of adding these words into the rule is to supersede the opinion expressed by the High Court of Madras that, since the passing of the Transfer of Property Act, the title to a pre-empted property could not vest in the plaintiff without an instrument of transfer (*n*).

Mesne profits.—Upon a pre-emption decree the property and the right to mesne profits therefrom vest in the pre-emptor only from the date when he pays the amount of the purchase price *finally* decreed; until that time, the original purchaser retains possession and is entitled to the rents and profits (*o*).

Extension of time for payment into Court.—See notes above under the head "Pre-emption" and notes to s. 148 above.

Sub-rule (2): Rival pre-emptors.—Sub-r. (2) prescribes the form of decree to be passed when there are rival pre-emptors. It is based upon the undermentioned rulings of the Allahabad High Court (*p*).

Pre-emption under the Mahomedan law.—The Mahomedan law is the only system prevalent in British India which provides substantive rules relating to the right of pre-emption in a systematic form (*q*). The Mahomedan law of pre-emption is applied by the Courts of British India to Mahomedans except in the Madras Presidency, the Punjab and Oudh. In the Madras Presidency, the right of pre-emption is not recognised by the Courts even as between Mahomedans, on the ground that it places a restriction upon liberty of transfer of property, and is therefore opposed to equity and good conscience (*r*). Pre-emption in the Punjab is regulated by the Punjab Laws Act, 1872, and in Oudh by the Oudh Laws Act, 1876. See Mulla's "Principles of Mahomedan Law," 6th Ed., pp. 147-149.

(*k*) *Muhammad v. Niamat-un-Nissa* (1898) 20 All. 88.

(*l*) *Sayyad Jiaul v. Sitaram* (1912) 36 Bom. 144;
Sitaram v. Syad Strajul (1917) 41 Bom. 636, 653.

(*m*) *Ram Sahai v. Gaya* (1885) 7 All. 107.

(*n*) *Ramasami v. Chinnan* (1901) 24 Mad. 449, 463.

(*o*) *Deokinandan v. Sri Ram* (1889) 12 All. 284;

Deonandan v. Ramdhari (1917) 44 I. A. 80,
44 Cal. 675.

(*p*) *Kashi v. Mukhta* (1884) 6 All. 37; *Hulsi v. Sheo Prasad* (1884) 6 All. 455; *Ajaid Na v. Mathura* (1889) 11 All. 164.

(*q*) *Zamir v. Daulat Ram* (1883) 5 All. 110, 113.

(*r*) *Ibrahim v. Mum Mir* (1870) 6 M. H. C. 26.

O. 20,
rr. 14-16.

Pre-emption by custom.—The Sunni Mahomedan law of pre-emption applies by custom to Hindus in Behar (s) and Gujarat (t).

Pre-emption by contract.—A right of pre-emption is occasionally given in mortgage deeds to the mortgagee, so that in case of a sale of the equity of redemption by the mortgagor, the mortgagee shall have the refusal of the property; and in such a case the price may or may not be fixed beforehand (u).

Vendor's title in pre-emption suit.—A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The reason is that the principle of pre-emption is substitution. A pre-emptor is therefore bound to take the title which the vendee was ready to take (v).

15. [S. 215.] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

Decree in suit for dissolution of partnership.

Preliminary decree directing accounts to be taken.—The preliminary decree directing accounts to be taken should always contain a declaration of the rights of the parties, and it should be in form No. 21, Sch. I, App. D (w). After the accounts are taken, a final decree is passed directing that the partnership assets be applied, first, in payment of the partnership debts, next, in payment of the costs of the suit, and lastly, in payment to each partner of the amount found due to him on taking the accounts; see Sch. I, App. D, form No. 22.

Appeal.—A preliminary decree in a suit for the dissolution of a partnership or the taking of partnership accounts is appealable under s. 96. But the appeal must be filed within the period prescribed by the law of limitation. If no appeal is preferred within the period of limitation, the party aggrieved by such decree is precluded by virtue of the provisions of s. 97 from disputing its correctness in an appeal from the final decree. See s. 97 and note thereto.

16. [S. 215-A.] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such account to be taken as it thinks fit.

Decree in suit for account between principal and agent.

(s) *Pakir v. Emambuksh* (1883) B. L. R., Sup. Vol. 35; *Judu Lal v. Janki Koer* (1908) 35 Cal. 575
(t) *Gordhandas v. Prankor* (1889) 6 B. H. C. A. C. 268.

(u) *Orby v. Trigg* (1872) 9 Mad. 2.
(v) *Sabodra v. Bageshwari* (1915) 37 All. 529.
(w) *Thirukumaresan v. Subbaraya* (1897) 20 Mad. 313.

Shall pass a preliminary decree directing accounts.—The provisions of this rule must be strictly followed. If the fact of agency is established, it is the duty of the Court to direct an account to be taken of the dealings between the parties, before passing the final decree. It is not proper to pass a final decree at the hearing (x). O. 20,
rr. 16-18

Appeal.—See notes to r. 15 above under the head “Appeal.”

Stay of proceedings.—Where an appeal is pending against a preliminary decree, the Appellate Court may make an order under O. 41, r. 5, staying the inquiry into accounts pending the hearing of the appeal (y). See notes to O. 41, r. 5, under the head “Stay of proceedings under a decree.”

17. [New.] The Court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account, in which the accounts in question have been kept, shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

Special directions as to accounts.

18. [New.] Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

Decree in suit for partition of property or separate possession of a share therein.

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54.

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

Sub-rule (1).—See s. 54 and notes thereto.

“Giving such further directions.”—These words are wide enough to include a direction for an enquiry into future mesne profits. But under the rule the

(x) *Raghunath v. Ganpatji* (1905) 27 All. 374. | (y) See *Balakishen v. Khugnu* (1904) 31 Cal. 722.

O. 20, direction should be in the preliminary decree. If no such direction is included in the preliminary decree, the Court has no power to direct an enquiry into future mesne profits by its final decree (z).

19. [S. 216.] (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Decree when set-off is allowed.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

Appeal from decree relating to set-off.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

Appeal from decrees relating to set-off.—This rule corresponds with s. 216 of the Code of 1882, except as regards the provision as to the Court to which an appeal should lie from a decree passed in a suit in which a set-off is claimed. The second paragraph of s. 216 ran as follows :—

“The decree of the Court with respect to any sum awarded to the defendant shall have the same effect, and be subject to the same rules in respect of appeal or otherwise, as if such sum had been claimed by the defendant in a separate suit against the plaintiff.”

The present rule provides that appeals from decrees relating to set-off shall lie to the Courts to which appeals in respect of the original claim would lie.

Decree in case of set-off.—It has been held by the Allahabad High Court that in a suit by a principal against his agent for accounts, the Court can grant a decree to the agent for the amount found due to him on the taking of the accounts between the parties (a). The ground on which the decision is based is that a suit for accounts against an agent necessarily involves an undertaking by the principal to pay to the agent any sum that may be found due to him. Commenting upon this case, Phillips, J., in a Madras case (b) said : “This, I think, is taking a somewhat large view of the intention of a plaintiff in such a suit, for it could rarely be his intention to bring a suit in order that a decree might be given against him.” See note to O. 8, r. 6, “The amount claimed to be set off must be legally recoverable,” p. 443 above.

20. [S. 217.] Certified copies of judgment and decree to be furnished. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

(z) *Ghulsum v. Ahmadas* (1919) 42 Mad. 293.

(a) *Farmanand v. Jagat Narain* (1910) 32 All. 525.

(b) *Narasimha v. Zamindar of Tiruvur* (1919) 42 Mad. 873, 879-880.

ORDER XXI.

Execution of Decrees and Orders.

Of execution of decrees in general.—The present order is the longest Order in the whole Schedule. It consists of 103 rules. It is proposed here to give a summary of these rules, and at the same time an idea of the different kinds of execution, and the procedure in respect thereof. The references to the rules given in this summary are to the rules of the present Order.

O. 21.

A obtains a decree against *B* for Rs. 5,000. Here *A* is the decree-holder, *B* is the judgment-debtor, and Rs. 5,000 is the judgment-debt. If *B* fails to satisfy the decree, *A* may apply for execution of the decree against *B*'s person, or against his property, or both (r. 30). But the Court may, in its discretion, refuse execution *at the same time* against the person and property of the judgment-debtor (r. 21). Execution against the person of the judgment-debtor consists in arresting him and detaining him in jail. Execution against the property of a judgment-debtor consists in attaching and selling his property, and paying the decree-holder the amount of the judgment-debt out of the sale-proceeds.

Application for execution.—All proceedings in execution are to be commenced by an application for execution (r. 10). The application for execution must be in writing [r. 11 (2)] and should contain the particulars set forth in rr. 11 (2) to 14. The only exception is where the decree is for the payment of money and the judgment-debtor is in the precincts of the Court when the decree is passed, in which case the Court may order immediate execution on the *oral* application of the decree-holder at the time of passing the decree [r. 11 (1)]. If the application complies with the requirements of rr. 11 (2) to 14, the Court will direct execution to issue (r. 24). If it does not, the Court may reject it, or may require it to be amended (r. 17). If the application is rejected, the decree-holder may present another application properly framed.

Who may apply for execution.—The application for execution is to be made by the decree-holder. If the decree is transferred by the decree-holder, the transferee may apply for execution (r. 16). If the decree has been passed jointly in favour of more persons than one, any one of such persons may apply for execution (r. 15). If the decree holder is dead, his legal representative may apply for execution (s. 146).

Against whom execution may be applied for.—If the judgment-debtor is living, execution is to be applied for against him. If he is dead, execution may be applied for against his legal representative. In the latter case, the decree may not be executed against the person of the legal representative, but only against the property of the judgment-debtor which has come to the hands of the legal representative and has not been duly disposed of by him (s. 50). As to notice to the legal representative, see the next paragraph.

Notice before ordering execution.—The law does not require any notice to be issued to the party against whom execution is applied for, except in the following two cases:—

1. Where the application for execution is made more than one year after the date of the decree or more than one year after the date of the last order made on any previous application for execution.
2. Where execution is applied for against the legal representative of the judgment-debtor.

- O. 21. In the two cases mentioned above the Code provides that "the Court executing the decree *shall* issue a notice" (r. 22). There is one case in which it is *discretionary* with the Court to issue a notice before making an order for execution, and that is where the decree is for money and execution is sought against the *person* of the judgment-debtor (r. 37).

Execution against the person of the judgment-debtor.—

(i) *Decrees for the payment of money.*—A obtains a decree against B for Rs. 5,000 and costs. [This is a money-decree.] B fails to pay the amount of the judgment-debt. A applies for execution of the decree against B's *person* [r. 11 (2), cl. (j)]. The decree being a money-decree, the Court may, instead of issuing a warrant for B's arrest, issue a notice calling upon him to appear and show cause why he should not be committed to the civil prison in execution of the decree (r. 37). If B appears and satisfies the Court that he is unable to pay the amount of the decree from poverty or other sufficient cause, and if there are no circumstances which disentitle B to the indulgence of the Court, the Court may make an order disallowing A's application for B's arrest and detention [r. 40 (1)]. If B does not appear, the Court should issue a warrant for his arrest if the decree-holder so desires (r. 37). If B appears, but fails to show cause to the satisfaction of the Court, the Court should cause him to be arrested [r. 40 (5)].

Where a warrant of arrest is issued, it should be executed by an officer of the Court appointed in that behalf (rr. 24-25). If when the officer goes to execute the warrant B offers payment of the amount of the judgment-debt (which must always be specified in the warrant), the officer should receive the payment and the warrant should not then be executed (r. 38). But if no payment is made, B should be arrested and brought before the Court "as soon as practicable" (s. 55). If no notice was issued prior to his arrest under r. 37, it is open to B to show that he is unable to pay the amount of the decree from poverty or any other sufficient cause [r. 40 (1)]. If the Court is satisfied that B is unable to pay the amount of the decree from poverty or any other sufficient cause, and if there are no other circumstances which would disentitle B to the indulgence of the Court, the Court will make an order directing B's release [r. 40 (1)]. Otherwise the Court will make an order committing B to prison [r. 40 (5)]. The prison is to be a civil prison (s. 55), and the term of detention in prison is six months if the amount of the decree exceeds Rs. 50, and six weeks if the amount of the decree does not exceed Rs. 50 (s. 58). If, while in prison, B pays the amount mentioned in the warrant to the officer in charge of the prison, or the decree is otherwise fully satisfied, as by attachment and sale of his property, he will be released from detention (s. 58). Otherwise, he will be detained in prison until expiration of the term of his detention unless the decree-holder requests the Court to release him from detention, or omits to pay the subsistence allowance of the judgment-debtor. A judgment-debtor released from detention in any one of the above cases cannot be rearrested in execution of the same decree [s. 58 (2)], though the judgment-debt has remained unpaid. This does not mean that his liability to pay the debt ceases, for the decree still subsists, and A may yet execute the decree against B's *property* [s. 58 (2)], though not against his *person*.

No woman can be arrested in execution of a money-decree [s. 56].

(ii) *Decrees other than those for the payment of money.*—A judgment-debtor may be arrested and imprisoned not only in execution of a decree for the payment of money, but also in execution of other decrees (rr. 31, 32, 33). The procedure to be followed in these cases is as follows: If the application is in proper form, the Court will issue a warrant for the arrest of the judgment-debtor (r. 24). If the judgment-debtor is arrested

in execution of the warrant, he must be brought before the Court "as soon as practicable" (s. 55). The Court will then make an order committing him to the civil prison. If, while in jail, the decree is fully satisfied, he will be released from detention [s. 58 (1)]. Otherwise he will be detained in prison until expiration of the term of his detention, unless the decree-holder requests the Court to release him from detention, or omits to pay the subsistence allowance of the judgment-debtor as provided by r. 39.

Execution against property of judgment-debtor.—This subject may be considered under two heads, namely, (1) attachment, and (2) sale. We shall first state the rules relating to attachment, and then the rules governing sale, for attachment precedes sale. Attachment is levied and the sale of the property attached is effected by an officer of the Court under a warrant issued from the Court.

Before considering the rules relating to attachment and sale, it is to be observed that there are certain kinds of property which are not liable to attachment or sale in execution of a decree. These are described in s. 60. Subject thereto all saleable property which belongs to the judgment-debtor, or over which he has a disposing power which he may exercise for his own benefit, is liable to attachment and sale in execution of a decree against him (s. 60).

I. Attachment.—Attachable property belonging to a judgment-debtor may be divided into two classes, (1) movable, and (2) immovable.

As to attachment of movable property.—See rr. 43 to 53.

Attachment of immovable property.—If the property be immovable, the attachment is to be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and prohibiting all other persons from taking any benefit from such transfer or charge. The order is to be proclaimed at some place on or adjacent to the property, and a copy of the order is to be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house (r. 54).

Where an attachment has been made, any private transfer of the property attached whether it be movable or immovable, is void as against all claims enforceable under the attachment (r. 64).

If any claim be preferred to any property attached in execution of a decree by any person other than a party to the suit, the procedure prescribed by rr. 58 to 63 is to be followed. If any questions arise in the course of execution proceedings between the parties to the suit, or their representatives, they are to be dealt with under s. 47.

If during the pendency of the attachment the judgment-debtor satisfies the decree through the Court, the attachment will be deemed to be withdrawn (r. 55). Otherwise the Court will order the property to be sold (r. 64). If the property attached is current coin or currency-notes, the Court may direct the same to be paid to the decree-holder in satisfaction of his decree (r. 56), for coin or currency-notes do not require to be sold.

II. Sale of attached property.—If the property attached be movable property which is subject to speedy and natural decay, the same may be sold at once (r. 43). Every sale in execution of a decree should be conducted by an officer of the Court except where the property to be sold is a negotiable instrument or a share in a corporation, which the Court may order to be sold through a broker (r. 76).

After the property is attached, the first step to be taken by the Court towards the sale thereof, whether the property be movable or immovable, is to cause a proclamation of the intended sale to be made, stating the time and place of sale, and specifying the property to be sold, the revenue (if any) assessed upon the property, the encumbrances

O. 21, r. 1. (if any) to which it is liable, the amount for the recovery of which the sale is ordered and such other particulars as the Court considers material for a purchaser to know in order to judge of the nature and value of the property (r. 66). No sale should take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which a copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale, unless the judgment-debtor consents in writing to the sale being held at an earlier date (r. 68). The Court may, in its discretion, adjourn the sale from time to time, but if the sale is adjourned for longer period than seven days, a fresh proclamation should be made, unless the judgment-debtor consents to waive it (r. 69).

It is important to note that no holder of a decree, in execution of which property is sold, can bid for or purchase the property without the express permission of the Court (r. 72).

Irregularity in the conduct of sale of attached property.—No sale of immovable property can be set aside on the ground of irregularity in publishing or conducting the sale, unless upon the facts proved the Court is satisfied that the party seeking to set aside the sale has sustained substantial injury by reason of such irregularity (r. 90). As regards movable property, the rule is that a sale of movable property is not liable to be set aside in any case on the ground of irregularity in publishing or conducting the sale. The only remedy open to the party who has sustained any injury by reason of such irregularity is to institute a suit for compensation against the person responsible for the irregularity. But if such person be the purchaser himself, the party sustaining the injury may sue for the recovery of the specific property and for compensation in default of such recovery (r. 78).

Disposal of sale-proceeds.—The sale-proceeds of property sold in execution of a decree are to be applied in the manner prescribed by s. 73.

Resistance to delivery of possession to purchaser.—Where immovable property is sold in execution of a decree, and the purchaser is resisted or obstructed in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction. The Court will thereupon fix a day for investigating the matter, and summon the party against whom the application is made to appear and answer the same (rr. 97-103).

Payment under decree.

1. [S. 257.] (1) All money payable under a decree shall be paid as follows, namely :—

Modes of paying money under decree.

- (a) into the Court whose duty it is to execute the decree ; or
- (b) out of Court to the decree-holder ; or
- (c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder. O. 21,
rr. 1, 2.

Retrospective effect of rules contained in this order.—On comparing this Order with the corresponding Chapter of the Code of 1882, it will be found that several changes have been introduced in the matter of procedure so far as it relates to the execution of decrees. In this connection it is important to remember that changes in matter of procedure are retrospective in effect and apply to pending proceedings (c).

Money payable under the decree.—It is money payable under a decree that may be paid into Court under this rule. Costs of an application awarded by an order under s. 35 cannot be said to be money payable under a decree. Hence such costs ought to be paid to the party direct, and not into Court (d).

Where an order has been made for the payment of money into Court on a certain date, and the Court is closed on that date, a payment made on the following date is good payment for the purposes of the order (e).

Decree directing payment to decree-holder.—Payment into Court is a valid compliance with a decree even though the decree directs payment to the decree holder (f).

Payment into Court.—Sub-r. (2) which requires notice to be given to the decree-holder where payment is made into Court is new. Where payment is made into Court, interest does not cease to run on the money payable under the decree until the decree-holder gets notice of the payment (g).

2. [S. 258.] (1) Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(c) *Hajrat Akramnissa v. Valiulnissa* (1894) 18 Bom. 429; *Balkrishna v. Bapu* (1895) 19 Bom. 204.
(d) *Shanks v. Secretary of State* (1889) 12 Mad. 120.

(e) *Aravamudu v. Samiyappa* (1898) 21 Mad. 385.
(f) *Wana v. Natu* (1910) 35 Bom. 35.
(g) *Ramaraya v. Sherbott* (1919) 42 Mad. 576.

- O. 21, r. 2. (3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any Court executing the decree.

S. 257A, C. P. C., 1882, omitted in this Code.—Before proceeding with the subject-matter of the present rule, it is important to note that s. 257A of the Code of 1882 has been omitted in this Code. That section ran as follows :—

“ Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.”

Agreement to give time to judgment-debtor.

Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.”

Agreement for satisfaction of judgment-debt.

Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt; and the surplus, if any, shall be recoverable by the judgment-debtor.”

This section was first enacted by Act XII of 1879 with a view to protect the interests of judgment-debtors against the exercise of undue pressure by decree-holders. It gave rise to conflicting decisions, and as interpreted by the majority of the High Courts was found in practice to be of little service to judgment-debtors. It has been therefore omitted in this Code with the result that—

- (1) agreements to give time to the judgment-debtor, and
- (2) agreements for the satisfaction of a judgment-debt which provide for the payment of any sum in excess of the decretal amount, may now be entered into between the decree-holder and the judgment-debtor without the sanction of the Court, and effect may be given to them, if otherwise valid, as to any other agreement.

Points of difference between old section 258 and the present rule.—The present rule corresponds with s. 258 of the Code of 1882 except in the following particulars :—

(1) The words “ of any kind ” have been added into sub-r. (1) to make it clear that this rule applies not only to money-decrees, but to decrees for the enforcement of a mortgage (h) and other decrees.

(2) In para. 3 of s. 258 there occurred the words “ as a payment or adjustment of the decree ” after the word “ recognized.” These words have been omitted [see sub-r. (3)] to make it clear that the Court cannot recognize an uncertified payment or adjustment for any purpose whatever. See notes below under the head “ Uncertified payment and limitation.”

Scope and application of the rule.—This rule provides that—

- (1) where any money payable under a decree of any kind is paid out of Court, or

(h) See *Vaidhinasamy v. Somasundram* (1905) 28 Mad. 473.

- (2) where a decree is otherwise *adjusted* in whole or in part to the satisfaction O. 21, r. 2. of the decree-holder,

the decree-holder *shall* certify such payment or adjustment to the Court whose duty it is to execute the decree, so that the same may be recorded by that Court.

If the decree-holder fails to inform the Court of the payment or adjustment, *it is open* to the judgment-debtor to protect himself from execution of the decree by applying to the Court within 90 days from the date of the payment or adjustment (i) to issue a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified. If the payment or adjustment is not certified by either party, it shall not be recognized by any Court executing the decree. This may be explained by the following

Illustration.

A obtains a decree against B for Rs. 2,000. It is subsequently agreed between A and B that A should accept Rs. 1,000 in full satisfaction of the decree. B accordingly pays A Rs. 1,000, but *neither the payment nor adjustment is certified to the Court*. A applies for execution of the full amount of the decree *notwithstanding* the adjustment. B objects to execution on the ground that the decree has been adjusted. The adjustment, not being certified, cannot be recognized by the Court *executing the decree*, and the Court must direct execution to issue. It will not avail B to contend that A had agreed to certify the payment to the Court, but has omitted to do so. See notes below under the head "Fraud."

History of sub-rule (3).—The Codes of 1859 (s. 206) and 1877 (s. 258) provided that a payment or adjustment made out of Court should not be recognized by any Court *executing the decree* unless it had been certified to that Court. The Code of 1877 was amended in the year 1879, and the amendment provided that an uncertified payment or adjustment should not be recognized by *any* Court, and the same provision occurred in the Code of 1882. In the year 1888, the section was again altered, by providing that an uncertified payment or adjustment should not be recognized by any Court *executing the decree*, and this is the form in which the rule now stands.

Sub-rule (3).—Sub-rule (3) provides that an uncertified payment or adjustment shall not be recognized by *any Court executing the decree*. The words "Court executing the decree" indicate the extent to which an uncertified payment or adjustment should not be recognized by a Court. These words show that the prohibition to take cognizance of an uncertified payment or adjustment is limited to the Court which is called upon to *execute the decree*. It is in execution proceedings alone that an uncertified payment or adjustment cannot be recognized by a Court. The rule does not prohibit a Court from taking cognizance of such payment or adjustment in proceedings other than execution proceedings. An uncertified payment or adjustment may therefore be recognized by a Court *trying a suit* for a relief based upon such payment or adjustment (j). This gives rise to the following questions :—

1. Whether, on the Court directing execution to issue in the case put in the above illustration, B can maintain a *suit* against A for a declaration that the decree has been adjusted and for an *injunction* restraining A from executing the decree ?

(i) Limitation Act, 1908, Sch. I., art. 174.
(j) *Swamirao v. Kashinath* (1891) 15 Bom. 419;
Kalyan v. Kamla (1891) 13 All. 389;
Ghanasham v. Kashirao (1892) 16 Bom. 589; *Iewar Chandra v. Haris Chandra* (1898) 25

Cal. 718. The operation of sub-r. (3) is not excluded, because a party proceeds by way of suit instead of proceeding by an application as required by s. 47. *Moru v. Hasan* (1919) 43 Bom. 240.

O. 21, r. 2. 2. Whether, if *A* causes the decree to be executed notwithstanding the adjustment, and *B*'s property is sold in execution, *B* can maintain a suit against *A* to set aside the sale, on the ground that the decree having been adjusted, *A* ought not to have caused the same to be executed ?

3. Whether, if *A* causes the decree to be executed notwithstanding the adjustment, *B* can maintain a suit against *A* to recover damages for breach of the contract represented by the adjustment ? In other words, whether, if *B* is compelled to pay in execution of the decree the full amount of the decree, namely, Rs. 2,000, he is entitled to recover back that sum from *A* as damages for breach of the contract on *A*'s part not to execute the decree ?

Each of the suits referred to above would involve recognition of an *uncertified* adjustment, and *B*'s success in each of them would depend *inter alia* upon the recognition of such adjustment by the Court trying the suit. Now, it has been made sufficiently clear that the prohibition against the recognition of an *uncertified* adjustment is confined to Courts *executing* decrees, and does not extend to Courts *trying* suits. Hence a Court trying any of the above suits would not be precluded from recognizing the adjustment though the adjustment has not been certified. It is not, however, to be supposed that this circumstance by itself is sufficient to entitle *B* to a decree in all the three suits, for in the first two cases there is an initial difficulty in *B*'s way. That difficulty is presented by the provisions of s. 47 by which it is enacted that all questions relating to the "execution, discharge or satisfaction" of a decree should be determined by the Court executing the decree, and *not by a separate suit*. Noting these provisions, we proceed to answer the above questions in order.

As regards the first question, it is quite true that if *B* brought a suit for an injunction restraining *A* from executing the decree, the Court trying the suit would recognize the adjustment though it might not have been certified. But the Court cannot try the suit at all, for such a suit is barred under s. 47, the principal question in the suit being whether *A* should be restrained from *executing* the decree. This being a question relating to "execution," it cannot be tried in a separate suit (*k*). Hence the answer to the first question is in the negative.

The answer to the second question is also in the negative, and for the same reasons. The suit being one to set aside the sale in execution, the principal question would be whether the *proceedings in execution* should be set aside and this question is also one relating to "execution" within the meaning of s. 47, and the suit would therefore be barred under that section (*l*). It is therefore immaterial whether the purchaser at the sale in execution is a stranger or the decree-holder himself. There are two cases both prior in date to the Allahabad decision cited above, in which the property was purchased by a *stranger*, and the suit was to set aside the sale on the ground that the decree had already been satisfied out of Court at the time the sale was held. In both these cases it was held that the person who bought the property having purchased it *bona fide* at an auction sale, the sale to him could not be set aside. But the question whether the suit was *barred* was not raised in either of these cases. According to the Allahabad decision cited above, the suit would be barred under s. 47 (*m*).

The third question stands upon a different footing. The suit therein referred to is one for the recovery of damages for breach of the contract represented by the

(*k*) *Azizan v. Matuk Lal* (1894) 21 Cal. 437 ; *Bairagulu v. Bapanna* (1892) 15 Mad. 302 ; *Deno Bundhu v. Hari* (1904) 31 Cal. 480.
(*l*) *Jaikaran v. Raghunath* (1898) 20 All. 254.

(*m*) *Yellappa v. Ramchandra* (1897) 21 Bom. 403 ; *Mothura Mohun v. Akhoy Kumar* (1888) 15 Cal. 557.

adjustment. The contract represented by the adjustment was to accept Rs. 1,000 in full satisfaction of the decree, and not to execute the decree for its full amount. If notwithstanding the payment to A of Rs. 1,000 in pursuance of the adjustment, A causes the decree to be executed, and B is compelled to pay the amount of the decree (that is, Rs. 2,000) in execution, B may sue A to recover back that amount as *damages* for breach of the contract not to execute the decree. Such a suit is not barred under s. 47, for the principal question in the suit is not one relating to *execution*, but to the contract, its breach, and the amount of damages suffered by B in consequence of the breach. The answer to the third question is therefore in the affirmative (n). The Court trying the suit will take cognizance of the adjustment, and will direct A by its decree to repay Rs. 2,000 as and by way of damages to B, though the adjustment has not been certified. It may here be noted that if after the decree is satisfied out of Court, A assigns the decree to X, and X then proceeds to realize the decree by execution against B, B has no cause of action against X, and he is not entitled to recover from X as damages the amount paid by him in execution to X, even though X took the assignment with the knowledge that the decree had been satisfied (o).

Summarizing the above, we may say that if a decree is adjusted to the satisfaction of the decree-holder, but the adjustment is not certified, it will not be recognized by any Court executing the decree. The result is that if the decree-holder applies for execution notwithstanding the adjustment, the Court will direct execution to issue, and the judgment-debtor will not be heard to say that the decree has been adjusted. Nor can he, even by instituting a regular suit for injunction, obtain a stay of execution, for such a suit is barred under s. 47. Nor is it open to him, if his property be sold in execution, to bring a suit to set aside the sale, for such a suit also is barred under s. 47. His only remedy is to sue the decree-holder for the damages sustained by him by reason of the breach of the contract represented by the adjustment. He need not, however, wait until *execution* of the decree against him. His cause of action arises on the *presentation of an application* by the decree-holder to execute the decree. Therefore where he has paid any money under the adjustment, he may sue the decree-holder to recover the same if the decree-holder *applies* to the Court for execution notwithstanding the adjustment (p).

Suit by judgment-debtor based upon uncertified adjustment.—We have already considered three kinds of suits that may be brought by a judgment-debtor against the decree-holder upon an uncertified adjustment, namely, (1) suits for an injunction, (2) suits for setting aside sales in execution, and (3) suits for damages for breach of the contract represented by the adjustment. All these suits are of a typical character, and they demand a careful study. The following case is of a different kind altogether. A obtains a decree against B for possession of certain immovable property. A then executes an *ekrarnama*, whereby in consideration of Rs. 156 paid to him by B, he relinquishes an eight-anna share of the property in favour of B. Subsequently he sells the remaining eight-anna share to B by a *kabala*. Both the *ekrarnama* and *kabala* are duly registered, but neither of them is certified to the Court. A then applies for execution of the decree, and obtains possession of the property. B sues A upon the two documents for a declaration of his right to the property, and for recovery of possession thereof. Is the suit

(n) *Hanmant v. Subbabbai* (1890) 23 Bom. 394;
V. Subbappa v. Subbappa (1882) 5 Mad. 397
 [P. B.]; *Periatambi v. Vellaya* (1898) 21
 M. L. 409; *Krishnasami v. Ranga* (1897)
 21 Mad. 389; *Poromanand v. Khepo* (1884)
 10 Cal. 354; *Gendo v. Nihal Kumar* (1908)

30 All. 464; *Krishna v. Savirimthi* (1919)
 42 Mad. 338.

(o) *Krishna v. Savirimthi* (1919) 42 Mad. 338
 (p) *Medai Kallani*, in the matter of (1907) 30
 Mad. 545.

O. 21, r. 2. barred under s. 47? It has been held that it is not barred, and that *B* is entitled to a decree. The suit is not one for an injunction, and it cannot therefore be said to be directed to *interfere with the execution of the decree*. In fact the decree has *already been executed*. Nor is the suit one for setting aside a sale in execution, for there has been no sale. The suit is one for the recovery of property conveyed to *B* by two documents, both of which are duly registered. The documents no doubt constitute an adjustment of the decree, but as stated above there is nothing in sub-r. (3) which bars a *suit* upon an uncertified adjustment (q).

The reader is now in a position to understand the following proposition which summarizes in one sentence all that has gone before :—

An uncertified payment or adjustment may be recognized by any Court *except a Court executing the decree*, and a *suit* based upon such payment or adjustment is maintainable *unless it is barred by the provisions of s. 47*.

Suit by decree-holder based upon uncertified adjustment.—Hitherto we have considered the case of the *judgment-debtor* so far as it is affected by an uncertified adjustment. We now turn to the case of the *decree-holder*. *A* obtains a decree against *B* for Rs. 315 and costs. *B* pays *A* Rs. 200, and induces *A* to give up the costs and accept a bond for the balance to be paid at the end of eight months. Neither the payment nor adjustment is certified to the Court. This does not preclude *A* from *suing* on the bond, for, as stated above, sub-r. (3) only prohibits a Court *executing a decree* from recognizing an uncertified payment or adjustment (r). Since the repeal of s. 257A or the Code of 1882, the result would be the same, even if the bond provided for payment of a sum *in excess of the balance* (s).

"Money payable under a decree".—Where under the terms of a decree in a mortgage suit the decree-holder (mortgagee) was to be in possession of the mortgaged property and to render accounts every year of receipts of the income of the property and give credit for the surplus income accruing from the property, it was held that the income of the property received by the mortgagee decree-holder under the terms of the decree did not constitute it "money payable under a decree" within the meaning of this rule (t).

"Decree of any kind."—See notes above under the head "Points of difference between old section 258 and the present rule."

"Where the decree is adjusted in part"—*A* obtains a decree against *B* and *U*. *A* then enters into an agreement with *B* by which *B* is discharged from liability under the decree. The agreement constitutes an adjustment of a "part" of the decree within the meaning of this rule (u).

Mode of certifying.—See notes below under the head "Uncertified payment and limitation."

This rule applies only to parties who stand in the relation of decree-holder and judgment-debtor at the date of payment or adjustment.—*A* obtains a decree against *B* for Rs. 5,000. *B*, being unable to pay the amount of the

(g) *Iswar Chandra v. Haris Chandra* (1898) 25 Cal. 718.

(r) *Swamirao v. Kashinath* (1891) 15 Bom. 419; *Kalyan v. Kamta* (1891) 13 All. 339; *Ghanasham v. Kashiram* (1892) 16 Bom. 589; *Tukaram v. Anantbhai* (1901) 25 Bom. 252; *Lalji v. Gaya* (1903) 25 All. 817; *Juji v. Annai* (1894) 17 Mad. 382 as explained in

Venkata v. Koran (1903) 26 Mad. 19 p. 26.
(s) See *Heera v. Pestonji* (1898) 22 Bom. 693; *Dhanram v. Ganpat* (1903) 27 Bom. 96.
(t) *Yella Reddi v. Syed Muhammad Ali* (1916) 39 Mad. 1026.
(u) *Mahomed Khan Bahadur v. Mahomed Munawwar* (1908) 31 Mad. 467.

decree in cash, transfers certain immovable property to *C* in consideration of *C* under O. 21, r. 2, taking to pay the amount of the decree to *A*. *C* pays the amount of the decree to *A* out of Court. Subsequently, *C* gets the decree transferred to himself from *A*, and applies for execution against *B*. The payment of the decretal amount by *C* to *A*, though not certified, is a bar to execution, for the payment was made not by *B*, the judgment-debtor, but by *C*, a third party, and this rule applies only where a payment is made out of Court by a judgment-debtor to the decree-holder (*v*).

Fraud.—There is an earlier decision of the Madras High Court which lends colour to the view that where a decree is adjusted to the satisfaction of the decree-holder, and he agrees to certify the adjustment to the Court, but omits to do so, and thereafter applies to the Court for execution of the decree, the judgment-debtor may object to the execution and prove the adjustment in execution proceedings, and the Court executing the decree may take cognizance of the payment notwithstanding the provisions of this rule, the reason given being that the suppression of the adjustment from the Court is not only a fraud upon the judgment-debtor, but a fraud upon the Court (*w*). But in later cases it has been held by the same High Court that if that be the effect of that decision, it is not good law (*x*).

In a Bombay case (*y*), a decree for Rs. 2,500 was adjusted by the judgment-debtor paying and the decree-holder accepting Rs. 2,000 in full satisfaction of the decree, but the adjustment was not certified to the Court. The decree-holder thereafter applied for execution of the decree. He omitted to state in his application, as required by O. 21, r. 11 (e), that the decree was adjusted. It was held, following an earlier decision of the same Court (*z*), that it was a case of fraud upon the Court, and the application for execution was dismissed. On the other hand, it has been held by the High Court of Calcutta that it is not competent to a Court executing a decree to enquire into the fact of a payment or adjustment which has not been certified as required by this rule even when fraud is imputed to the decree-holder (*a*). It is submitted, with respect, that the view taken by the High Court of Calcutta and that taken by the High Court of Madras in its later decisions is correct. The reasons given by the High Court of Bombay in support of the contrary view are not satisfactory. In one of the Bombay cases cited above (*b*), it was said in effect that the Court has power under s. 47 to inquire into the alleged fraud. But what could be the object of that enquiry unless it be to ask the Court to recognize an uncertified payment or adjustment, in other words, to recognize that which the present rule says in explicit terms it shall not recognize. In the other Bombay case (*c*), it was said in effect that the Court of first instance having found as a fact that there was fraud on the part of the decree-holder, the lower appellate Court should have dismissed his application for execution. But this is begging the whole question, for is not the question this, namely, whether it is competent to the Court to enquire into the charge of fraud and admit evidence on that charge if the sole object of the enquiry be to recognize an uncertified payment or adjustment which the law says it shall not recognize. To us it so appears that if such an enquiry were allowed, the provisions of sub-r. (3) would be rendered nugatory. If there be fraud, there is nothing to preclude the judgment-debtor from adopting criminal proceedings against the decree-holder. The law allows the

(*v*) *Rama Ayyan v. Sreenivasa* (1896) 19 Mad. 230; *Ponnusami v. Luchmanan* (1911) 35 Mad. 659.

(*w*) *Ramayyar v. Ramayyar* (1897) 21 Mad. 356.

(*x*) *Periatambi v. Vellaya* (1897) 21 Mad. 409; *Ganapathy v. Chenga* (1906) 29 Mad. 312; *Veerappa v. Ponnayya* (1907) 17 Mad. L. J. 527; *Budrudeen v. Gulam* (1911) 36 Mad. 357.

(*y*) *Bansa v. Bhawra* (1915) 40 Bom. 338.

(*z*) *Trimbak v. Hari* (1910) 34 Bom. 575, per Heaton, J.

(*a*) *Binoo Gorain v. Jaimurat* (1911) 16 C. W. N. 923; *Jogendra v. Asudosh* (1914) 24 Cal. L. J. 462; *Parma Ram v. Lehna Singh* (1919) P. R. no. 135, p. 349.

(*b*) 34 Bom. 575, p. 581, *supra*.

(*c*) 40 Bom. 333, 336 *supra*.

C. 21, r. 2. judgment-debtor 90 days within which he may apply to have the payment or adjustment certified [Limitation Act, Sch. I, art. 174]. If he does not so apply, and the decree-holder applies for execution within that period, he may apply to have the payment or adjustment certified, but this he should do within 90 days. And it has been held that *objections* filed by a judgment-debtor to the decree-holder's application for execution may be treated as an *application* to certify, provided the objections are filed within 90 days of the adjustment (d). But the judgment-debtor is not entitled to an extension of time even if fraud is established on the part of the decree-holder. For such extension he can only be entitled to under s. 18 of the Limitation Act, and that section provides only for the case where an applicant has by means of fraud been kept from the knowledge of his right to make the application; it does not provide for the case where he is kept by means of fraud from the exercise of his right to make the application (e).

Uncertified payment and limitation.—Sub-r. (3) of this rule provides that an uncertified payment *shall not be recognized* by any Court executing the decree. The third paragraph of the old section provided that an uncertified payment or adjustment shall not be recognized as a payment or adjustment of the decree by any Court executing the decree. It was accordingly held under that section that there was nothing to prevent an uncertified payment from operating as a part payment within the meaning of s. 20 of the Limitation Act, so as to prolong the period of limitation for applying for execution under that Act (f). The words "as a payment or adjustment of the decree" have been omitted in sub-r. (3). The result is that under the present rule the Court cannot recognize an uncertified payment or adjustment for any purpose whatever. It follows that an uncertified payment can no longer operate as a part payment so as to prolong the period of limitation for an application for the execution of a decree (g). This may be explained by an illustration. A obtains a decree against B in January, 1889, for Rs. 4,000. B pays A out of Court Rs. 2,000 in January 1891, but the payment is not certified. A applies for execution of the decree for the balance in January 1893, that is, more than three years after the date of the decree, but within three years from the date of payment under the decree. Under the old section, the payment, though not certified, operated as a fresh starting point for limitation and the application was therefore not barred. Under the present rule, the payment, not being certified, cannot be recognised by the Court even for the purpose of limitation, and the application must be rejected as barred by limitation.

Nice questions have arisen in this connection as to the meaning of "certify" and as to the modes in which payments made out of Court may be certified. It has been held by the High Courts of Calcutta and Madras (h), that where interest on the decretal amount has been paid by the judgment-debtor out of Court, or where part payment has been made of the decretal amount by the judgment-debtor out of Court, the decree-holder may "certify" the payment either by an application made expressly for that purpose or by a declaration that he has received such payment made in an application for execution of the rest of the decree (h) [O. 21, r. 11 (e)]. According to the Allahabad High Court, such a declaration as aforesaid made in an application for execution does not amount to "certifying" at all within the meaning of this rule (i). This may be explained by an

(d) *Budrudeen v. Gulam* (1911) 38 Mad. 357, 380.

(e) *Binoo Gorain v. Jaimurat* (1911) 16 C. W. N. 923, 926-927.

(f) *Hurri Pershad v. Nasib Singh* (1894) 21 Cal. 542; *Tukaram v. Babaji* (1897) 21 Bom. 122; *Rajeswara v. Hari* (1896) 19 Mad. 162; *Roshan Singh v. Mata Din* (1904) 26 All. 36

(g) *Bhajan Lal v. Cheda Lal* (1914) 12 All. L. J. 825; *Bireswar v. Ambika Charan* (1918) 45 Cal. 630.

(h) *Ewasuffzeman v. Sanchia Lal* (1916) 43 Cal. 207 [payment of interest]; *Masilamani v. Sethuswami* (1918) 41 Mad. 258.

(i) *Chattar Singh v. Amir Singh* (1916) 38 All. 204.

illustration. *A* obtains a decree against *B* for Rs. 4,000 and interest in 1906. He then applies for execution of the decree in 1911, that is, more than three years from the date of the decree. In his application *A* states that *B* paid him interest on the decretal amount on 19th June 1909. According to the Calcutta and Madras High Courts, *A*'s declaration in the application amounts to *certifying* the payment of interest within the meaning of this rule, and the payment being *certified*, it saves the bar of limitation, the application for execution having been made within three years from the date of the *certified payment*. According to the Allahabad High Court, *A*'s declaration in the application for execution does not amount to *certifying* at all, and the payment being *uncertified*, it cannot operate to save the bar of limitation. No such question, however, can arise in the case of a mortgage decree, the reason being that an application for a final decree under O. 34 is not an application for *execution*, while sub-rule (3) applies only to a Court *executing* a decree (*j*).

O. 21, r. 2.

Uncertified adjustment and estoppel.—Since an uncertified adjustment cannot be recognized by the Court executing the decree, it cannot operate as an estoppel against the decree-holder. *A* obtains a decree against *B*. The decree is adjusted, but the adjustment is not certified to the Court. *A* receives payments under the adjustment and then applies for execution of the decree. The adjustment being uncertified, the fact that *A* has received payments under the adjustment does not estop him from applying for execution (*k*).

Restitution of uncertified payment on reversal of decree in appeal.—

If a decree is reversed in appeal, the judgment-debtor is entitled to recover back any payment that he may have made under the decree, though the payment may not have been certified. The decree being reversed in appeal, the payment, whether certified or not, is one made without consideration, and the judgment-debtor is entitled to a refund by an application to the Court of first instance (*l*). See s. 144.

Joint-decree.—See notes to O. 21, r. 16, under the head "Payment by judgment-debtor out of Court to one of several holders of a joint decree."

Minor.—An adjustment of a decree made by a guardian without obtaining the permission of the Court as required by O. 32, r. 7, cannot be certified under this rule (*m*).

Representative.—The word "judgment-debtor" in this rule includes persons claiming under him. Such persons therefore are as much precluded from setting up an uncertified adjustment in execution proceedings as the judgment-debtor himself would be (*n*). Compare s. 146.

Limitation.—A decree-holder may apply at any time for having a payment or an adjustment certified to the Court (*o*). But the application by a judgment-debtor for the issue of a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified, must be made within 90 days from the date of the payment or adjustment. See Limitation Act, 1908, Sch. I, art. 174.

Appeal.—An order allowing or refusing an application to record an adjustment of a decree or a payment made out of Court under a decree is a *decree* within the meaning of s. 2, cl. 2, read with s. 47, and is therefore appealable under s. 96 (*p*).

(j) *Ramji Lal v. Karan Singh* (1917) 39 All. 532.
(k) *Trimbak v. Hart* (1910) 34 Bom. 575; *Jogendra v. Provath* (1913) 19 Cal. L. J. 126.

(l) *Vasudev v. Vishnu* (1887) 11 Bom. 724.
(m) *Arunachellam v. Ramanadhan* (1906) 29 Mad. 309.

(n) *Panduranga v. Vythilinga* (1907) 30 Mad. 537.

(o) *Tukaram v. Babaji* (1897) 21 Bom. 122; *Sheikh Elahi Bux v. Nawab Lall* (1919) 4 Pat. L.J. 159.

(p) *Jamna v. Mathura* (1894) 16 All. 129; *Rangji v. Bhaiji* (1847) 11 Bom. 57; *Guruvayya v. Vudayappa* (1895) 18 Mad. 26.

• 9. 21,
rr. 2-4.

Criminal proceedings.—The prohibition against the recognition of an uncertified payment or adjustment is confined to *civil Courts executing decrees*, and does not extend to criminal Courts. Hence an uncertified payment or adjustment may be recognized by criminal Courts, and proof thereof is admissible in the investigation and trial of offences by those Courts. *A* holds a decree against *B* for Rs. 1,000. *B* pays the full amount of the decree to *A* out of Court, but the payment is not certified. *A* then applies for execution of the decree, but omits to state in the application for execution, though required to do so by r. 11, sub-r. (2), cl. (e), of this Order, that the full amount of the decree has been paid. *A* is guilty of the offence of “giving false evidence” within the meaning of ss. 191 and 193 of the Indian Penal Code, and if the decree is executed, he is also guilty of the offence of “fraudulently causing a decree to be executed after it has been satisfied” within the meaning of s. 210 of the Penal Code. In either case, proof of the uncertified payment may be admitted by a criminal Court (*g*). It is however to be noted that a mere application for execution not followed by execution does not constitute an offence under s. 210 of the Penal Code, for it is of the essence of the offence under that section that the decree must have been “caused to be executed” (*r*).

Courts executing Decrees.

3. [New.] Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

Lands situate in more than one jurisdiction.

Land situate in more than one jurisdiction.—This rule is new. It gives effect to a ruling of the Calcutta High Court in the undermentioned case (*s*). The rule, when amplified, may be stated thus : where immovable property attached in execution of a decree forms one estate, of which a part is situate within the local limits of the jurisdiction of the Court executing the decree, and the rest beyond such limits, the Court executing the decree has the power to attach and sell the whole estate, though only a part thereof is situate within the local limits of its jurisdiction.

4. [S. 223, 5th para.] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6 ; and such Court of Small

Transfer to Court of Small Causes.

(g) *Queen-Empress v. Bapuji* (1886) 10 Bom. 288 ;
Madhub Chunder v. Nobodeep (1889) 16 Cal.
126 ; *Queen-Empress v. Pillala* (1886) 9
Mad. 101 ; *Queen-Empress v. Mutturaman*

(1882) 4 Mad. 325.
(r) *Shama Charan v. Kasi Nath* (1896) 23 Cal. 971.
(s) *Ram Lal v. Bama Sundari* (1886) 12 Cal. 307.

Causes shall thereupon execute the decree as if it had been passed by itself.

O. 2
rr. 4-7.

5. [S. 223, 6th para.] Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

Mode of transfer.

Procedure where Court desires that its own decree shall be executed by another Court.

6. [S. 224.] The Court sending a decree for execution shall send—

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

Clause (6).—The omission to transmit to the Court executing the decree the certificate referred to in cl. (b) is not a “material” irregularity within the meaning of r. 90 of this Order. Hence it is not a good ground for setting aside a sale in execution (t).

7. [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge requires such proof.

Court receiving copies of decree, etc., to file same without proof.

Alteration in the rule.—The words, “or of the jurisdiction of the Court which passed it,” which occurred in the corresponding section of the Code of 1882 after

O. 21, the words "or of the copies thereof" have been omitted. See notes below under the
rr. 7-10. head "Proof of jurisdiction."

Proof of jurisdiction.—A decree is sent for execution by Court X to Court Y. The judgment-debtor raises an objection in Court Y that Court X had no jurisdiction to pass the decree. Under the old section Court Y had the power to enquire whether Court X had jurisdiction to pass the decree or not (u), though it was held that that power should not be exercised unless the defect appeared *on the face of the decree* (v). Under the present rule, Court Y has no such power at all. This follows from the omission in this rule of the words "or of the jurisdiction of the Court which passed it" which occurred in the old section. The object of the omission is to give effect to the principle that a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it (w). As to execution of decrees of Courts of Native States, see notes to s. 44, p. 119 above.

8. [S. 226.] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Execution of decree or order by Court to which it is sent.

Subordinate Court.—If a Munsiff in district X sends a decree passed by him for execution *direct* to a Munsiff in district Y, the latter has no jurisdiction to execute the decree. The proper course is for the Munsiff in district X to send the decree to the District Court of district Y, and the latter Court may then under this rule transfer the decree for execution to the Munsiff in that district (x).

9. [S. 227.] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Execution by High Court of decree transferred by other Court.

Application for Execution.

10. [S. 230, 1st para.] When the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the Officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

Application for execution.

(u) *Haji Musa v. Purmanand* (1891) 15 Bom. 216
 219; *Imdad Ali v. Jagan Lal* (1895) 17 All.
 478; *Bhagwantappa v. Vishwanath* (1904)
 28 Bom. 378.
 (v) *Leake v. Daniel* (1868) 10 W. R. F. B. 10, 11.

(w) *Hari v. Narsingrao* (1913) 38 Bom. 194; *Sheor-
 pat Rai v. Harak Chand* (1919) P. R. no.
 22, p. 62.
 (x) *Debi Datal v. Moharaj* (1895) 22 Cal. 764.

Court by which decree may be executed.—See s. 38.

O. 21,
rr. 10, 11.

"Court which passed the decree."—See s. 37 as to the definition of "Court which passed a decree," and notes thereto.

What decrees may be executed.—See notes to s. 36,

"If the decree has been sent to another Court."—Where the decree of a District Court has been sent to the Court of a Munsiff for execution, and has not been returned to the District Court, the "proper Court" within the meaning of the Limitation Act, 1908, art. 182 (5), in which to apply "for execution" of the decree is the Court of the Munsiff (y).

11. [Ss. 256, 235.] (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case and shall contain in a tabular form the following particulars, namely :—

- (a) the number of the suit ;
- (b) the names of the parties ;
- (c) the date of the decree ;
- (d) whether any appeal has been preferred from the decree ;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such application and their results ;

O.21, r. 11.

- (g) the amount with interest (if any) due upon the decree or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs (if any) awarded ;
- (i) the name of the person against whom execution of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required, whether—
 - (i) by the delivery of any property specifically decreed ;
 - (ii) by the attachment and sale, or by the sale without attachment, of any property ;
 - (iii) by the arrest and detention in prison of any person ;
 - (iv) by the appointment of a receiver ;
 - (v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

Sub-rule (1) corresponds with s. 256 of the Code of 1882, and sub-rule (2) with s. 235.

Difference between old section 256 and sub-rule (1).—Section 256 of the Code of 1882 ran as follows :—

“ When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court or against his movable property within the same limits.”

Sub-rule (1) differs from s. 256 in the following particulars :—

1. Under s. 256 immediate execution could only be issued if the amount of the decree did not exceed Rs. 1,000. Under the present rule there is no limit to the amount of the decree. But the decree must be one for the payment of money.

2. As a general rule, a decree-holder seeking to arrest the judgment-debtor must present an application *in writing* to the Court, and the Court may then direct a warrant to issue for the arrest of the judgment-debtor who, as a rule, cannot be arrested without a warrant. S. 256 of the Code of 1882 dispensed with a written application, and enabled the Court to issue a warrant for the arrest of the judgment-debtor on an *oral* application. Sub-rule (1) goes further, and empowers the Court to order immediate arrest of the judgment-debtor *prior to the preparation of a warrant, if he is within the precincts of the Court.* O. 21,
rr. 11, 12.

3. Execution can no longer issue against the movable property of the judgment-debtor on an *oral* application as it could under s. 256.

Privilege from arrest.—The privilege from arrest under civil process conferred by s. 135 of this Code does not extend to a judgment-debtor against whom an order has been made for immediate arrest under this sub-rule. See r. 135, sub-s. (3).

Alterations in sub-rule (a).—Sub-rule (2) corresponds with s. 235 of the Code of 1882 except in the following particulars:—

1. In cl. (g), the words, “together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed,” are new.
2. In cl. (j), sub-cl. (ii), the words “or by the sale without attachment,” are new.
3. Cl. (j), sub-cl. (iv), is new.

The application shall be verified.—An application for execution may be verified by any person acquainted with the facts of the case. It may therefore be verified by a person who holds a general power of attorney from the decree-holder, notwithstanding that the decree-holder may be residing within the jurisdiction of the Court (z).

The application shall state the date of the decree.—The date of the decree means the date on which the judgment was pronounced (a). See O. 20, r. 7.

The application shall specify the mode in which the assistance of the Court is required.—Where an application did not specify the mode in which the assistance of the Court was required, it was rejected (b). See r. 17 below.

Sub-rule (3).—This sub-rule is new. The Court may under this sub-rule require the applicant to produce a certified copy of the decree. Such copy, however, is not a necessary annexure to an application for execution. An application, therefore, which is not accompanied by a copy of the decree, cannot be said to be an application not “in accordance with law” within the meaning of art. 132 (5) of sch. I of the Limitation Act (c).

12. [S. 236.] Where an application is made for the attachment of any movable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the

Application for attachment of movable property not in judgment-debtor's possession.

(z) *Bakar v. Uddi Narain* (1904) 26 All. 154.

(a) *Golam v. Goljan* (1898) 25 Cal. 109.

(b) *Sha Karamchand v. Gholabhai* (1896) 19 Bom.

84.

(c) *Raghunandan v. Badan Singh* (1918) 40 All.

209.

O. 21, property to be attached, containing a reasonably accurate
rr. 12-14. description of the same.

Failure to annex inventory.—Where no such inventory as is required by this rule is annexed to the application for execution, the application cannot be said to be one “in accordance with law” within the meaning of art. 182 of the Limitation Act, 1908 (*d*).

13. [S. 237.] Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

Application for attachment of immovable property to contain certain particulars.

(a) a description of such property sufficient to identify the same and in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

In cl. (a), the words “and, in case such property can be identified . . . or numbers,” are new.

14. [S. 238.] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing, any transferable interest in, the land, or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

Power to require certified extract from Collector's register in certain cases.

Alteration in the rule.—Under the old section it was *necessary*, where the application was for the attachment of land registered in the Collector's Office, that the application should, in each case, be accompanied by a certified extract from the register of such office. Under the present rule, the Court *may at its option* require the applicant to produce such extract. The object is to save costs to the applicant of procuring such extract.

15. [S. 231.] (1) Where a decree has been passed jointly **O. 21, r. 15.**

Application for execution
by joint decree-holder.

in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

Alterations in the rule.—This rule corresponds with s. 231 of the Code of 1682 except in the following particulars:—

1. The words ‘or his or their representatives’ which occurred in s. 231 after the words ‘one or more of such persons,’ have been omitted in view of the provisions of s. 146. See notes below under the head ‘Any one or more of such persons.’
2. The words ‘unless the decree imposes any condition to the contrary’ in sub-rule (1) are new. See notes below under the same words.

What is a joint decree.—A decree jointly passed in favour of more persons than one is a joint decree. *A* and *B* obtain a decree against *C* for Rs. 5,000; this is a joint decree. It is not the less a joint decree, because the shares of *A* and *B* in the decretal amount have been determined by the decree. Thus if it is determined by the decree that the share of *A* is Rs. 2,000, and the share of *B* is Rs. 3,000, the decree is still a joint decree. But though the decree in such a case is a joint decree, the interest of *A* and *B* being determined by the decree, either of them may apply for execution to the extent of his interest (*e*).

Application by one of several decree-holders for execution of the whole decree.—Ordinarily all the decree-holders in a joint decree must join in an application for execution of the decree. The present rule provides for the case in which all decree-holders are unable or are unwilling to join in the application, and in such case enables one or more of such decree-holders to apply for execution of the whole decree ‘for the benefit of them all.’ Where an application is made under this rule by some only of several joint decree-holders, the Court may, in its discretion, grant or refuse the application (*f*). Similarly, it is in the discretion of the Court whether or not to give notice to the other decree-holders or to the judgment-debtor before making an order for execution under this rule: it is not obligatory upon the Court to do so (*g*). If the application is allowed, the Court will under sub-r. (2) make such order as it deems necessary for protecting the interests of the other decree-holders and of the judgment-debtor (*h*).

(*e*) *Hurriah Ohunder v. Kali Sunderi* (1883) 9 Cal. 482, 10 I. A. 4.

(*f*) *Sheikh Ahmed v. Shahzada* (1880) 7 C.L.R. 537.

(*g*) *Durga Das v. Dewraj* (1906) 33 Cal. 306.

(*h*) *Taravundari v. Beharilal* (1868) 1. B.L.R.A.C. 28.

O.21, r. 15. "Unless the decree imposes any condition to the contrary."—The provisions of this rule do not apply where by the terms of the decree execution has been made dependent on all the decree-holders joining in the application (i).

Application by one of several decree-holders for execution in respect of his share of the decree.—The application under this rule by one of several holders of a joint decree must be for the execution of the *whole* decree and further, it must be for the benefit of himself and the other decree-holders. A joint decree cannot be executed by one of several joint holders in respect of what the applicant considers his *share* in the decree (j). Thus, if a decree is passed for A and B for Rs. 5,000, the decree is joint, and neither A nor B can apply for execution of his proportionate share of the decree. But one of several holders of a joint decree may apply for execution of the decree to the extent of his *interest* therein, if the *extent of such interest is determined by the decree*. Thus, if in a suit for possession of land by A and B against C, the Court has *declared* each of the plaintiffs to be entitled to a moiety of the land, the Court may allow either plaintiff to execute the decree to the extent of his one half share, though the decree is a joint decree (k).

The rule set forth above that one of several holders of a joint decree is not entitled to execution in respect of his share of the decree, but that he must apply for execution of the whole decree, applies only in those cases where the *whole* decree has remained unsatisfied. That rule does not apply where a joint decree has been satisfied in *part* before the date of the application for execution. In such a case, execution cannot issue for the *whole* decree, but only for so much thereof as has remained unsatisfied. This subject is considered in the next following paragraph.

Payment by judgment-debtor out of Court to one of several holders of a joint decree.—A obtains a decree against C for Rs. 5,000. In such a case the safest course for C is to pay the amount of the decree *into Court* (r. 1). The Court will then pay the amount to A on his application. If C does not adopt that course, and pays the amount to A *out of Court* (r. 1), C must see that A, the decree-holder, certifies the payment to the Court. If A fails to certify the payment, C must apply to the Court to record the payment as certified. If C also fails to do so, the Court executing the decree will not recognise the payment. Hence if A, notwithstanding the payment to him of the amount of the decree, applies for execution of the decree against C, the Court will direct execution to issue (r. 2).

Suppose now that there are two or more decree-holders, and the payment is made by the judgment-debtor to *one* of them. What are the rights of the other decree-holders to execute the decree? We proceed to answer this question.

- I. (1) A and B obtain a decree against C for Rs. 5,000. C pays B his (B's) share of the decretal amount out of Court, and the payment is certified to the Court. A then applies under this rule for execution of the *whole* decree. A cannot execute for more than his own share, as the decree has been satisfied as to B's share (l).
- (2) Suppose that in the above case, the payment is not certified to the Court but B admits the payment. The result will be the same as in ill. (1) (m).

(i) *Farzand v. Abdullah* (1884) 6 All. 69.
 (j) *Collector of Shahjahanpur v. Surjan* (1882) 4 All. 72; *Banarsi Das v. Maharani* (1883) 5 All. 27, 35; *Dattchand v. Bai Shivkor* (1891) 15 Bom. 242; *Muthusami v. Natesa* (1896) 18 Mad. 464; *Meik v. The Midnapur*

Zamindary Co. Ltd. (1919) 4 Pat. L. J. 575.
 (k) *Hurriah Chunder v. Kalisunderi* (1883) 9 Cal. 482, 10 I. A. 4.
 (l) *Tarruk v. Divendro* (1883) 9 Cal. 831.
 (m) *Sultan v. Savalayammal* (1892) 15 Mad. 348.

But if *B* does not admit the payment, the Court may allow execution O.21, r. 15. to issue for the *whole* decree.

II. *A* and *B* obtain a decree against *C* for Rs. 5,000. *C* pays the *whole* amount of the decree to *B* out of Court, and the payment is certified to the Court. *A* then applies for execution of the decree to the extent of his own share. Is *A* entitled to execute the decree to the extent of his share, regard being had to the fact that *B* has certified satisfaction of the *whole* decree? It has been held that he is, for one of two joint decree-holders cannot alone certify satisfaction of the whole decree so as to bind the other decree holders, though he may certify satisfaction in respect of his own share therein (*n*). In the case put above, *A* has another remedy besides proceeding in execution against *C*. That remedy is by way of suit against *B* to recover his share from him, *B* having certified to the Court that he has received payment from *C* of the *whole* amount of the decree, thus *admitting* receipt of the whole amount (*o*).

“Any one or more of such persons.”—This expression includes persons claiming under such persons. A transferee of a decree within the meaning of r. 16 below is such a person (*p*).

Amendment.—An application for execution of a joint decree by one only of the decree-holders should state that the application is made on behalf of all the decree-holders. If the application contains no such statement, it should be rejected. It cannot be allowed to be amended, for O. 21, r. 17, while it empowers the Court to allow a defect in the requirements of rr. 11 to 14 to be amended, does not include the present rule in it (*q*).

Appeal.—An order determining any question mentioned or referred to in s. 47 is a “decree” (s. 2), and is therefore appealable under s. 96. The questions referred to in s. 47 are questions arising *between a decree-holder on the one hand and the judgment-debtor on the other*, and relating to the execution, discharge or satisfaction of the decree. Hence orders determining such questions are appealable as decrees under s. 96. Bearing this in mind, we proceed to note the following cases :—

(1) *A* and *B* obtain a decree against *C*. *A* alone applies for execution of the whole decree. *C* (the judgment-debtor) contends that *A* alone should not be allowed to execute the whole decree. Here the question being one *between the decree-holder on the one hand and the judgment-debtor on the other*, any order made upon the application is appealable as a decree. If *A*’s application is allowed, *C* may appeal from the order, and if the application is disallowed, *A* may appeal from the order (*r*).

(2) Suppose that in the above case, the objection to execution was raised not by *C*, the judgment-debtor, but by *B*, the other decree-holder. In such a case, the question being *between the decree-holders inter se*, no appeal will lie from any order made upon the application whether the application is allowed or refused (*s*).

Limitation.—See Limitation Act, Sch. I, art. 182, Explan. 1.

(*n*) *Tamman Singh v. Lachhmin* (1904) 28 All. 318; *Moti Ram v. Hannu* (1904) 26 All. 34; *Lachman v. Chaturbhuj* (1906) 28 All. 252.
(*o*) *Somasundaram v. Krishnaswami* (1906) 29 Mad. 183.

(*p*) *Dwar Buksh v. Fatik* (1899) 26 Cal. 250.
(*q*) *Meik v. The Midnapur Zamindary Co. Ltd.* (1919) 4 Pat. L. J. 575.
(*r*) *Lakshmi v. Pannassa* (1894) 17 Mad. 394.
(*s*) *Ratanlal v. Bai Gulab* (1899) 23 Bom. 623.

O.21, r. 16. 16. [S. 232.] Where a decree, or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree, is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder :

Application for execution
by transferee of decree.

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

Alterations in the rule:—

- 1 The words "or if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree," have been added into the first paragraph to make it clear that the rule is not confined in its application to a transferee of the *whole* decree, but extends to a transferee of the *interest* of any holder of a *joint* decree. This was, in fact, the interpretation put upon the old section (t).
2. The words, "if that Court thinks fit," which occurred in the old section in the first paragraph before the words "the decree may be executed" have been omitted. See notes below under the head "Right to execution does not depend upon discretion of Court."

Application for execution by transferee of decree.—No order should be made under this rule for the execution of a decree on the application of a transferee of the decree unless—

- I. the decree has been transferred by *assignment in writing or by operation of law*; [an oral assignment is not sufficient (u)];
- II. the application for execution is made to the Court which *passed the decree*; and
- III. where the decree has been transferred by assignment, *notice* of the application has been given to the transferor and the judgment-debtor.

No application by the transferees necessary for recognition as transferee. The rule does not provide for any such application. All that the rule requires is that where the decree has been transferred by assignment, the transferee should give notice of the application for execution to the

(t) *Muthunarayana v. Balkrishna* (1896) 19 Mad. 306. ¶

(u) *Jatindra Nath v. Peyer Deyo Bibi* (1916) 4 Cal. 990, 999, 43 I. A. 108, 112.

transferor and the judgment-debtor (v). See notes below, "Transfer of O. 21, r. 16 decree against a company in liquidation."

We proceed to consider the above conditions in order.

I. Who may apply for execution under this rule.—The following persons, and no others, may apply for execution under this rule :—

- (a) The transferee of a decree under an assignment *in writing*. [A transferee under an *oral* assignment has no *locus standi* to apply for execution under this rule (w)].
- (b) The transferee of a decree by *operation of law*, e.g., the legal representative of a deceased decree-holder, or the Official Assignee in the case of an insolvent decree-holder, or the purchaser of a decree at a Court-sale in execution of a decree against the decree-holder (r. 53) (x).
- (c) A transferee under an assignment in writing or by operation of law from the transferee mentioned in cls. (a) and (b), whether by immediate or mesne assignment (y).

Explanation I.—The expression "transferee" in cls. (a), (b) and (c), is not confined to a transferee of the *whole* decree, but includes a transferee of a *portion* of the decree (z), or, where the decree is a joint one, the transferee of the *interest* of any one of the decree-holders in the decree (a).

Illustrations of Explanation I.

1. A, who holds a decree against B for Rs. 5,000, transfers his interest in the decree to the extent of Rs. 2,000 to X. The application for execution may be made by X as *assignee of a portion of the decree*, or it may be made by A, the decree-holder, or by A and X both together. In any case the application must be for execution of the *whole* decree, *Kishore v. Gisborne & Coy.* (1890) 17 Cal. 341; *Gyamonee v. Radha* (1880) 5 Cal. 592, and not merely for the portion transferred: *Ramchandra v. Abdul* (1913) 35 All. 204.

2. A and B obtain a decree against C for Rs. 5,000. A assigns his interest in the decree to X. Here X occupies the double character of a *transferee* within the meaning of this rule and of a transferee of an interest in a *joint decree* within the meaning of r. 15. Hence any application that X may make for execution will be governed by the provisions both of this and the preceding rule: *Dwar Bux v. Fatik* (1899) 26 Cal. 250.

Explanation II.—A person to whom a party to a suit agrees to transfer any decree *that may be passed* in the suit is not a transferee within the meaning of this rule.

Illustration.

A sues B to recover Rs. 5,000. During the pendency of the suit, A agrees with C to transfer to him any decree that may be passed in his favour in the suit. A decree is subsequently passed for A. C is not a transferee within the meaning of this rule, and he is not entitled to execute the decree against B. The word "decree-holder" in this rule means a person in whose favour a decree has actually been passed. When

(v) *Ramohandra v. Subramania* (1904) 14 Mad. L. J. 393; *Annamalai v. Ramaier* (1908) 18 Mad. L. J. 24, 25.
 (w) *Parvati v. Digambar* (1891) 15 Bom. 307.
 (x) See *Gow. Sunder v. Hem Chunder* (1899) 16 Cal. 355.
 (y) See *Amar Chundra v. Gurus Prosunno* (1900) 27 Cal. 488; *Ganga v. Yakub* (1900) 27

Cal. 670.
 (z) *Kishore v. Gisborne and Co.* (1891) 17 Cal. 341; *Endoori v. Venkatachinnulu* (1909) 33 Mad. 80, doubted in *Mohkam Chand v. Ganga Ram* (1917) P. B. no. 15, p. 55.
 (a) *Muthunarayana v. Balakrishna* (1896) 19 Mad. 308.

O. 21, r. 16. the assignment was made, there was no decree in existence: *Basroorvittil v. Ramchandra* (1907) 17 Mad. L. J. 391.

Explanation III.—A person to whom the holder of a decree for possession of immovable property sells a *portion of the property* is not a transferee of the decree within the meaning of this rule, and he is not therefore entitled to execute the decree. A transfer of property is not the same thing as a transfer of a decree (b).

Explanation IV.—A transferee of a decree awarding maintenance is entitled to execution under this section. The reason is though it may be that a right to future maintenance cannot be transferred having regard to the provisions of s. 6, cl. (d) of the Transfer of Property Act, 1882, there is no objection to a transfer of such right when it is awarded by a decree. The transferee therefore of such a decree is entitled to recover by execution maintenance that has fallen due. He cannot, of course, attach maintenance before it has fallen due (c). See s. 60, sub-s. (1), cl. (n), and notes thereto on p. 167 above.

Benamidar.—A obtains a decree against B. C purchases the decree from A in the name of D. Here C is the real transferee, and D is *benamidar* or ostensible transferee. Is D entitled to take out execution of the decree? Yes, according to the High Court of Allahabad (d). No, according to the High Court of Calcutta; but if he has succeeded in taking out execution (as where it is not brought to the notice of the Court that he is a *benamidar*), the application for execution made by him will save a subsequent application by C from the bar of limitation (e).

Where the alleged transferee of a decree is found to be the *benamidar* of a judgment-debtor, the Court is bound by the second proviso to this rule to refuse to allow the decree to be executed against the other judgment-debtors in favour of the alleged transferee (f).

The mere fact that an order for execution has been made on the application of a *benamidar* does not preclude the real transferee from applying under this rule to conduct the further execution of the decree himself. But the proceedings in execution up to that date are binding upon the real transferee (g).

II. Application for execution by a transferee should be made to the Court which passed the decree.—A transferee of a decree must apply for execution to the Court which passed the decree, though the decree has been sent for execution to another Court (h). The Court to which a decree has been transmitted for execution has no jurisdiction to make an order for execution on the application of a transferee of the decree. If such an order is made, it is illegal, and will be set aside in appeal (i).

As to the definition of "Court which passed the decree," see s. 37 and notes thereto.

III. Notice shall be given to the transferor and the judgment-debtor. If no notice is given, the Court has no power to execute (j). And even after notice has been given, the Court should not direct execution until it has heard the objections of the judgment-debtor. If the property of the judgment-debtor is attached before the Court has heard his objections, the attachment is illegal, even if the Court subsequently hears his objections and confirms the attachment after such hearing (k).

(b) *Hansraj Pal v. Nukhrati Kunwar* (1907) All. W. N. 280.

(c) *Asad Ali v. Haidar Ali* (1910) 38 Cal. 13. See however, *Endoori v. Venkatachinnulu* (1909) 38 Mad. 80.

(d) *Kanta Prasad v. Indomati* (1915) 37 All. 414.

(e) *Abdul v. Chukhun* (1879) 5 C. L. R. 253; *Gour Sunder v. Hem Chunder* (1889) 16 Cal. 355; *Balkishan v. Bedmati* (1893) 20 Cal. 388, 395.

(f) *Annabatulla v. Annabatulla* (1915) 28 I. C. 906.

(g) *Manikham v. Tatayya* (1898) 21 Mad. 388.

(h) *Framji v. Ratansha* (1872) 9 B. H. C. 49;

Kadir v. Ilahi Baksh (1880) 2 All. 283.

(i) *Amar Chandra v. Guru Prosunno* (1900) 27 Cal. 488; *Tameshar v. Thakur Prasad* (1908) 25 All. 443.

(j) *Gulzari v. Daya Ram* (1887) 9 All. 46.

(k) *Kasum Goolam v. Dayabhai* (1911) 36 Bom. 58.

Where the judgment-debtor is dead, the notice required by this rule should be given to **O. 21, r. 16**, his legal representative (l).

Where on an application by the transferee of a decree to have his name substituted as decree-holder, no objection is taken by the judgment-debtor as to the validity of the transfer, the judgment-debtor will be precluded from questioning the validity of the transfer on an application by the transferee for execution of the decree (m).

There is nothing to preclude a transferee of a decree from applying under s. 39 to the Court which passed the decree to send the decree for execution to another Court (n). But the notice required by this rule must be issued by the Court which *passed the decree*, and not by the Court to which the decree is sent for execution (o).

It has been held by the High Court of Calcutta that the mere issue of a notice under this rule does not operate as a revivor within the meaning of arts. 182 and 183 of the limitation Act (p). The contrary has been held by the High Courts of Allahabad and Madras. According to these Courts a mere application by the transferee for substituting his name for that of the decree-holder operates as a revivor of the decree and gives a fresh starting point of limitation for executing the decree (q). And it has been held by the Madras Court that an application by the transferee to bring the representative of the deceased judgment-debtor on the record to serve him with notice under this rule has the same effect (r).

Right to execution does not depend upon the discretion of the Court.—

In the old section, the words were “and if that Court thinks fit, the decree may be executed,” &c. It was accordingly held under that section that the Court had a discretion to grant or refuse an application for execution made by a transferee (s). The word “if that Court thinks fit” have been omitted in this rule. The result is that where the conditions specified in this rule are satisfied, a transferee of a decree is entitled to execution as of right like the original decree-holder.

Transfer of decree for the payment of money against two or more persons to one of them.—This subject may be considered under the following two heads :—

1. Where the whole decree has been transferred.
2. Where the decree is a joint one, and part only of the decree has been transferred.

First, as regards transfer of the whole decree.—Where a decree for the payment of money has been transferred by assignment or by operation of law to one of several judgment-debtors, the decree is wholly extinguished. Hence the transferee cannot execute the decree against the other judgment-debtors, but his remedy against them is by a *regular suit* for contribution, as if the decree had been satisfied by him. The object of the second proviso to the rule is not to deprive the transferee of a decree, who might happen to be one of the judgment-debtors, of all relief, but to impose upon him the duty of proceeding by what was considered a more appropriate procedure, that is, a suit for contribution (t). The provisions of this rule cannot be evaded by the judgment-debtor who satisfies the decree by taking a transfer of the decree in the name of a benamidar (u).

(l) *Khushroobhai v. Hormazsha* (1887) 11 Bom. 727.

(m) *Taj Singh v. Jagan Lal* (1916) 38 All. 289.

(n) *Chathoth v. Saidindavide* (1903) 28 Mad. 259.

(o) *Nando Lal v. Chatterput* (1902) 29 Cal. 235.

(p) *Manohar Das v. Futeh Chand* (1903) 30 Cal. 979.

(q) *Pitam Singh v. Tota Singh* (1907) 29 All. 301 ;

Annamalai v. Ramaier (1908) 18 Mad. L. J. 24.

(r) *Mahalinga v. Kuppanchariar* (1907) 30 Mad.

541.

(s) *Megh Narayan v. Radha* (1870) 4 B. L. R. A. C. 200 ; *Parvata v. Digambar* (1891) 15 Bom. 307.

(t) *Anant v. Nagappa* (1908) 32 Bom. 195, 197.

(u) *Annabattula v. Annabattula* (1915) 28 I. C. 906 ; *Ramayya v. Krishnamurti* (1917). 40. Mad. 296.

Illustrations.

O. 21, r. 16. (a) *A* obtains a decree against *B* and *C* for Rs. 5,000. *B* satisfies the decree by paying Rs. 5,000 to *A*. In such a case *C* is bound to pay to *B* his (*C*'s) share of the judgment-debt. If *C* fails to contribute his share, *B*'s remedy is by way of suit against *C* to recover the amount. [This illustration is merely introductory].

(b) *A* obtains a decree against *B* and *C* for Rs. 5,000. *B* purchases the decree from *A*. Here *B*'s position is exactly the same as in ill. (a); that is to say, the decree must be taken as having been satisfied by *B*. *B* cannot therefore execute the decree against *C*, and his only remedy is to bring a suit against *C* for contribution: *Sreenath Doss v. Juggadanund* (1886) 9 W. R. 230.

(c) *A* obtains a decree against *B* and *C* for Rs. 5,000. *A* dies, and on his death the decree passes to *B* as his heir. The position is the same as in ill. (b): *Banarsi v. Maharani* (1883) 5 All. 27.

(d) *A* obtains a decree against *B* and *C* for Rs. 5,000. *B* pays the amount of the decree to *A*. At *B*'s request *A* transfers the decree to *F*. *F*, being merely a benamidar for *B*, is not entitled to execute the decree against *C*. It is competent to *C* in such a case to show that *B*, and not *F*, paid the amount of the decree to *A*, and such payment may be proved even if it has not been certified under O. 21, r. 2: *Ramayya v. Krishnamurti* (1917) 40 Mad. 296.

Next, as regards transfer of a portion of a joint decree.—Where a decree has been passed jointly in favour of two or more persons, and the interest of any decree-holder in such decree has been transferred by assignment or by operation of law to one of several judgment-debtors, the decree is extinguished to the extent of the interest so transferred, and execution can only issue for the rest of the decree.

Illustration.

A and *B* obtain a decree against *C* and *D* for Rs. 5,000. *A*'s share of the decree is Rs. 2,000. *A* dies, and on his death his interest in the decree passes to *C* as his heir. The decree is extinguished to the extent of Rs. 2,000, and neither *B* (as decree-holder) nor *C* (as transferee of *A*'s interest in the decree) can execute the decree against *D* for more than Rs. 3,000: *Pogose v. Fukurooddeen* (1878) 25 W. R. 343; *Banarsi v. Maharani* (1883) 5 All. 27. The same principle has been held to apply to mortgage-decrees: *Kudhai v. Sheo Dayal* (1888) 10 All. 570.

“Decree for the payment of money against two or more persons.”—The expression “a decree for the payment of money against two or more persons” in the second proviso to the rule means a *personal* decree for the payment of money against two or more defendants. Hence the proviso does not apply where the decree is not against the defendants *personally*. *A* obtains a decree against *B* as the legal representative of *X* and against *C* as the legal representative of *Y* for Rs. 20,000 to be paid out of the estates of *X* and *Y*. *A* dies leaving *B* as his heir, and on his death the decree passes to him by operation of law. The decree not being a personal decree against *B* and *C*, *B* is entitled, as transferee of *A*'s decree, to have the decree executed against the estate of *Y* (*v*).

Further, the expression “decree for the payment of money against two or more persons” means a decree against two or more persons *jointly*. Hence the rule laid down in the second proviso does not apply where the decree is not passed against the

defendants jointly. In a suit by A against B and C, A obtains a decree against B for Rs. 90 and against C for Rs. 30. A then assigns the decree to C. The decree not being a joint decree, C may execute the decree passed against B for Rs. 90 (w). O. 21,
rr. 16,17.

Appeal.—An order determining any question between the judgment-debtor and the representative of the decree-holder (s. 47) is a decree (s. 2), and is therefore appealable as such (s. 96). A transferee of a decree is a “representative” of the decree-holder within the meaning of s. 47. Therefore an order refusing to recognize the transferee of a decree or dismissing his application for execution on the objection of the judgment-debtor is a decree, and appealable as such (x).

Suit by transferee.—A transferee of a decree, whose application is rejected under this rule on the ground that the transfer is not a valid one, is not precluded from instituting a regular suit for a declaration as to the validity of the transfer. Such a suit is not barred by the provisions of s. 47 (y).

Equities enforceable against original decree-holder.—See s. 49 and notes thereto.

Transfer of decree against a company in liquidation.—Where a decree against a company in liquidation is transferred pending the winding up proceedings, and the liquidator refuses to recognize the transferee, the transferee may apply to the executing Court under s. 47 (3) to be substituted for the original decree-holder to enable him to prove his claim before the liquidator. S. 171 of the Indian Companies Act, 1913, is no bar to the granting of such an application (z).

17. [S. 245.] (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions

(w) *Anant v. Nagappa* (1908) 32 Bom. 195.
(x) *Badri Narain v. Jai Kishen* (1894) 18 All. 488; *Tameshar v. Thakur* (1908) 25 All. 443; *Ganga Das v. Yakub* (1900) 27 Cal. 670; *Subbuhayammal v. Chidambaram*

(1902) 25 Mad. 383.
(y) *Bommanapati v. Chintakunta* (1903) 26 Mad. 264.
(z) *Kashi v. The Union Bank of India* (1919) 41 All. 432.

O. 21, r. 17. hereinafter contained, order execution of the decree according to the nature of the application :

Provided that in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

Alterations in the rule.—This rule corresponds with s. 245 of the Code of 1882 except in the following particulars :—

1. The words “ may allow the defect to be remedied ” in sub-rule (1), have been substituted for the words “ may allow it [application] to be remedied ” as being more comprehensive and covering the case of omission to produce a copy of the decree as now required by sub-r. (3) of r. 11.
2. Sub-rule (2) is new. See notes below under the head “ Sub-rule (2) : limitation.”

Scope of the rule.—This rule lays down the procedure to be adopted by the Courts on receiving an application for execution.

Sub-rule 2 : limitation.—Article 182 of the Limitation Act provides *inter alia* that the first application for execution must be made within three years from the date of the decree. If the decree has not been executed, and it is necessary to make further applications, each successive application must be made within three years from the date of the “ last application.” But the “ last application ” in each case must have been one “ in accordance with law ; ” otherwise it cannot give a fresh starting point for limitation. An application which does not comply with the requirements of rules 11 to 14 of this Order is not one “ in accordance with law ” (a). With these observations, we proceed to consider the bearing of sub-rule (2) on the provisions of the Limitation Act. Sub-rule (1) provides that where an application is made for execution, but it does not comply with the requirements of rr. 11 to 14, the Court may allow the applicant to amend it within a time to be fixed by the Court. If the application is amended within the time fixed or within such further time as may be allowed by the Court (s. 148), it will be deemed by virtue of sub-rule (2) to have been an application “ in accordance with law,” and presented on the date when it was first presented. Under the old section it was held that where an order was made for amending an application for execution, and the amendment was made, the application should be deemed to have been presented not on the date when it was first presented, but on the date when it was amended. The result was that if the amendment was not made until after the expiration of the period of limitation, the application was held to be time-barred, though the amendment was made within the time fixed by the Court (b). Those decisions are no longer law. Compare s. 149.

Illustration.

The last day for presenting an application for execution is 31st July 1908. The decree-holder presents the application on that day. The application does not comply with the requirements of O. 21, r. 11 (2). The Court may, under this rule, return the application for amendment and fix a date within which it should be amended. If the

(a) *Aspar v. Troilokya* (1890) 17 Cal. 631, 639 ;
Gopal Sah v. Janki Koer (1896) 23 Cal. 217, 222. | (b) *Gopal Sah v. Janki Koer* (1896) 23 Cal. 217 ;
Raghunatha v. Venkatesa (1908) 26 Mad. 101.

application is amended within the time fixed by the Court, it will be deemed to have been presented on 31st July 1908. Further, it will be deemed to have been an application "in accordance with law" within the meaning of art. 182 of the Limitation Act 1908, so as to give a fresh starting point of limitation. O. 21,
rr. 17, 18.

Where on an application for execution presented by an agent it is objected that the agent is not duly authorized, and the agent thereupon files a power-of-attorney, the Court should not dismiss the application but treat it as having been filed on the date on which the power-of-attorney was filed (c).

18. [S. 246.] (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

Execution in case of cross decrees.

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation

0.21, r. 18. to a decree passed against him singly in favour of one or more of such persons.

Illustrations.

(a) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(b) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross-decree under this rule.

(c) *A* obtains a decree against *B* for Rs. 1,000. *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

(d) *A*, *B*, *C*, *D*, and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100 against *F* singly and applies for execution to the Court in which the joint-decree is being executed. *F* may treat his joint decree as a cross decree under this rule.

Alterations in the rule.

1. The words "where applications are made to a Court for the execution of cross-decrees" in sub-rule (1) are new. They give effect to certain decisions noted below under the head "Application of the rule."
2. The words "separate suits" in sub-rule (1) are new. They have been added to show that, for the purposes of execution, a counter-claim is not a separate suit (d).
3. Sub-rule (4) and the illustration thereto, that is, ill. (d), are both new. This sub-rule gives effect to the decisions noted under the head "Sub-rule (4)."

Application of the rule—The meaning of sub-rule (1) may be explained by the following illustration: *A* holds a decree against *B* for Rs. 5,000. *B* holds a decree against *A* for Rs. 3,000. *A* and *B* each applies for execution of his decree to Court *X* which has jurisdiction to execute both decrees. The decrees being cross-decrees they will be set off against each other. Hence *B*, who is the holder of the decree for the smaller amount, will not be allowed to take out execution of his decree. Execution will only be allowed of *A*'s decree to the extent of Rs. 2,000, being the difference between the amount of his and *B*'s decree. If in the case put above, the decree held by *B* was also for Rs. 5,000, neither party should be allowed to take out execution, and satisfaction should be entered upon both decrees.

This rule does not apply unless—

- (1) the cross-decrees are for the payment of two sums of money;
- (2) the decrees have been obtained in separate suits [see notes above under the head "Alterations in the rule"];
- (3) both the decrees are capable of execution at the same time [ill. (1)], and by the same Court, and

- (4) the decree-holder in one of the suits in which the decrees have been passed **O. 21, r. 18** is the judgment-debtor in the other, and each party fills the same character in both the suits [ills. (b) and (c)].

If the cross-decrees are of the character specified above, it is further necessary, before the provisions of this rule can apply, that both decrees must be before the executing Court for execution, and applications should have been made for execution of both decrees. If either decree-holder omits to apply for execution of his decree, the other decree-holder may take out execution of his decree for its full amount (e). Note the words with which the rule begins.

"Cross-decrees for the payment of two sums of money."—A sues B on a mortgage, and obtains a decree for Rs. 1,800, to be realized *by sale of the mortgaged property*. B obtains a decree against A for Rs. 2,000. Here A's decree, though it is one for sale in enforcement of a mortgage, and not strictly for the payment of money, may be set-off against B's decree, by virtue of the provisions of r. 20 of this order (f).

Where execution is taken out for the smaller sum.—This rule provides that where applications are made for the execution of cross-decrees, one for a larger amount and the other for a smaller amount, execution should be taken out only for the difference. This means that the decree for the smaller amount cannot be executed at all, and no separate execution should issue of that decree (g). It is to be noted, however, that if the Court, in contravention of the provisions of this rule, allows execution to issue of the decree for the smaller sum, and a sale is made in such execution, the sale is not void, the reason being that "a purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount" (h).

Same character in both suits.—The provisions of this rule do not apply unless the decree-holder in one suit is the judgment-debtor in the other, and each party fills the same character in both suits. A holds a money decree against B. B holds a decree for sale passed in a suit brought by him as mortgagee against C, the mortgagor, and against A, a purchaser of a portion of the mortgaged property from C. A applies for execution of his decree against B. B is not entitled to set off his decree against A's decree. The reason is that A does not fill the same character in both the suits. The decree held by A is in his favour personally which he may execute against B by the arrest of his person or the attachment of his property. This cannot be said of B's decree against A, for B is not ordered by the decree *personally* to pay any sum of money, but is only given an option to pay if he likes to save from sale the property in which he is interested (i). If in the case put above C, the mortgagor, was the holder of the money decree against B instead of A, and C applied, for execution against B, B (the mortgagee) could have set off his decree against C (j).

Assignment of decree.—It has been held by the High Court of Calcutta that a decree obtained against the assignor in a suit pending at the date of the assignment may be set-off against the decree assigned, if the assignee had notice of such suit (k). A obtains a decree against B for Rs. 5,000. B then sues A for Rs. 2,000. Pending B's suit C obtains a transfer of A's decree with notice of the suit. A decree is then passed for B in his suit against A. C applies for execution against B of the whole decree for

(e) *Chajmal v. Lal Dharam* (1902) 24 All. 481; *Rewa Mahlon v. Ram Kishan* (1887) 14 Cal. 18, 24, 13 I. A. 106-110; *Ponnusamy v. Doraisamy* (1909) 32 Mad. 336.
(f) See *Krishnan v. Venkatapathi* (1906) 29 Mad. 318.
(g) *Sinnu v. Santhoff* (1908) 26 Mad. 423.

(h) *Rewa Mahlon v. Ram Kishan* (1887) 14 Cal. 18, 13 I. A. 106.
(i) *Shree Shankar v. Chunni Lal* (1916) 38 All. 669.
(j) *Nagar Mal v. Ram Chand* (1911) 33 All. 240.
(k) *Kristo Ramani v. Kedar Nath* (1889) 16 Cal. 619.

O. 21, Rs. 5,000. He is not entitled to execute for more than Rs. 3,000, as the transfer was taken with notice of B's suit. See notes to s. 49.

Sub-rule (4).—This sub-rule gives effect to the decisions in the undermentioned cases, where it was held that the holder of a decree passed jointly and severally against several judgment-debtors, one of whom holds a decree against such decree-holder singly may treat his joint decree as a cross-decree (l). See ill. (l) to the sub-rule.

19. [S. 247.] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

Execution in case of cross-claims under same decree.

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and,
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

Object of the rule.—The object of this rule is to prevent each side executing a decree in respect of sums due, whether for costs or otherwise, under the *same decree* (m).

Application of the rule.—This rule is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. A, a mortgagor, sues B, the mortgagee, for redemption. A decree is passed in the suit ordering that upon A paying to B Rs. 1,000 (mortgage-debt) on a day fixed by the Court B should reconvey the mortgaged property to A, and that if such payment is not made within the time fixed by the Court the property should be sold. At the same time A is awarded costs, Rs. 100, to be paid by B. Here both the sums being payable under the same decree, the provisions of the present rule apply, though B's remedy, if A failed to pay the mortgage-debt, would be by sale of the mortgaged property, and A's remedy, if B failed to pay the costs, would be against B personally. Hence A, being entitled to the smaller amount (Rs. 100), cannot take out execution at all against B, (n). B, being entitled to the larger amount (Rs. 1,000), is alone entitled to take out execution. But he cannot take out execution for more than Rs. 900, which is the same thing as saying that he must reconvey the property to A, if A paid Rs. 900, and he cannot insist on payment of the full sum of Rs. 1,000 as a condition of reconveyance (o). The point to be noted is that in the case of cross-claims under the same decree, execution may be taken out only by the party entitled to the larger sum. The party entitled to the smaller sum is not entitled to take out execution. It follows from this that if A is entitled to recover from B mesne profits amounting to Rs. 445 under a decree, and B entitled to recover from A under the same decree costs amounting to Rs. 855, A being entitled to the smaller sum cannot take out execution against B, though B's claim to execute his decree for costs is barred by limitation (p).

See s. 20 below.

(l) *Hury Doyal v. Din Doyal* (1883) 9 Cal. 479; *Ram Sukh Das v. Tota Ram* (1892) 14 All. 389.
(m) *Bhagwan v. Ratan* (1894) 16 All. 395, at 397.

(n) *Sankara v. Gopala* (1900) 23 Mad. 121.
(o) *Bhagwan v. Ratan* (1894) 16 All. 395; *Ishr v. Gopal* (1884) 6 All. 351.
(p) *Madappa v. Jaki* (1916) 40 Bom. 60.

Cross-decrees and cross-claims in mortgage suits.

20. [*New.*] The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge. **O. 21, rr. 20-22.**

Object of the rule.—This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross-claims apply to these of mortgage-decrees. The rule also makes it clear that the expression “decree for the payment of money” and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge. See in particular s. 34, s. 73, and O. 21, r. 53.

It has been held by the High Court of Allahabad that a simple decree for recovery of money can be set off against a decree for recovery of money by enforcement of a mortgage or charge (q). See notes to r. 18 above, “Cross-decrees for the payment, etc.”

21. S. [230, 2nd para.] The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Simultaneous execution.

Simultaneous execution against person and property.—An order refusing execution at the same time against the person and property of the judgment-debtor amounts to a decree under s. 2, cl. (2), read with s. 47, and it is therefore appealable (r).

Notice to show cause against execution in certain cases.

22. [S. 248.] (1) Where an application for execution is made—

- (a) more than one year after the date of the decree, or
- (b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative

O.21, r.22. of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

Alterations in the rule.—Sub-rule (2) is new. It enables the Court to issue execution without issuing a notice in cases where the issue of a notice may involve an unreasonable delay or defeat the ends of justice.

Consequence of omission to give notice.—This rule provides that, except where notice is dispensed with under sub-r. (2) the Court executing the decree *shall* issue a notice to the person against whom execution is applied for, where the application for execution is made more than one year after the date of the decree, or it is made against the legal representative of the judgment-debtor. This gives rise to the question whether the omission to give notice as required by this rule renders a sale absolutely *void for want of jurisdiction*, or whether the omission is a mere *irregularity*, in which case the sale is not void, but *voidable*, that is, valid until it is set aside. In *Gopal Chunder v. Gunamoni Dasi* (s), the High Court of Calcutta held that a notice under this rule is necessary in order that the Court should *obtain jurisdiction* to sell the property by way of execution, and that the omission to give the notice is by itself sufficient to render the sale void. This decision has since been approved by the Privy Council in *Raghunath Das v. Sunder Das* (t), and it has been followed in numerous cases (u). Since the notice under this rule affords the very foundation of the jurisdiction, it follows that where execution is issued without previously issuing a notice in a case where notice is required to be given under sub-r. (1), and property belonging to the judgment-debtor is sold in execution the sale is a nullity, not only where the property is purchased by the decree-holder [O. 21, r. 72] (v), but also where it is purchased by a third party (w). It does not make any difference whether the property sold is movable or immovable (x).

Notice to wrong person.—The principle laid down above applies to cases where no notice as required by this rule is given at all. We now turn to cases where a notice is served, but, as it turns out subsequently, upon a *wrong person*. The leading case upon the subject is *Malkarjun v. Narhari* (y). In that case a decree had been passed against a debtor, who afterwards died, and in executing the decree against his estate, a person was served as his legal representative with notice as required by this rule. The person served objected that he was not the legal representative of the deceased. The executing

(s) (1893) 20 Cal. 370.

(t) (1914) 41 I. A. 251, 42 Ca. 72.

(u) *Shyam Mandal v. Satinath* (1916) 44 Cal. 954, and the cases cited in the next three footnotes.

(v) *Rameswari Dass v. Doorga Dass* (1881) 6 Cal. 103 [no notice to legal representative].

(w) *Imam-un-nissa v. Liaket Husain* (1881) 3 All. 424 [no notice to legal representative]; *Gopal Chunder v. Gunamoni Dasi* (1893) 20

Cal. 370 [no notice to legal representative]; *Sahdeo v. Ghasiram* (1894) 21 Cal. 19; *Parashram v. Balmukund* (1908) 32 Bom. 572 [decree more than a year old, and no notice to judgment debtor].

(x) *Sahdeo v. Ghasiram* (1894) 21 Cal. 19 [where the property sold was an elephant].

(y) (1901) 25 Bom. 337, 27 I. A. 216, in app. from *Brava v. Sidramappa* (1897) 21 Bom. 424

Court decided, and as it turned out subsequently, decided erroneously, that he was to be treated as such representative [see s. 47]. After that the execution proceedings went on with the result that certain property belonging to the deceased judgment-debtor was sold and purchased by a third party. The question arose whether the sale was void as made without jurisdiction, or whether it was merely voidable. Their Lordships of the Privy Council held that a notice having been served in fact, though upon a wrong person, the Court *had* jurisdiction to sell the property, and the sale was not void. Their Lordships further held that the omission to give notice to the right person constituted a serious irregularity, and that the sale was therefore voidable, that is to say, it was valid until it was set aside under O. 21, r. 90, or by independent suit brought within a year as provided by art. 12, cl. (a) of the Limitation Act. Their Lordships said: "He (the person served) contended that he was not the right person, but the Court, having received his protest, decided that he was the right person and so proceeded with the execution. *In doing so the Court was exercising its jurisdiction. It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right (z).*" See notes to s. 65, "Sale when void and when voidable," p. 181.

In some recent cases where no notice was given at all to the legal representative, the High Court of Calcutta, purporting to follow the decision in *Malkarjun's case*, held that the sale was not void, but voidable under O. 21, r. 90, on proof of substantial injury (a). These decisions, it is submitted, are not good law. They proceed upon a misconception of what was actually decided in *Malkarjun's case*. In that case a notice *had been served*, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative [see s. 47]. *It had therefore jurisdiction to sell*, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good until it was set aside by appropriate proceedings for the purpose. The Calcutta cases above referred to were of a wholly different character. In those cases no notice was served upon the legal representative at all.

More than one year after the date of the decree.—The term 'decree' in sub-r. (1), cl. (a), means the decree capable of execution. Thus where an appeal is preferred from a decree, and the appeal is dismissed for default under O. 41, r. 11, the decree of the lower Court is the decree capable of execution, and the period of one year is to be calculated from the date of that decree (b). See notes to s. 36, "What decree may be executed."

Death of judgment-debtor pending execution by the Court to which the decree is sent for execution.—See notes to s. 50, "The application for execution against a legal representative," &c., p. 147.

"Court executing the decree".—It may either be the Court which passed the decree or the Court to which the decree is sent for execution.

Sub-rule (a).—This sub-rule is new. See notes above, "Alterations in the rule."

Decree against two or more persons jointly.—Art. 182 of the Limitation Act, 1908, applies to decrees of Courts other than Chartered High Courts. By Explanation I to that article it is provided that when a decree has been passed jointly against

(z) *Ib.*, p. 347. See also *Kharajmal v. Daim* (1905)

32 Cal. 296, pp. 314-315, 32 I. A. 23.

(a) See *Kumad v. Prasanna Kumar* (1912) 40 Cal.

45, and the cases there cited.

(b) *Shyam Mandal v. Satinath* (1916) 44 Cal. 954.

O. 21, rr. 22-24. more persons than one, the application for execution of the decree, if made against any one or more of them, shall take effect against them all. The result is that an order of revivor of a joint decree made under this rule against one or more of the judgment-debtor will operate against the other judgment-debtors, though no notice is given to them under this rule. No such Explanation is appended to art. 183 which applies to decrees of Chartered High Courts. The result is that where a joint decree is passed by a Chartered High Court, an order of revivor of such decree made against one of several judgment-debtors does not operate against other judgment-debtors to whom no notice is given under this rule (c).

Limitation.—Art. 182 of the Limitation Act, 1908, which applies to decrees of Courts other than Chartered High Courts, provides *inter alia* that a decree of such Court must be enforced within three years from the date thereof, unless a notice has been issued under this rule, in which case the application may be made within three years from the “date of issue of notice” under that section. It has been held by the High Court of Calcutta that “the date of issue of notice” referred to in art. 182 means the date when the notice is *actually issued* and not the date when the Court *passes the order* for issuing the notice (d). On the other hand, it has been held by the High Courts of Bombay and Allahabad that “the date of issue of notice” means the date when the Court *passes the order* for issuing the notice, and not the date on which the notice is *actually issued* (e). But if no notice is issued at all, the mere order for issuing a notice will not give a fresh starting point for limitation (f). It is not, however, necessary that the notice must have been actually served (g).

Art. 183 of the Limitation Act, which applies to decrees of Chartered High Courts, provides *inter alia* that a decree of such Court must be enforced within twelve years from the date thereof, unless the decree has been *revived*. It has been held by the High Court of Calcutta, that an order for execution operates as a revivor within the meaning of this article (h), but the mere *issue of a notice* under this rule does not (i).

23. [s. 249.] (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

24. [Ss. 250, 251.] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(e) *Krishnaiyah v. Gajendra* (1917) 40 Cal. 1127.
 (d) *Kadareseur v. Mohim Chandra* (1902) 6 C. W. N. 858.
 (e) *Govind v. Dada* (1904) 28 Bom. 416 *Jumai v. Abdul* (1908) 80 All. 536.
 (f) *Hari v. Yamunabai* (1899) 23 Bom. 35. Note

the words “has been issued” in art. 182 of the Limitation Act.
 (g) *Damodar v. Sonaji* (1903) 27 Bom. 622.
 (h) *Suja v. Monohur Das* (1897) 24 Cal. 244.
 (i) *Monohur Das v. Futeh Chand* (1903) 30 Cal. 97a.

(2) Every such process shall bear date, the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed. O. 21,
rr. 24, 25.

(3) In every such process a day shall be specified on or before which it shall be executed.

Delegation of authority to execute.—The officer to whom a warrant is delivered for execution under this rule may deliver it to his subordinate for execution. It is not necessary that the “proper officer” should himself execute all warrants sent to him (j). But a warrant addressed to the *peon* of a Court cannot be executed by a *Nazir* (k).

Arrest without warrant.—Where an officer of the Court arrests a judgment-debtor without having in his possession the warrant of arrest at the time of arresting, the arrest is illegal (l).

“Shall be sealed”.—The provisions of this rule being mandatory, the omission of the Court’s seal on the warrant renders the attachment illegal (m).

Specification of day on or before which warrant should be executed.—The warrant should specify the date on or before which it is to be executed. Resistance to the execution of a warrant which does not specify such date is not illegal (n). Further, a warrant cannot be executed after the expiration of the date specified in the warrant for its execution (o). If the warrant is extended, the date to which it is extended must be specified on the warrant. If this is not done, the warrant is not a good warrant, and resistance to its execution after the date originally specified in it cannot amount to an offence under s. 186 of the Indian Penal Code (p).

25. [S. 343.] (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified

Endorsement on process.

in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.

(j) *Abdul Karim v. Bullen* (1884) 6 All. 385;
Dharam Chand v. Queen-Empress (1895)
22 Cal. 598; *Sheo Prakash v. Bhoop Narain*
(1895) 22 Cal. 759.
(k) *Mohini v. King-Emperor* (1916) 1 Pat. L. J.
550.
(l) *Empress v. Amar Nath* (1883) 5 All. 318.

(m) *Khidir Bux v. King-Emperor* (1918) 3 Pat.
L. J. 636.
(n) *Mohini v. King-Emperor* (1916) 1 Pat. L. J.
550.
(o) *Anand Lall v. Empress* (1884) 10 Cal. 18;
Abinash v. Ananda (1904) 31 Cal. 424.
(p) *Sheikh Nasur v. Emperor* (1909) 37 Cal. 122

O. 21,
rr. 26-29.

Stay of execution.

26. [Ss. 239, 240.] (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

When Court may stay execution.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

Power to require security from, or impose conditions upon, judgment-debtor.

See notes to s. 47, "Changes introduced by the section."

27. [S. 241.] No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

Liability of judgment-debtor discharged.

Contrast with this the provisions of s. 58, sub-s. (2).

28. [S. 242.] Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

29. [S. 243.] Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

Stay of execution pending suit between decree-holder and judgment-debtor.

"Decree."—An award filed in Court under s. 11 of the Indian Arbitration Act 10 of 1899 is *not a decree*, although it is enforceable, as provided by s. 15 of that Act *as if it were a decree*. The execution therefore of such an award cannot be stayed under this rule (g). O. 21.
rr. 29-31.

Inherent power to stay execution.—A Court may under this rule stay execution of a decree obtained by *A* against *B* pending the decision of a *suit* brought by *B* against *A*. If *B*'s suit is dismissed and an appeal is preferred by *B* from the decree, the Court may under s. 151 stay execution of *A*'s decree pending the decision of *B*'s appeal (r).

Appeal.—See s. 47, notes under the head "Changes introduced by the section," p. 121 above.

Mode of execution.

30. [S. 254.] Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property, or by both.

Decree for payment of money.

Alternative to some other relief.—See O. 20, r. 10.

31. [S. 259.] (1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

Decree for specific moveable property.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to

(g) *Tridhuvandas v. Jivanaband* (1910) 35 Bom. 196. | (r) *Sardarni v. Rani Harnam* (1910) Punj. Rec. no. 82, p. 239

O. 21, pay, or where, at the end of six months from the date of the
rr. 31,32. attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

Alterations in the rule.—The words “or for the recovery of a wife,” which occurred in the corresponding sec. 259 of the Code of 1882 after the words “share in a specific movable,” have been omitted, for there can be no decree under the law for the recovery of a wife, as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him which may be enforced in case of disobedience either by the imprisonment of the defendant, or by the attachment of his property, or by both, under r. 32.

Decree for specific movable property.—As to the cases in which a decree may be passed for the delivery of specific movable property, see Specific Relief Act I of 1877, s. 11.

Rule when not applicable.—It has been held by the High Court of Calcutta that this rule does not apply where the property sought to be attached is not in the possession of the judgment-debtor (s).

22. [S. 260, R. S. C., O. 42, r. 30.] (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison, or by the attachment of his property, or by both.

Decree for specific performance, for restitution of conjugal rights, or for an injunction.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation, or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as he thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree **Q. 21, r.32.** and paid all costs of executing the same, which he is bound to pay, or where, at the end of the one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to *B*. *A* in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of *A*'s property would adequately compensate *B* for the depreciation in the value of his mansion. *B* may apply to the Court to remove the building and may recover the cost of such removal from *A* in the execution proceedings.

Alterations in the rule.—Sub-rules (2) and (5) are new. See notes below under the head "Sub-rule (5)."

The words "or for an order requiring the performance of, or abstinence from, any other particular act" which occurred in s. 260 of the Code of 1882 have been omitted, and in lieu thereof the words "or for an injunction" have been substituted. See notes below under the head "sub-rule (1) : decree for injunction."

Specific performance.—As to specific performance of contracts, see Specific Relief Act I of 1877, ss. 12-30.

Injunctions.—As to perpetual injunctions, see Specific Relief Act I of 1877, ss. 54-57.

Sub-rule (1): decree for injunction.—Sub-rule (1) applies to both prohibitory and mandatory injunctions (*t*). Where an injunction has been granted, on each successive breach of it, the decree may be enforced under this rule by an application made within three years of such breach under art. 181 of the Limitation Act (*u*). A separate suit to enforce the injunction is barred by the provisions of s. 47 (*v*). If the decree is enforced by the imprisonment of the defendant, the period of imprisonment should not at any one time exceed six months : see s. 58.

(*t*) *Sachí Prasad v. Amarnath* (1919) 46 Cal. 103, 107.

(*u*) *Venkatachalam v. Veerappa* (1906) 29 Mad. 314; *Sachí Prasad v. Amarnath* (1919) 46

Cal. 103. But see *Ram Saran v. Chatar Singh* (1901) 23 All. 465; *Bhagwan Das v. Sukhdev* (1908) 28 All. 300.

(*v*) *Sachí Prasad v. Amarnath* (1919) 46 Cal. 103.

O. 21, r. 32. Where a woman, who had been directed by a decree to refrain from preventing her daughter returning to her husband, *permitted* the daughter, who was of age, to reside in her house, it was held that such conduct did not constitute a breach of the direction under the decree so as to render it punishable under this rule (w).

It was held under the old section that an order directing a defendant to render accounts within a specified time was an "order requiring the performance of a particular act" within the meaning of that section, and that disobedience to the order was punishable under that section (x). The words "performance of or abstention from any other particular act" which occurred in the old section were held to have a very wide general meaning, and they have been omitted from this rule, and in lieu thereof the word "injunction" has been substituted. The result is that disobedience to an order directing a party to render accounts can no longer be punished under this rule, as such an order cannot be said to be an "injunction" within the meaning of this rule (y).

Opportunity of obeying the decree.—All that the Court has to see before directing execution to issue under this rule is whether the party bound by the decree has had an *opportunity* of obeying the decree or injunction and has wilfully failed to obey it. If the party has had the opportunity and has *wilfully* failed to obey the decree, the Court may order execution to issue under this rule without giving him any further opportunity, and it is not obligatory upon the Court in such a case to serve a notice upon the party calling upon him to obey the decree or injunction (z).

Where an application is made under this rule, but the party bound by the decree has had no opportunity of obeying the decree, the application will be dismissed. But the dismissal of the application is no bar to another application made after an opportunity has been afforded to the party of obeying the decree. Thus if a decree is made directing the defendant to deliver certain articles necessary for the performance of the duties of priest in a temple to the plaintiff, the plaintiff is not entitled to execute the decree under this rule unless it is proved that he went to the temple after notice to the defendant to receive the articles from him (and thereby afforded an opportunity to the defendant to comply with the decree), and that the defendant failed to deliver the articles. If such an opportunity has not been afforded, the plaintiff's application will be dismissed, but its dismissal will be no bar to a subsequent application after such opportunity has been afforded (a).

"Party against whom a decree for injunction has been passed."—See notes to s. 50 under the head "Decree for injunction," p. 147 above.

Sub-rule (5).—This sub-rule is new. It corresponds to O. 42, r. 30, of the English Rules. In the absence of any provision in the old section similar to the one contained in this sub-rule, it was held that where a decree directed the defendant to remove an obstruction, such as pulling down a wall or opening a path-way, and the defendant failed to obey the decree, it was not competent to the Court to depute any of its officers to remove the obstruction, as that was not one of the modes of execution sanctioned under that section (b). Under the present rule, the Court may direct the act to be done so far as practicable by the decree-holder or some other person appointed by

(w) *Ajnasi Kuar v. Suraj Prasad* (1877) 1 All. 501.

(x) *Digambar v. Kally Nath* (1881) 7 Cal. 654; *Raghunath v. Ganpatji* (1905) 27 All. 374.

(y) *Arjun v. King Emperor* (1918) 3 Pat. L. J. 106.

(z) *Durga Das v. Dewraj* (1906) 33 Cal. 306.

(a) *Kishore Bun v. Dwarkanath* (1894) 21 Cal. 784,

21 I. A. 89.

(b) *Bhoobun Mohun v. Nobin Chunder* (1872) 18 W. R. 282; *Protab Chunder v. Peary* (1882) 8 Cal. 174; *Sakarlat v. Bai Parvati* (1902) 26 Bom. 283, 286-287; *Durga Das v. Dewraj* (1906) 33 Cal. 306, 309-311.

the Court (c). But the Court has no power under this rule to order the police to see that its decree is carried out. Thus where a decree is passed declaring the plaintiff's right to perform certain ceremonies in a temple and restraining the defendants from obstructing the plaintiffs from performing the ceremonies, the Court has no power under this rule to order the police to see that the plaintiffs performed the ceremonies without interference on the part of the defendants (d). O. 21,
rr. 32,33.

The expression "the act required to be done" means what has to be done to enforce the injunction (e).

In a recent Calcutta case (f), Richardson, J., expressed the opinion that sub-r. (5) applies to prohibitory as well as mandatory injunctions.

33. [New.] (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree for the restitution of conjugal rights or at any time afterwards, may order that the decree shall not be executed by detention in prison.

Discretion of Court in
executing decrees for restitu-
tion of conjugal rights.

(2) Where the Court has made an order under sub-rule (1), and the decree-holder is the wife, it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and if it thinks fit require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

Compare the Matrimonial Causes Act, 1884 (47 and 48 Vict., c. 68).

(c) *Sachi Prasad v. Amarnath* (1919) 46 Cal. 103, 107.

(d) *Goswami Gordhan Lalji v. Goswami Maksudan* (1918) 40 All. 848.

(e) *Sachi Prasad v. Amarnath* (1919) 46 Cal. 103, 108.

(f) *Sachi Prasad v. Amarnath* (1919) 46 Cal. 103, 107.

O.21,r.34.

34. [Ss. 211, 262.] (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

Decree for execution of document or endorsement of negotiable instrument.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—

“ C. D., Judge of the Court of

(or as the case may be), for A. B., in a suit by E. F. against A. B.,”

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

Sub-rule (6) : registration.—This sub-rule is new. It gives effect to a decision of the Allahabad High Court that where a document requires registration, it must be

registered, though it may be executed by the Court (g). At the same time provision is made for the registration of documents, though their registration is optional, if the decree-holder desires to have them registered. **O. 21, rr. 34, 35.**

Appeal.—An appeal lies from an order under this rule on an objection to the draft of a document ~~or of an~~ endorsement [O. 43, r. 1, cl. (i)].

35. [S. 263.] (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

Alterations in the rule.—Sub-rules (2) and (3) are new. See notes below.

Sub-rule (2).—A plaintiff who is entitled to possession jointly with other persons could be granted a decree for joint possession, whether the plaintiff was originally in possession and was subsequently dispossessed (h), or whether he had never been in possession (i). Sub-rule (2), which is new, has been inserted to remove the difficulty felt in executing decrees obtained by the owner of an undivided share in immovable property for joint possession as against his co-sharers and persons holding under them, as also the difficulty felt in executing decrees obtained by a purchaser of the rights of a co-sharer for joint possession of the property with the other co-sharers.

Resistance to delivery of possession to decree-holder.—Where the holder of a decree for the possession of immovable property is resisted or obstructed by any person in obtaining possession of the property, the procedure to be followed is that prescribed by rr. 97-103 of this order.

Actual and formal possession.—The delivery of possession directed to be given by sub-rules (1) and (3) contemplates the decree-holder being placed in *khas* or *actual* possession of the property, while that directed to be given by sub-r. (2) and by r. 36

(g) *Kanahia Lal v. Kali Dhin* (1880) 2 All. 392.
(h) *Bhatrow Rai v. Saran Rai* (1904) 26 All. 588.

(i) *Jagannath v. Ram Phai* (1911) 34 All. 150.

O. 21 r. 35. contemplates the decree-holder being placed in *formal* or *symbolical* possession. *Formal* or *symbolical* possession is delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree.

Rules 35 and 36 refer to cases where a suit is brought for possession of immovable property, and a decree is passed in the suit for the delivery of the property to the decree-holder. Rules 95 and 96 refer to cases where immovable property belonging to a judgment-debtor is sold in execution of the decree against him, and possession of the property is sought by the auction-purchaser. In considering the distinction between actual and symbolical possession, it is desirable to consider both these sets of rules together, for they are both governed by the same principles. Where the immovable property of which possession is directed by the decree to be delivered to the decree-holder is in the possession of the judgment-debtor, *actual possession* must be delivered of the decree-holder under r. 35 (1). Where it is in the possession of a tenant or other person entitled to occupy the same, *symbolical possession* only can be delivered, and that is to be done under r. 36. Likewise, where immovable property is sold in execution of a decree, and possession is sought by the auction-purchaser, *actual possession* must be delivered to him under r. 95, if the property is in the possession of the judgment-debtor. But if the property is in the possession of a tenant or other person entitled to occupy the same, *symbolical possession* only can be delivered, and that is to be done under r. 96.

It is clear from what is stated above that there are only three cases in which the law allows symbolical possession to be given, namely, the cases contemplated (1) by sub-rule (2) of the present rule, (2) by r. 36, and (3) by r. 96 of this Order. *Symbolical* possession given in such cases operates as *actual* possession against the judgment-debtor, but not against third persons who were not parties to the decree (j). In other words, *symbolical* possession is no possession at all as against third parties. This distinction is of great importance in the law of limitation. The rule to be deduced from the cases on the subject is that where in execution of a decree *symbolical* possession is delivered of immovable property to the person entitled to possession thereof, and such person subsequently institutes a suit for *actual* possession, the symbolical possession is to be treated as actual possession where the suit is *against the judgment-debtor or his representatives* and the period of 12 years allowed for such a suit is to be calculated not from the date of sale, but from the date of the subsequent dispossession [ill. (2)]. But where the suit for actual possession is instituted *against a third party claiming to be in possession of the property adversely to the judgment-debtor*, no regard is to be had at all to the symbolical possession of the plaintiff in determining the period of limitation; and the 12 years are to be calculated, not from the date on which symbolical possession was delivered to the plaintiff, but from the date on which the possession of such third party became adverse as against the judgment-debtor [ill. (1)].

Illustrations.

(1) *P* obtains a decree against *D*. In execution of the decree certain property alleged to belong to *D* is sold, and it is purchased by *A*. *A* applies for possession, and he is placed in *symbolical* possession of the property. *C* has been in possession of the property adversely to *D* for 10 years prior to the date on which *A* is placed in *symbolical*

(j) *Runjit Singh v. Bunwari Lal* (1884) 10 Cal. 993; *Juggobundhu v. Ram Chunder* (1880) 5 Cal. 584; *Juggobundhu v. Purnanand*

(1889) 16 Cal. 530; *Radha Krishna v. Ram Bahadur* (1917) 20 Bom. L. R. 502 [P. C.]

possession. *C* continues to be in possession of the property as before. After three years *O. 21, r. 35*. *A* sues *C* for possession. The defence is that *C* has been in adverse possession for more than twelve years, and the suit is therefore barred under art. 144 of the Limitation Act. *A* contends that his symbolical possession operated to break the continuity of the adverse possession of *C*, and that the period of twelve years allowed by art. 144 for a suit for possession should be calculated from the date on which symbolical possession was delivered to him. The suit is barred, for *A*'s possession, being merely symbolical, did not operate at all as possession as against *C* who was not a party to the suit, and it could not therefore break the continuity of *C*'s possession (*k*). In other words, delivery of symbolical possession to *A* did not amount to a *dispossession* of *C*.

(2) *A* obtains a decree against *B* for possession of certain immovable property. The property being in the occupancy of *B*'s tenants, symbolical possession is delivered to *A* under r. 36. Subsequently *B* dispossesses *A* by receiving the rents and profits. *A* thereupon sues *B* for actual possession. The period of limitation for such a suit is twelve years from the date of dispossession (*l*). The same principles apply where a person is placed in symbolical possession under sub-rule (2) of this rule in cases where the decree is one for joint possession, and also where he is placed, in symbolical possession under r. 96 of this Order (*m*).

Note.—It will be observed that in ill. (2) the suit is against the judgment-debtor, and in ill. (1) it is against a third person who was not a party to the suit. Symbolical possession operates as actual possession against the judgment-debtor, that being the only means by which, as between the parties, the Court could effectuate and carry out its object. But it does not operate as actual possession against third persons who were not parties to the suit, and the reason for this is very plain. A suit might be brought, and a decree obtained, by a person who has neither title nor possession, against another person who has neither title nor possession; and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner who had been in actual possession for many years, and who was no party to the suit, it would operate most unjustly (*n*).

It has been stated above that where a judgment-debtor himself is in possession, actual possession must be delivered to the person entitled to possession under sub-r. (1) of this rule or under r. 95, as the case may be. Suppose now that symbolical possession is delivered in a case where actual possession ought to have been delivered. Does symbolical possession given under these circumstances operate as actual possession against the judgment-debtor? It has been held by the High Courts of Calcutta and Madras that it does, exactly as if symbolical possession were rightly delivered. Symbolical possession given in circumstances in which actual possession ought to have been delivered is not a nullity according to those Courts. The delivery of symbolical possession even erroneously operates as actual possession against the judgment-debtor and his representatives, for it is said that after all it is possession obtained through an officer of the Court and by process of law, and the judgment-debtor must be taken to be a party to the proceeding relating to the taking of possession. From this point of view, a suit for actual possession may be brought at any time within 12 years from the date on which symbolical possession is given (*o*). On the other hand, it has been held by a Full Bench of the Bombay High Court that symbolical possession given in circumstances in which actual

(*k*) *Harjivan v. Shriram* (1895) 19 Bom. 620;
Ranjit Singh v. Bunwari Lal (1884) 10 Cal.
993.

(*l*) *Juggobundhu v. Ram Chunder* (1880) 5 Cal.
584 [F. B.].

(*m*) *Joggobundhu v. Purmanand* (1889) 16 Cal.

530 [F. B.].

(*n*) *Ranjit Singh v. Bunwari Lal* (1884) 10 Cal.
993, 995.

(*o*) *Hari Mohan v. Baburati* (1897) 24 Cal. 715;
Govind v. Venkata (1907) 17 Mad. L. J.
598.

- O. 21, rr. 35-37. possession ought to have been given is a *nullity*, and the period of limitation for a suit for actual possession is 12 years from the *date of sale*. The reason given by the High Court of Bombay is that symbolical possession is not actual possession nor is it equivalent to actual possession except where the Code expressly or by implication provides that it shall have that effect, and there is no section of the Code by which it is provided that where symbolical possession is given in a case in which actual possession ought to have been given, such possession should be treated as equivalent to actual possession (*p*).

Illustration.

In execution of a decree obtained by *A* against *B* certain property belonging to *B* is sold, and it is purchased by *C* in the year 1895. *B* is in possession of the property at the date of sale. *C* applies for possession, but instead of actual possession being delivered to him under r. 95, symbolical possession is given to him in the year 1905. *C* subsequently sues *B* for actual possession in the year 1908, that is, more than 12 years after the date of sale, but within 12 years from the date of delivery of symbolical possession. According to the Bombay High Court, the suit is barred by limitation; according to the Calcutta and Madras High Courts, it is not barred.

36. [S. 264.] Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Decree for delivery of immoveable property when in occupancy of tenant.

See notes to r. 35 above.

Arrest and detention in the civil prison.

37. [S. 245 B.] (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

Discretionary power to permit judgment-debtor to show cause against detention in prison.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor. O. 21.
rr. 37-39.

Discretionary power to issue notice.—When a decree is for the *payment of money*, and execution is applied for against the *person* of the judgment-debtor, the Court *may* issue a notice to the judgment-debtor calling upon him to show cause why he should not be committed to the civil prison in execution of the decree. As to the procedure to be followed when the judgment-debtor appears in pursuance of the notice, see r. 40 below.

Privilege from arrest.—See s. 135, sub-section (2).

38. [s. 337.] Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

Warrant for arrest to direct judgment-debtor to be brought up.

39. [Ss. 339, 340.] (1) No judgment-debtor shall be arrested in execution of a decree, unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

Subsistence allowance.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payments shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

O. 21,
rr. 39, 40. (5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

40. [s. 37 A.] (1) Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;
- (b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree ;
- (c) any undue preference given by the judgment-debtor to any of his other creditors ;
- (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;

- (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree. O. 21,
rr. 40, 41.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

Attachment of Property.

41. [Cf. S. 267.] Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

Examination of judgment-debtor as to his property.

- (a) the judgment-debtor, or
- (b) in the case of a corporation, any officer thereof,
or
- (c) any other person.

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

Object of the rule.—The object of this rule is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money decrees. It is a useful rule, but orders for discovery may operate harshly against the party directed to give discovery and must not be lightly made (q).

O 21,
rr. 41-43.

"Any and what other property."—This refers to property which is liable to attachment and sale under the decree against the judgment-debtor. Property of a judgment-debtor which he has mortgaged is *prima facie* liable to be seized in execution of a decree against him, and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage-debt (see s. 73). If the mortgagee claims that he is in possession as mortgagee, he may be examined under this rule (r). See note to r. 62 below.

What property may not be attached.—See s. 60.

42. [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

Attachment under a preliminary decree.—In a suit by *A* against *B* for the recovery of possession of immovable property and for mesne profits, a preliminary decree is passed against *B* for the delivery of the property to *A*, and an inquiry is directed as to the mesne profits due by *B* to *A*. *B* delivers possession of the property to *A*. Subsequently, while the inquiry as to mesne profits is yet pending, *A* applies for attachment of certain property belonging to *B*. The attachment may be allowed under this rule (s). See O. 20, r. 12.

Death of defendant before determination of amount of mesne profits.—*A* sues *B* for possession of certain immovable property and for mesne profits. The decree awards possession of the property to *A*, and directs an inquiry as to mesne profits. *B* dies pending the inquiry, but his legal representative is not brought on the record. The amount of mesne profits is subsequently determined and a final decree is passed for the amount. In execution of the decree certain property forming part of the estate of *B* is attached in the hands of his legal representative. The legal representative contends that the attachment ought to be set aside on the ground that the final decree was passed after the death of *B*, and it could not therefore bind the estate of *B*, as the estate was not represented during the inquiry as to mesne profits. This contention is valid, and the attachment must be set aside (t). See notes to s. 47, "Claim by legal representative," &c., p. 123, Contrast, O. 22, r. 6.

43. [S. 269.] Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Attachment of moveable property, other than agricultural produce in possession of judgment-debtor.

(r) *In re Premji* (1893) 17 Bom. 514. See *Mudhun Mohan v. Gokul Das* (1866) 10 M. I. A. 563, 571, as to attachment of property in possession of a mortgagee.
(s) See *Sharada Moyee v. Wooma Moyee* (1867)

* S. W. R. 9.
(t) *Radha Prasad v. Lal Sahab* (1891) 13 All. 53, 17 I. A. 150; see also *Khirajmal v. Daim* (1905) 32 Cal. 296, 32 I. A. 23.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once. O. 21,
rr. 43, 44.

Attachment by actual seizure.—Where a warrant of attachment is executed by affixing it to the outer door of the warehouse in which goods belonging to the judgment-debtor are stored, it amounts to “actual seizure” within the meaning of the present rule (u).

Rateable distribution.—See notes to s. 73, “Assets held by a Court,” case H, p. 201, above.

44. [New.] Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment.—

Attachment of agricul-
tural produce.

- (a) where such produce is a growing crop, on the land on which such crop has grown, or
- (b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited.

and another copy on the outer door or some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

Attachment of agricultural produce.—This and the following rule provide for the attachment of agricultural produce. Both these rules are new. “Growing crops” are under this Code included in the category of movable property [see s. 2, cl (13)]. But the procedure relating to the *actual seizure* of movables cannot be applied in its entirety to growing crops, for considerable injury would result to both parties if such crops were allowed to be removed on attachment like other movable property. With a view to prevent such injury, and to secure to both parties the fullest value from

O. 21, the property attached, it is enacted by the next following rule that where agricultural
 rr. 44, 45. produce is attached, the Court should make such arrangements for the custody thereof
 as it may deem sufficient, and subject to such conditions as may be imposed by the
 Court, the judgment-debtor should be allowed to continue to perform all acts of
 husbandry and if he endeavours to defeat the attachment by neglecting the crop, the
 decree-holder should be allowed to intervene and protect his interests.

45. [New.] (1) Where agricultural produce is attached,
 the Court shall make such arrangements
 for the custody thereof as it may deem
 sufficient and, for the purpose of enabling
 the Court to make such arrangements,
 every application for the attachment of a growing crop shall
 specify the time at which it is likely to be fit to be cut or
 gathered.

Provisions as to agricul-
 tural produce under attach-
 ment.

(2) Subject to such conditions as may be imposed by
 the Court in this behalf either in the order of attachment or in
 any subsequent order, the judgment-debtor may tend, cut,
 gather and store the produce and do any other act necessary
 for maturing or preserving it; and if the judgment-debtor
 fails to do all or any of such acts, the decree-holder may, with
 the permission of the Court and subject to the like conditions,
 do all or any of them either by himself or by any person ap-
 pointed by him in this behalf, and the costs incurred by the
 decree-holder shall be recoverable from the judgment-debtor
 as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop
 shall not be deemed to have ceased to be under attachment or
 to require re-attachment merely because it has been severed
 from the soil.

(4) Where an order for the attachment of a growing
 crop has been made at a considerable time before the crop is
 likely to be fit to be cut or gathered, the Court may suspend
 the execution of the order for such time as it thinks fit, and
 may, in its discretion, make a further order prohibiting the
 removal of the crop pending the execution of the order of
 attachment.

(5) A growing crop which from its nature does not admit
 of being stored shall not be attached under this rule at any time
 less than twenty days before the time at which it is likely to
 be fit to be cut or gathered.

Time at which the crop is likely to be cut or gathered.—The decree holder should specify in the application for attachment the time at which the crop is likely to be cut or gathered. The object is to enable the Court to make necessary arrangements for the custody of the crop [sub-r. (1)]. If the application is presented within twenty days before the maturity of a crop not lending itself to storage, it should be refused [sub-r. (5)].

O. 21,
rr. 45, 46.

See notes to r. 44 above.

Attachment of debt, share
and other property not
in possession of judgment-
debtor.

46. [S. 268.] (1) In the case of—

- (a) a debt not secured by a negotiable instrument,
- (b) a share in the capital of a corporation,
- (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;
- (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;
- (iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be fixed on some conspicuous part of the Court-house, and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

Attachment of debt.—A debt to be attached must be *actually due* from the garnishee (judgment-debtor's debtor) to the judgment-debtor; it may be either presently

O. 21, r. 46. payable, or payable in the future by reason of a *present obligation* (v). As stated by their Lordships of the Privy Council in the undermentioned case (w), "an *existing* debt, though payable at a future day, may be attached." But only such debts can be attached as the judgment-debtor could deal with properly and without violation of the rights of third persons (x). For instances of attachable debts, see notes to s. 60 under the head "Debts," p. 163 above.

The following are some of the important rules relating to the attachment of debts:—

1. It is not necessary for the purpose of attaching a debt that the exact amount of the debt should be stated, provided there is a debt *actually due* at the time of attachment. *B* delivers certain goods to his agent *C* for sale. The goods are sold by *C* and the sale-proceeds received by him. In execution of a decree obtained by *A* against *B*, *A* may attach the sale-proceeds in the hands of *C*, though the exact amount due to *B* may not then have been ascertained (*y*).

2. The attachment of a debt does not prevent the judgment-debtor from suing his debtor for it, and from taking any other step necessary for the recovery thereof, but he is not entitled to receive *payment* thereof from his debtor unless the claim in respect of which the debt is attached is first satisfied. *C* owes a debt to *B*. The debt is attached in execution of a decree obtained by *A* against *B*. This does not preclude *B* from *suing C* to recover the debt, or from *prosecuting the suit* if a suit has already been instituted; but he cannot receive *payment* of the debt from *C* unless he first satisfies *A*'s decree (*z*). See sub-rule (1), cl. (i).

Attachment of mortgage-debt.—*A* executes a mortgage of his land to *B* to secure re-payment of Rs. 5,000 lent and advanced to him by *B*. It is provided by the mortgage-bond that if *A* fails to pay the mortgage-debt on the due date, *B* should have the right to sue *A* personally for the debt, and also to realise the debt by the sale of the mortgaged property. In such a case *B*'s interest in the mortgage bond comprises (1) the right to sue *A* personally for the mortgage-debt, and (2) the right to realise the debt by a *sale of the mortgaged property*. Suppose now that *X* obtains a decree against *B*, the mortgagee, for Rs. 5,000, and that in execution of the decree he seeks to attach the mortgage-debt due to *B*. Is the mortgage-debt a "debt" within the meaning of this rule, or, because it is secured by a mortgage of *immoveable* property, is it "immoveable property" within the meaning of r. 54, and attachable in the mode proscribed by that rule? The answer afforded by the decisions on the subject, eliminating what are merely *obiter dicta* (a), is that a mortgage-debt is a "debt" within the meaning of this rule, and it is therefore to be attached in the manner prescribed by this rule (b). Suppose now that the mortgage-debt due to *B* is attached under this rule in execution of *X*'s decree, and that it is sold in execution and purchased by *P*. What are the rights of *P*? The answer is that they are entirely the same as those of *B*, the mortgagee. *P* may sue *A* for a *personal* decree against him; he can also sue him for a decree for the *sale* of the mortgaged property (c).

(v) *Tapp v. Jones* (1875) L. R. 10 Q. B. 591, 592; *Webb v. Stanton* (1883) 11 Q. B. D. 518, 527; *Chatterton v. Watney* (1881) 16 C. D. 378, 383.
 (w) *Syud Tuffuzool v. Rughoonath* (1871) 14 M. I. A. 40, 50.
 (x) *Badeley v. Consolidated Bank* (1888) 38 C. D. 238; *Davis v. Freethy* (1890) 24 Q. B. D. 519; *Campion v. Palmer* [1896] 2 I. R. 445.
 (y) *Madho Das v. Ramji* (1894) 16 All. 286.
 (z) *Shib Singh v. Sita Ram* (1891) 13 All. 76; *Bett v. Collector of Etawah* (1895) 17 All. 198, 22 I. A. 31.

(a) *Appasami v. Scott* (1886) 9 Mad. 5, 8; *Sami v. Krishnasami* (1887) 10 Mad. 169.
 (b) *Karim-un-nissa v. Phul Chand* (1893) 15 All. 134; *Debendra Kumar v. Rup Lal* (1889) 12 Cal. 546; *Kasinath Das v. Sadario* (1893) 20 Cal. 805; *Baldev v. Ramchandra* (1895) 19 Bom. 121; *Muniappa v. Subramania* (1895) 18 Mad. 457; *Tarvadi v. Bai Kashi* (1902) 26 Bom. 305; *Nataraja v. The South Indian Bank* (1911) 37 Mad. 51.
 (c) *Tarvadi v. Bai Kashi* (1902) 26 Bom. 305.

As regards attachment of the interest of a usufructuary mortgagee, if there is a debt O. 21, r. 46. which the mortgagee is entitled to recover from the mortgagor at the time of the attachment, the attachment is to be made in the manner prescribed by this rule (d). But if there is no debt payable by the mortgagor, all that can be attached is the mortgagee's interest in the immoveable property mortgaged to him, and the attachment is to be made in the manner prescribed by r. 54 of this Order for attachment of immoveable property (e).

Attachment of debt after the same is paid by a cheque.—A gave a cheque to B for work done. Before the cheque was presented by B for payment, X, who had obtained a decree against B, attached in A's hands the amount due by him to B: held that A having handed over the cheque to B, the payment was complete, and there were therefore no funds of B in A's hands which could be attached (f).

Procedure where garnishee denies debt.—Where the garnishee denies the debt, the decree-holder may have it sold, or he may have a receiver appointed under s. 51 with power to him to sue the garnishee to recover the debt from him (g). As to release of debt from attachment, see notes to O. 21, r. 58, under the head "Rules 58 to 63 apply to 'debts' also."

Garnishee's right of set-off.—If a cross debt is due to the garnishee from the judgment-debtor at the date of the attachment, the garnishee is entitled to set it off against the amount due by him (h).

Procedure where garnishee resides outside jurisdiction and debt also is payable outside jurisdiction.—It is not competent to a Court under this rule to issue a prohibitory order upon a person resident outside the limits of its jurisdiction in respect of property also beyond such limits. Thus where A obtains a decree in the Court of Bardwan against B residing in Bardwan, and there is a debt due to B from C who resides in Calcutta, the debt being also payable in Calcutta, the proper course for A to adopt, if he seeks to attach the debt, is to apply to the Bardwan Court to issue a prohibitory order upon B prohibiting him from recovering the debt, and also to apply to that Court to transfer the decree for execution to the Calcutta Court, and, after the decree is so transferred, to apply to the Calcutta Court to issue a prohibitory order upon C prohibiting C from paying the debt to B (i).

Claims over which Courts in British India have no jurisdiction, as where a debt is due to the judgment-debtor from a non-resident foreigner in respect of which no suit could be brought by the judgment-debtor in a British Indian Court, are not debts liable to be attached under this rule (j).

Sub-rule (3): payment into Court.—A obtains a decree against B. In execution of the decree, A attaches a debt due ostensibly from C to D, but alleged by A to be in reality due from C to B. In such a case, if the Court orders the amount of the debt to be paid into Court, it is incumbent upon the Court to provide by its order that the money when deposited should not be paid to the decree-holder [A] until adjudication of the question as to who is entitled to the money, B or D (k).

(d) *Chulilal v. Othenam* (1914) 27 Mad. L. J. 239; *Ramasami v. Srinivasa* (1916) 39 Mad. 389.
(e) *Manilal v. Motibhai* (1911) 35 Bom. 288.
(f) *Bhagvandas v. Abdul Hussain* (1879) 3 Bom. 49.
(g) *Tooles v. Antone* (1887) 11 Bom. 448.
(h) *Tyaballi v. Almarum* (1914) 38 Bom. 631.

(i) *Begg Dunlop & Co. v. Jagannath* (1911) 39 Cal. 104; *Bank of Bengal v. Sarat* (1919) 4 Pat. L. J. 141.
(j) *Ghanshamlal v. Bhansali* (1881) 5 Bom. 240.
(k) *Harinath v. Haradas* (1916) 43 Cal. 269.

O. 21;
rr. 47, 48

47. [New.] Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

Attachment of share in moveables.

Attachment of share in moveables.—This rule is new. It provides for the attachment of a share or interest in *moveable property* belonging to the judgment-debtor and others in co-ownership. Such a share or interest is obviously incapable of actual seizure, and provision has therefore been made for the issue to the judgment-debtor of a notice prohibiting him from transferring his share or interest in any way.

48. [New.] (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may, by notification in the Gazette of India or in the local official Gazette, as the case may be appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

Attachment of salary or allowances of public officer or servant of railway company or local authority.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond

those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India ; and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule. O. 21,
rr. 48, 49.

Attachment of salary of public officer, etc.—This rule is new. It provides a special procedure for the attachment of the salary of public officers, railway servants and servants of local authorities. The rule follows upon the lines of section 151, sub-section (3), of the Army Act (44 and 45 Vict., c. 58) which, it may be observed, applied only to officers of the army. Under the Code of 1882 the salary of a public officer or railway servant could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree (1). This led to considerable inconvenience in the execution of decrees, and put the decree-holder in many cases to an enormous expense. The present rule substitutes a less expensive, and at the same time more effective machinery for the execution of decrees against this class of judgment-debtors. Under it the salary of public officer or a railway servant or a servant of local authority may be attached, *whether the judgment-debtor or the disbursing officer is or is not within the local limits of the jurisdiction of the Court executing the decree.* As to the extent to which the salary of such persons may be attached, see s. 60, cl. (h) and (i).

Sub-rule (3) ; Liability of Government.—Sub-r. (3) provides that if an attachment order is not returned in accordance with the provisions of sub-r. (2), the Government shall be liable for such sum as should have been stopped out of the judgment-debtor's pay. But no order can be made against the Government unless the Government is on the record (m).

49. [New. 53 & 54 Vict., c. 39, s. 23. R. S. C., O. 46, rr. 1A and 1B.] (1) Save as otherwise

Attachment of partner-
ship property.

provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of

(1) *Rango Jitram v. Balkrishna* (1888) 12 Bom. 44 ; | (m) *Niadar Mal v. Biddulph* (1912) Panj. Rec.
Sayadkhan v. Davies (1904) 28 Bom. 198 ; | no. 98, p. 327.
Abdul Gafur v. Albyn (1908) 30 Cal. 718.

O. 21, r. 49. such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

Attachment of partnership property.—This rule is new. The first three sub-rules are a reproduction of the English Partnership Act, 1890 [53 and 54 Vict., c. 39] s. 23. The last three rules correspond to O. 46, rr. 1A and 1B of the English Rules. As to suits by and against firms, see O. 30 below.

This rule provides that no execution can issue against any *partnership property* except on a decree passed *against the firm or against the partners in the firm as such* (n), but a judgment-creditor of a partner in a firm may apply for an order charging *that partner's interest*, and for a receiver. The share of a partner in a partnership business is liable to attachment under s. 60 (o). See notes to r. 50 under the head "Where decree has been passed against a firm."

"Against the partners in the firm as such."—These words in sub-r. (1) do not occur in s. 23 of the English Partnership Act. They have been added to show that the operation of this rule is not ousted by the mere circumstance that the decree is passed, not against the firm, but against the partners constituting it, where those partners have been sued as such.

"Direct accounts."—It has been held in England under the Partnership Act, s. 23, sub-s. 2, of which sub-r. (2) is a reproduction, that the discretion given to *direct accounts* should only be exercised under special circumstances, as for instance, with a

(n) The same was the law before the present Code came into force: *Karimbhai v. Conservator of Forests* (1879) 4 Bom. 222.

(o) *Jagat Chunder v. Iswar Chunder* (1893) 20 Cal. 693.

view to a dissolution. The decision is based upon the words "if a charge had been made in favour of the decree-holder by such partner." These words, it has been said, should be read with s. 31, sub-s. 1, of the English Partnership Act, which provides that an assignment by a partner of his share in the partnership either absolute or by way of charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to require any accounts of the partnership transactions, but entitles the assignee only to receive the share of the profits of the assigning partner and the assignee must accept the account of profits agreed to by the partners. Relying upon these provisions, Rigby, L.J., said: "I think it plain that the intention of the legislature was that under ordinary circumstances, in dealing with a case under sub-s. 2 of s. 23 [sub-r. (2) of this rule], the analogy of an assignment by a partner of his share should be adhered to" (p). Before the passing of the Partnership Act there was some doubt in England as to whether the assignee of a share in a partnership had a right to compel the other partners to come to an account with him during the continuance of the partnership. *Whetham v. Davey* (q) and *Glyn v. Hood* (r) favoured the view that he had. But the better opinion seemed to be the other way (s), and it is the one adopted in the Partnership Act. There is no provision in the Indian Contract Act corresponding to that contained in s. 31 of the English Partnership Act. If the decision in *Whetham's case* be adopted in India as the law governing the rights of an assignee, the Court may under sub-r. (2) direct accounts to be taken whether the circumstances of the case are special or ordinary, so that the amount of the share attached may be determined, and it may be handed over to the decree-holder. But if what is called the better opinion above is adopted as the law in this country,—and it is probably the view that would be adopted here,—the Court should not direct accounts to be taken under sub-r (2) except under special circumstances.

Execution of decree
against firm.

50. [New. R. S. C., O. 48A, r. 8.] (1)
Where a decree has been passed against a
firm, execution may be granted—

- (a) against any property of the partnership;
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
- (c) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(r) *Brown Janson & Co. v. Hutchinson & Co.*
[1896] 2 Q. B. 126.
(q) (1885) 30 C. D. 574.
(r) (1889) 1 Giff. 328.

(s) *Lindley on Partnership*, 5th Ed. (1888), p. 364.
See also *Juggut Chunder v. Raza Nath*
(1884) 10 Cal. 689.

21, r. 50. (2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

Scope of the rule.—This rule is new. It is a reproduction of O. 48A, r. 8, of the English Rules. Execution under this rule can only be granted where a decree has been passed against a firm. A decree passed against a firm must perforce be in the firm's name. Under this rule execution may be granted against the partnership property. It may also be granted against the partners, in which case the decree-holder may proceed against the separate property of the partners. It is not to be supposed, however, that where a decree has been passed against a firm, execution will be granted as a matter of course against all the partners: In certain cases, *special leave* is necessary to issue execution against a partner. It is only when execution is applied for against a person referred to in sub-r. (1), cls. (b) and (c), that it will be granted as of course. But where execution is sought against any other person alleged to be a partner, the decree-holder must apply to the Court which passed the decree for leave to execute the decree against him. Thus if in a suit against a firm a person has been individually served as a partner with the writ of summons, but fails to appear at the hearing, and a decree is passed against the firm, the decree-holder is entitled to execution against him as of course: see cl. (c) of sub-r. (1). But a decree-holder is not entitled to execution as of course against a person who is sought to be made liable as a partner, but who was not served with the summons and who did not appear at the hearing. In such a case the decree-holder must apply for leave to execute the decree against such person. If such person admits the liability, the leave applied for will be granted at once. But if he disputes the liability, the Court may direct an issue to determine whether he was a partner or held himself out to be a partner in the defendant firm (d). These rules follow from the peculiar nature of a suit against a firm and from the special rules as to service of summons in such a suit. To understand the present rule, it is necessary to peruse rules 3, 6 and 7 of Order 30. The important point to note is that where persons are sued as partners in the name of their firm, it is not necessary that the summons should be served upon each one of them or for the matter of that upon any one of them: it may be served upon any one or more

(d) *Davis v. Hyman & Co.* [1903] 1 K. B. 854.

of the partners, or at the principal place of the firm's business upon any person having the control or management of the business though he may not be a partner. O. 21, rr. 50, 51.

"Where a decree has been passed against a firm."—Execution under this rule can only be granted where a decree has been passed against the firm in the firm's name. A decree cannot be passed against a firm, unless the suit is against partners in the name of their firm. And, conversely, where a suit is against partners in the name of their firm, the decree must be against the firm in the firm's name. See O. 30, r. 6, and notes thereto.

"Against any property of the partnership."—"Property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such." See r. 49, sub-r. (1).

"Against any person who has appeared."—See O. 30, rr. 3, 6 and 7, and notes thereto.

Leave to issue execution.—Order 30 deals with the mode of suing firms. Rule 1 provides that two or more persons being liable as co-partners may be sued in the firm's name. It does not matter that the firm is dissolved at the date of the suit, so long as the claim in respect of which the suit is brought arose during the partnership (u). Rule 3 of Order 30 provides that where the firm is dissolved to the knowledge of the plaintiff before the institution of the suit, the summons should be served upon every partner within British India whom it is sought to be made liable; if some only of several partners are served, and a decree is passed against the firm, the decree-holder is not entitled to issue execution against a partner who was not served, not even if the decree-holder applies for leave under sub-r. (2). The reason is that rule 3 of Order 30 overrides sub-r. (2) of this rule. Sub-r. (2) only applies where there has been no dissolution, or none to the knowledge of the plaintiff. In order to be entitled to obtain leave under sub-r. (2), the decree-holder must have served him with the summons in accordance with the proviso to rule 3 of Order 30 (v).

Issue to determine liability.—See notes above, "Scope of the rule."

Minor partner.—The proviso to sub-r. (1) declares that nothing in that sub-rule should be deemed to limit or otherwise affect the provisions of section 247 of the Contract Act. The combined effect of that section and the present rule is that where a decree has been passed against a firm containing a minor partner, execution may be granted against the property of the firm, including the minor's share therein, but it cannot be granted against the separate property of the minor.

51. [s. 270.] Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Attachment of negotiable instruments.

(u) *Ellis v. Wadson* [1899] 1 Q. B. 714, 716.
(v) *Wigram v. Cox, Sons, Buckley & Co.* [1894]

1 Q. B. 792.

O. 21,
r. 52, 53.

52. [S. 272.] Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or Officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Attachment of property
in custody of Court or
public officer.

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

Attachment of property in the hands of a receiver.—A receiver is an officer of the Court. An attachment therefore of money in the hands of a receiver made *without previous permission or sanction of the Court* for such attachment is improper and irregular, and cannot be recognized by the Court (*w*).

Anticipatory attachment.—This rule does not allow of an anticipatory attachment of money *expected to reach* the hands of a public officer, but applies only to money actually in his hands. An attachment made before the money has reached the hands of the officer is invalid (*x*).

Priority.—There is a conflict of decisions as to whether where a fund in Court is attached by several decree-holders, they are entitled to share rateably (*y*), or whether they are to be paid in the order of their attachments (*z*). The former view, it is submitted, is correct; an attachment does not confer any *title* upon the attaching creditor; it merely prevents and avoids any private alienation [see notes to s. 64, "Effect of attachment," p. 177].

53. [S. 273.] (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made—

Attachment of decrees.

- (a) if the decrees were passed by the same Court, then by order of such Court, and,
- (b) if the decree sought to be attached was passed by another Court, then by the issue to such other

(w) *Mahommed v. Mahommed* (1894) 21 Cal. 85; *Kahn v. Ali Mahomed* (1892) 18 Bom. 577.
(x) *Tulaji v. Balabhai* (1898) 22 Bom. 39, commented on in *Umabai v. Amritao* (1914) 39 Bom. 80, at p. 85; *Thiruvangadial v. Thiruvangadiah* (1914) 26 Mad. L. J. 364; *Thakurdas v. Joseph* (1917) 44 Cal. 1072.
(y) *Suitesna v. Haje Mahomed* (1913) 38 Mad.

221; *Thakurdas v. Joseph* (1917) 44 Cal. 1072. See also *Thiraviyam v. Lakshmana* (1918) 41 Mad. 616, 618-619.
(z) *Thiruvangadial v. Thiruvangadiah* (1914) 26 Mad. L. J. 364; *Umma v. Adamji* (1919) 42 Mad. 692, dissenting from 38 Mad. 221, *supra*.

Court of a notice by the Court which passed, O. 21, r. 53.
the decree sought to be executed, requesting
such other Court to stay the execution of its
decree unless and until—

- (i) the Court which passed the decree sought to be executed cancels the notice, or
- (ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree of his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such

O.21r, 53. order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

Alterations in the rule.—This rule corresponds with s. 273 of the Code of 1882 except in the following particulars :—

1. The words “or for sale in enforcement of a mortgage or charge” in sub-r. (1) are new. See notes below “Attachment and realization of decrees”.
2. The words “or his judgment-debtor” in sub-r. (1), cl. (b), sub-head (ii) are new. The said words give effect to the opinion expressed by Maclean, C.J., in the undermentioned case (a).
3. Sub-rules (3) and (6) are also new. See notes below under these sub-rules.

Attachment and realization of decrees.—For the purpose of this rule decrees have been divided into two classes, namely :—

- (1) decrees for the payment of money or for sale in enforcement of a mortgage or charge, and
- (2) other decrees.

First, as to attachment of decrees.—Decrees of the first class are to be attached in the manner prescribed by sub-r. (1). Decrees of the second class are to be attached in the manner prescribed by sub-r. (4).

Next, as to realization of attached decrees.—Decrees of the first class are to be realized in the manner prescribed by sub-r. (2). There is no provision made in this rule for the realization of decrees of the 2nd class, e.g., a decree for partition (b), or for foreclosure of a mortgage (c), or a decree for specific performance. These decrees are to be realized by a sale thereof. But decrees of the first class, that is, money-decrees (d) and mortgage-decrees, are not to be realized by sale. They can only be realized in the manner prescribed by sub-r. (2). The reason of this distinction is as follows :—

“Decrees” are not expressly mentioned in s. 60 as property liable to attachment and sale. Hence they are attachable and saleable as comprised in the expression “all other saleable property” which occurs in that section. Being liable to attachment as saleable property, they can be sold in execution of another decree. But money-decrees and mortgage-decrees *must not be sold*, because the present rule prescribes *special procedure* for the realization of such decrees [sub-r. (2)]. But for this provision, money-decrees and mortgage-decrees would have to be realized by *sale* like other decrees. The special procedure prescribed by sub-r. (2) is an exception to the general rule that property when attached can only be realized by a sale thereof.

Under the old section, decrees were divided into two classes, namely :—

- (1) decrees for the payment of money, and
- (2) other decrees.

(a) *Adhur Chandra v. Lal Mohun* (1897) 24 Cal. 778, 779. The decision in *Umt Koya v. Umma* (1911) 35 Mad. 622 would have been different if the case was governed by the present Code.
(b) *Gopal v. Joharimal* (1892) 16 Bom. 522.

(c) *Barhma Din v. Baji Lal* (1904) 26 All. 91.
(d) *Sultan Kuar v. Gulzari Lal* (1880) 2 All. 290 ;
Tiruvengada v. Vythilinga (1893) 6 Mad. 418 ; *Jotindro Nath v. Dwarka Nath* (1898) 20 Cal. 111 ; *Siddalingappa v. Shankarappa* (1908) 27 Bom. 556.

There was no specific provision for decrees for sale in enforcement of a mortgage. Hence the question arose whether such decrees belonged to the first class or the second class. The decisions on the subject were conflicting (e). To remove this doubt, the words "or for sale in enforcement of a mortgage or charge" have been inserted in sub-r. (1). These words make it clear that mortgage-decrees are to be attached and realized in the same manner as money-decrees [see sub-rules (1) and (2)].

O.21, r.53.

Decrees other than money-decrees and mortgage-decrees.—D1 holds a decree against J for partition of certain property passed in Court X. D2 obtains a decree against D1 for Rs. 6,000 in Court Y. If D1 fails to satisfy the decree obtained against him by D2, D2 may apply to Court Y to execute his decree by attachment and sale of the decree held by D1 against J. The decree held by D1, being neither a money-decree nor a mortgage-decree, the only mode of realizing it in execution of D2's decree is by attachment and sale thereof.

Money-decrees and mortgage-decrees.—Where the decree attached is a money-decree or a mortgage-decree, it can only be realized by execution, it cannot be sold in execution. For this purpose, two applications must be made, one for attachment of the decree, and the other for its execution. The application for attachment must be made by the holder of the decree sought to be executed to the Court which passed it. But the application for execution of the attached decree must be made to the Court which passed the decree attached, and it may be made either by the holder of the decree sought to be executed or by the holder of the decree attached. We proceed to give illustrations.

(a) *Where the decree sought to be executed and the decree sought to be attached are passed by the same Court.*—D1 holds a decree against J for Rs. 5,000 passed by Court X. This is a money-decree. D2 obtains a decree against D1 also in Court X for Rs. 6,000. If D2 seeks to attach D1's decree in execution of his decree, he should apply to Court X for attachment, and either he or D1 may then apply to that Court for execution of the decree held by D1 against J. D can apply for execution, for he is deemed to be the representative of D1 [see sub-r. (3)].

(b) *Where the decree sought to be executed and the decree sought to be attached are passed by different Courts.*—D1 sues J on a mortgage, and obtains a decree for sale of the mortgaged property under O. 34, r. 5, in Court X. This is a mortgage-decree. D2 obtains a decree against D1 for Rs. 6,000 in Court Y, and in execution of his decree applies to Court Y for attachment of the mortgage-decree held by D1 against J. The attachment is to be made by the issue to Court X of a notice by Court Y requesting Court X to stay execution of D1's decree against J unless and until—

- (i) the notice is cancelled by Court Y, or
- (ii) an application is made to Court X by D2 or D1 to execute the decree held by D1 against J.

If an application is made by D2 or D1 to Court X to execute the decree held by D1 against J, Court X will proceed to execute the decree and the nett proceeds that may be realized in execution will be applied in satisfaction of D2's decree.

If in the case put above, Court X does not stay execution of D1's decree on receiving the notice from Court Y, and proceeds with the execution in spite of the notice, the

(c) See *Delhi and London Bank, Ltd. v. Partab Singh* (1906) 28 All. 771 (mortgage-decree held not to be a money-decree); *Vaidinada-*

samy v. Somasundram (1905) 28 Mad. 473 (mortgage-decree held to be a money-decree).

O. 21, proceedings will be deemed to be *ultra vires*, and a sale held in execution of that decree rr. 53, 54. will be set aside as void (f).

Sub-rule (3): representative.—This sub-rule is new. It gives effect to the undermentioned decisions (g) under the Code of 1882. It declares in effect that one who attaches a decree is a *representative* of the decree-holder within the meaning of s. 47. Thus in the cases put above D2 is the representative of D1.

Sub-rule (6): Adjustment of attached decree.—This sub-rule is new. The latter part of the rule gives effect to a Bombay decision that where a decree is attached, no adjustment of the decree subsequent to the attachment can be recognized by the Court (h). See r. 2 of this Order.

"Decree."—A decree, whereby B was compelled to deliver up possession of certain lands to C, is reversed in appeal, and B is declared to be entitled to recover back possession from C with mesne profits. A obtains a decree against B, and applies in execution of his decree to attach B's right to recover mesne profits from C. The right is not attachable, for it is not a *decree*. "The language of [this rule] seems to apply only to cases where the right attached is a right expressly *settled* by the decree, and not a right *arising* from the decree by way of restitution" (i).

54. [S. 274.] (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

Attachment of immovable property.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

Immoveable property.—The equity of redemption of a mortgagor is "immoveable" property within the meaning of this rule (j). The life-interest taken by a Parsi widow under her husband's will in the income of his immoveable property is not moveable but immoveable property, and is attachable under this rule (k).

Mortgage-debt.—The sale of a mortgage-debt in execution of a decree carries with it the security without attaching the mortgaged property under this rule: see notes to r. 46, "Attachment of mortgage-debt," p. 594 above.

Omission to beat the drum.—Such an omission is a "material irregularity" within the meaning of r. 90 of this Order (l).

Proclamation of sale.—See r. 64 below and notes thereto.

(f) *Barhma Din v. Bajt Lal* (1904) 26 All. 91; *Manik Lal v. Banamali* (1905) 32 Cal. 1104.
(g) *Sah Man Mall v. Kanagasabapathi* (1893) 16 Mad. 20; *Krishnan v. Venkatapathi* (1906) 29 Mad. 318.

(h) *Gopal v. Joharimal* (1892) 16 Bom. 522.
(i) *Vasudeva v. Narayana* (1901) 24 Mad. 341.
(j) *Parashram v. Govind* (1897) 21 Bom. 226.
(k) *Natha v. Dhunbatji* (1899) 23 Bom. 1.
(l) *Trimbak v. Nana* (1886) 10 Bom. 504.

Removal of attachment
after satisfaction of decree.

55. [S. 275.] Where—

O. 21,
rr. 55, 56.

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or
- (c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Alterations in the rule:—

1. The words “or certified to the Court” in cl. (b) are new. The effect of these words is to place satisfaction certified under r. 2 of this Order on the same footing as satisfaction made through the Court.
2. The latter part of the rule commencing with the words “the attachment shall be deemed to be withdrawn,” etc., is new. Under the old section, an express order was necessary for the withdrawal of the attachment. No such order is necessary under the present rule. The attachment is to be deemed to be withdrawn on the happening of any of the events specified in cls. (a), (b) and (c).

Bearing of this rule on s. 73.—See notes to s. 73 under the head “Assets held by a Court,” beginning with case A, p. 197.

“The attachment shall be deemed to be withdrawn.”—A’s property is attached in execution of a decree obtained by him against B. C, another judgment-creditor of A, applies for execution of his decree, but no attachment is issued upon his application. On the date fixed for the sale A pays into Court the amount payable under B’s decree. The next day C applies for sale of the property. C is not entitled to have the property sold because the effect of the payment into Court was the withdrawal of the attachment under this rule, and there being no attachment under C’s decree no sale can be ordered in execution of his decree (m).

56. [S. 27.]

Order for payment of
coin or currency notes to
party entitled under decree.

Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

(m) *Sorabji v. Kala* (1911) 36 Bom. 157; *Vibudha-priya v. Yusuf Sahib* (1905) 28 Mad. 380. See *Sorabji's* case discussed in the notes

to s. 73 under the head “Assets held by a Court.”

O. 21,
rr. 57, 58.

57. [New.] Where any property has been attached in execution of a decree,* but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

Determination of attachment.

Object of the rule.—The object of the rule is to put an end to doubts which have arisen from time to time as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings from the file" for which there was no justification under any of the earlier Codes (n). This subject has already been discussed in the notes to s. 64 under the head "Effect of striking off execution proceedings or of removing them from the file," p. 176.

By reason of the decree-holder's default.—The provisions of this rule that the attachment should cease upon the dismissal of the application for execution do not apply unless the dismissal was on the ground of "default" on the part of the decree-holder (o). The word "default" is not confined to default in appearance or in payment of process fees or in production of documents, but includes failure to do what the decree-holder is bound to do, that is, to proceed with his application for execution. Failure, therefore, to give notice to the judgment-debtor prior to the drawing up of the proclamation as required by r. 66 of this Order, is default within the meaning of this rule (p). Where a sale in execution of a decree is set aside for any reason other than default on the part of the decree-holder, the antecedent attachment is revived so as to support a second application for execution of the decree by sale of the same property and no fresh attachment is necessary (q).

Attachment before judgment.—This rule does not apply to attachments before judgment. Hence an attachment before judgment does not cease to have effect because of the dismissal of the application for execution for default of prosecution. A sues B and obtains an order for attachment before judgment. A then obtains a decree in the suit against B. Thereafter A applies for execution of the decree, but the application is dismissed for default of prosecution. The dismissal of the application has not the effect of putting an end to the attachment before judgment (r).

Investigation of Claims and Objections.

58. [S. 278.] (1) Where any claim is preferred to or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or

Investigation of claims to, and objections to attachment of, attached property.

(n) *Diwan Chand v. Bedha* (1919) Punj. Rec. no. 154, pp. 410, 418.
(o) *Aziz Baksh v. Kaniz* (1912) 34 All. 490.
(p) *Namuna Bibi v. Roshia-Miah* (1911) 38 Cal. 482; *Dildar Hussain v. Sheo Narain* (1919)

41 All. 157.
(q) *Mahabharat v. Surja Kanta* (1918) Pat. L. J. 310.
(r) *Venkatasubiah v. Venkata Seshatya* (1919) 42 Mad. 1.

objection with the like power as regards the examination of O. 21, r. 58. the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

Rules 58 to 63.—These rules deal with investigation of claims preferred to property attached in execution of a decree and of objections to the attachment of such property.

Scope of the rule.—Objections to attachment raised by a party to the suit in which the decree under execution was passed or his representative fall within the scope of s. 47. Objections to attachment raised by a third party come under the present rule. This distinction is important in two ways :—

1. Where an objection to attachment is made by a party to the suit or his representative, the objector should proceed by an application under s. 47 : a separate suit for the purpose is barred. But where an objection to attachment is made by a third party the objector may either proceed by an application under this rule or he may bring a regular suit to establish his objection ; failure to proceed by an application under this rule is no bar to a separate suit. The object of this rule is to give a claimant a speedy and summary remedy, but the rule does not deprive him of his remedy by suit. The summary remedy given by this rule is alternative to the remedy by way of suit (s). See notes to r. 63 below, " Payment by claimant under protest."

2. An order made under s. 47 allowing or disallowing an objection to attachment is a " decree " (s. 2), and is therefore appealable. But orders under r. 60, 61 or 62 made upon an application under this rule are not appealable under the Code (t), and the remedy of the party against whom the order is made is by a regular suit to establish the right which he claims to the property in dispute (r. 63). Such suit must be brought within one year from the date of the order [Limitation Act, art. 11] (u), but subject to such suit, the order is conclusive (v) ; see r. 63.

The following illustration shows the operation of rr. 58-62. In execution of a decree obtained by A against B certain property alleged to belong to B is attached. If the property attached is claimed by C, C may bring a regular suit for a declaration that the property attached belongs to him and for removal of the attachment. Or, if he desires to avail himself of the speedy remedy provided by this rule, he may present an

(s) *Kanhaya Lal v. National Bank of India* (1913) 40 Cal. 598, 40 I.A. 56; *Sundar Singh v. Ghosi* (1898) 18 All. 410; *Krishnabhupati v. Vikrama* (1895) 18 Mad. 13, 17; *Raghunath v. Surosh Kama* (1899) 23 Bom. 266.

(t) *Abdul v. Muhammad* (1882) 4 All. 190; *Daya-*

ram v. Govardhandas (1904) 28 Bom. 458.

(u) *Harishankar v. Naran* (1894) 18 Bom. 260.

(v) *Rahim Bux v. Abdul Kadar* (1905) 32 Cal. 537; *Rajaram v. Raghubansman* (1897) 24 Cal. 563; *Sardhari Lal v. Ambika Pershad* (1888) 15 Cal. 521, 526, 15 I. A. 123.

D. 21, r. 58. *application to the Court executing the decree claiming that the property belongs to him and for the removal of the attachment.* If *C's* claim is allowed (r. 60), *A* (decree-holder) may bring a suit under r. 63 for a declaration that the property belongs to *B* (judgment-debtor), and is therefore liable to attachment. And if *C's* claim is disallowed (r. 61), he may bring a suit for a declaration that the property attached belongs to him, and is therefore not liable to attachment. If no such suit is brought within one year from the date of the order under r. 60 or 61, the order will be conclusive.

Objections to attachment, though made by *parties* to a suit or their *representatives*, come within the scope of this rule if the objection is based on the ground that the property attached is held by them *on behalf of a third party* as a trustee, guardian, or in other *fiduciary* capacity. See notes to s. 47 under the heads "Parties to the suit," p. 129 above, and "objection by party or his representative that property attached is not liable to attachment," p. 135 above.

Mortgage-decree.—This rule does not apply where the property in dispute is directed to be *sold under a mortgage decree*. The reason is that the property directed to be *sold* under a mortgage-decree does not require to be *attached* by way of execution (*w*) and the benefit of the summary procedure afforded by the present rule is limited to claims and objections arising in respect of an *attachment*. *A* obtains a decree against *B* for sale of certain property mortgaged to him, and applies in execution for the sale thereof. If the property is claimed by *C*, the procedure is by *suit* for a declaration that the property belongs to him, and not by application under this rule (*x*).

Rules 58 to 63 apply to "debts" also.—*A* obtains a decree against *B* for Rs. 5,000, and attaches in execution of the decree a debt alleged to be due by *C* to *B*. Can *C* apply under this rule to have the attachment removed? Yes; and if the attachment is not removed, he may institute a suit for a declaration that no debt is due from him to *B* within a year from the date of the order against him. If no such suit is filed, the order will be conclusive against him (*y*). In an earlier Bombay case, the opinion was expressed that the procedure laid down in the sections of the Code of 1882 corresponding to rr. 58 to 63 did not apply to a debt attached in execution of a decree, the reason given being that a *debt* was not property capable of *possession* within the meaning of rr. 60 and 61, and that if *C* alleged that no debt was due, the proper course was for the Court to satisfy itself as to its existence (r. 66), and if it was satisfied that no debt existed, it should abstain from proceeding to sell the debt (*z*). But this view has since been dissented from, and it has been held that the words "possessed of" in rr. 60 and 61 are not restricted to objects capable of *physical* possession, but apply also to objects capable of *constructive* possession, such as a debt. Moreover, the word "property" in the present rule is wide enough to include a debt. As to a garnishee's right to set-off, see notes to r. 46 above.

Appeal.—No appeal lies under the Code from an order made in a claim case [see notes to s. 47, "Objection by party or his representative that property attached is not liable to attachment," p. 135 above]. But it has been held by the High Court of Madras, that an appeal lies from such an order under cl. 15 of the Letters Patent. It follows from this that where an appeal is preferred from the order, the period of

(*w*) *Dyachand v. Hemchand* (1880) 4 Bom. 515, 520; *Venkatanarasammah v. Ramia* (1879) 2 Mad. 108, 112; *Ratan Lal v. Bala Parshad* (1918) Punj. Rec. no. 58, p. 197.
(*x*) *Himatram v. Khushal* (1894) 18 Bom. 98; *Deefholts v. Peters* (1887) 14 Cal. 631.

Sanwal Das v. Bismillah (1897) 19 All. 480, 481-482.
(*y*) *Chidambara v. Ramasamy* (1904) 27 Mad. 67; *Tayyabali v. Atmaram* (1914) 38 Bom. 631.
(*z*) *Harilal v. Abhesang* (1880) 4 Bom. 323.

limitation for the suit contemplated by r. 63 below is to be calculated from the date of the order made on appeal (a).

O. 21,
rr. 58-60.

59. [S. 279.] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Evidence to be adduced
by claimant.

"Some interest."—These words means "such an interest as would render the possession of the judgment-debtor possession not on his own account but on account of or in trust for the claimant" (b).

"Or was possessed of."—These words mean "was possessed of for himself, and not as trustee for the judgment-debtor." See the next rule and the notes thereto.

Limits of inquiry.—Rules 58 to 62 provide for a summary investigation into possession. Hence in an investigation under these rules what the Court has to determine is merely the question of possession, and it cannot go into the question of title with respect to the property taken in attachment. In execution of a decree obtained by A against B three pieces of Government securities are attached. The securities stand in the name of C. C applies for removal of the attachment under r. 58, alleging that the securities belong to him and they are held by him on his own account. A alleges that the securities are held by C *benami* for B. It is not open to the Court under these circumstances to inquire whether C, in whose name the securities stand, is merely the *benamidar*. The property must therefore be released from attachment (c). The question whether C is merely the *benamidar* is a question of title, and it can only be gone into in a suit under r. 63.

60. [S. 280.] Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Release of property from
attachment.

Property in possession of some person not in trust for judgment-debtor.—A obtained a decree against B as the heir and legal representative of his deceased father, and in execution of the decree attached certain money in the hands

(a) *Sabhapathi v. Narayanasami* (1902) 25 Mad. 555; *Venugopal v. Venkatasubbiah* (1916) 39 Mad. 1196.
(b) *Bhagwan v. Khetter Moni* (1896) 1 C. W. N. 617; *Sabhapathi v. Narayanasami* (1902) 25

Mad. 555.
(c) *Monmohiney v. Radha Kristo* (1902) 29 Cal. 543; *Hamid v. Buktair* (1887) 14 Cal. 617; *Sheoraj v. Gopal* (1891) 18 Cal. 290.

O. 21, rr. 60, 61. of *C* due to the estate of the deceased. Previously to the date of the decree an order had been made by the High Court under ss. 17 and 18 of the Administrator-General's Act 2 of 1874, authorising the Administrator-General to collect the assets of the deceased. It was held on the application of the Administrator-General that the attachment should be removed. As the order under the Administrator-General's Act authorised the Administrator-General to realize the debt from *C* as part of the assets of the deceased, the amount in the hands of *C* could not be said to be property in the possession of a third person in trust for the judgment-debtor (*B*) (*d*). See Notes to r. 62 below.

Property in possession of a judgment-debtor not on his own account but on account of or in trust for some other persons.—Such property, if attached, should be released from attachment under this rule. Thus where goods consigned by railway by *A* to *B* for sale against which *B* had made specific advances were attached, while they were yet in the hands of the railway company, in execution of a decree against *A*, it was held that though the goods were in the possession of *A* (judgment-debtor) by the railway company, they were in his possession not on his own account, but "on account of or in trust for" *B*, and should therefore be released from attachment on *B*'s application (*e*).

Effect of order of release.—An order made under this rule releasing the property attached from attachment is only provisional and liable to be set aside by a regular suit (r. 63). "It is not conclusive; a suit may be brought to claim the property, notwithstanding the order" (*f*). It has not the effect therefore of putting an end to an attachment duly made, so as to leave the claimant free to deal with the property as he likes. If a suit is brought by the decree-holder to establish his right to attach the property, and a decree is passed for him, the effect of the decree is to set aside the order of release and to maintain the attachment originally made. The result is that any private transfer of the property by the claimant, though made after an order under this rule releasing the property from attachment, will be void under s. 64, if the right to attach is subsequently established by suit under r. 63 (*g*). In execution of a decree obtained by *A* against *B* certain property standing in the name of *C* (*B*'s son) is attached. *C* objects to the attachment, and the property is released from attachment under this rule. *C* then mortgages the property to *M*. *A* then sues *B* and *C* for a declaration that *B*, and not *C*, is the real owner of the property, and that the property is therefore liable to be sold in execution of his decree against *B*, and a decree is passed in his favour. The property is then re-attached and sold in execution of *A*'s decree, and purchased by *P*. The mortgage to *M* is a transfer contrary to the attachment within the meaning of s. 64, and *P* takes the property free from the mortgage.

Appeal.—See notes to r. 58 above, "Appeal," p. 610 above.

61. [S. 281.] Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a

Disallowance of claim to property attached.

(*d*) *Bhatji v. Administrator-General of Bombay* (1899) 23 Bom. 428.
(*e*) *Velji v. Bharmal* (1897) 21 Bom. 287.
(*f*) *Sardhari Lal v. Ambika Pershad* (1888) 15 Cal. 521, 15 I. A. 123.

(*g*) *Bonomali v. Prosunno* (1896) 23 Cal. 829;
Ram Chandra v. Mudeshwar (1906) 33 Cal. 1158; *Ali Ahmad Khan v. Bansidhar* (1909) 31 All. 367.

tenant or other person paying rent to him, the Court shall disallow the claim. O. 21,
rr. 61, 62

Effect of order under this rule.—An order in favour of a decree-holder made under this rule does not enure for the benefit of the other decree-holders who are not parties to the proceedings (h).

Disallowance of claim.—An order disallowing a claim under this rule is not a nullity and cannot be said to have been made without jurisdiction merely because the Court erroneously does not go into the question of *possession*, but disallows the claim on *some other ground*. Such an order, therefore, is conclusive unless a suit is filed by the claimant as provided by r. 63 of this Order (i).

Appeal.—See notes to r. 58 above, “Appeal,” p. 610 above.

62. [s. 282.] Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

Continuance of attachment subject to claim of incumbrancer.

Scope of the rule.—This rule is an enabling rule, empowering the Court to pass a certain specified order on the fulfilment of two specified conditions. The conditions are (1) that the Court is satisfied that the property attached is subject to a mortgage or lien in favour of some person not in possession; and (2) that the Court in its discretion thinks fit to continue the attachment. Where those two conditions are satisfied then the rule empowers the Court to continue the attachment subject to the mortgage or lien. An order which refuses to acknowledge a mortgage or lien, and directs the continuance of the attachment free from such mortgage or lien cannot be referred to this rule. It is rather an order in proceedings under r. 66 below (j).

“Subject to a mortgage.”—The Code clearly makes a distinction between the case in which property is expressly sold subject to a mortgage and the case in which notice of an alleged mortgage is given in the proclamation of sale. The former is provided for by the present rule, and the latter by r. 66 below. In the former case the Court *after being satisfied of the existence of the mortgage* sells only the judgment-debtor's equity of redemption, that is to say, the purchaser buys the property *subject to the mortgage*. In the latter case he buys the property with notice of the mortgage and subject to such risk as the notice might involve; the executing Court does not decide whether the mortgage subsist or not. If there is in reality a subsisting mortgage, the purchaser has to redeem it. If, on the other hand, the mortgage specified in the proclamation of sale turns out invalid, the purchaser acquires the property free from liability for the mortgage. The point to be noted is that mere notice of an alleged mortgage in the proclamation of sale does not preclude the purchaser from proving the real nature of the mortgage when a claim is set up by the alleged mortgagee against the property (k). And it is also to be noted that if the mortgage specified in the proclamation turns out invalid, the

(h) *Jagan Nath v. Ganesh* (1896) 18 All. 413.
(i) *Bhagwan Das v. Raj Nath* (1912) 34 All. 365.
(j) *Ganesh v. Damoo* (1917) 40 Bom. 64; *Durga Prasad v. Mansa Ram* (1904) 1 All. L. J. 581.

(k) *Shib Kunwar v. Sheo Prasad* (1906) 28 All. 418; *Ganesh v. Purshottam* (1909) 33 Bom. 311; *Narayan v. Umbar* (1911) 35 Bom. 275; *Jairaj Mal v. Radha Kishan* (1913) 35 All. 257.

O. 21, judgment-debtor is not entitled to claim from the purchaser the amount alleged to have
rr. 62, 63. been due on the mortgage (*l*).

"Mortgage in favour of some person not in possession".—Where a mortgagee is in possession of the mortgaged property at the time of attachment, he can claim to have the attachment removed under r. 60 (*m*). See notes to r. 41 above. In such a case it is only the equity of redemption that can be attached and sold. But if mortgagee is not in possession, either the equity of redemption may be attached and sold or the mortgaged property itself may be attached and sold subject to the mortgage. As to the position of the mortgagee in the latter case, see s. 73.

63. [S. 283.] Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.

Saving of suits to establish right to attached property.

Alterations in the rule.—S. 283 of the Code of 1882 ran as follows: "The party against whom an order under sections 280, 281 or 282 [now rr. 60, 61 or 62] is passed may institute a suit to establish the right which he claims," etc. The present rule, on the other hand, says that "where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims," etc. The specific reference to the previous sections or rules has been omitted. A corresponding change has also been made in the Limitation Act, 1908, Sch. I, art 11. See notes below, "Order against party to a claim or objection."

Parties to suits under this rule.—This rule provides that unless the party against whom an order is made institutes a suit to establish the right which he claims to the property in dispute [within the period of a year from the date of the order as provided by art. 11 of the Limitation Act, 1908], the order made against him shall be conclusive. Now the party against whom an order may be made may be the decree-holder (r. 60), or the claimant including an incumbrancer (r. 61), or even the judgment-debtor. The result, therefore, is as follows:—

1. The *decree-holder* against whom an order is made under r. 60 may sue the successful claimant for a declaration of his right to attach and sell the property released from attachment (*n*). To such a suit the judgment-debtor is not a necessary party (*o*). See notes below under the head "Res judicata."

2. The *claimant* whose claim has been disallowed under r. 61 may sue the decree-holder to establish his right to the property attached (*p*). To such a suit the judgment-debtor is a necessary party (*q*). The claimant may in his suit under this rule ask also for any further or consequential relief to which he claims to be entitled (*r*), e.g., damages for wrongful seizure (*s*), but he is not bound to do so (*t*). And since the right conferred

(*l*) *Izzat-un-Nisa Begam v. Partab Singh* (1909) 31 All. 583.

(*m*) *Kassirav v. Vithaldas* (1873) 10 B. H. C. 100.

(*n*) *Mitchell v. Mathura Dass* (1886) 12 I. A. 150.

(*o*) *Ghasi Ram v. Mangal Chand* (1906) 28 All. 41.

(*p*) *Naryanrav v. Balkrishna* (1890) 4 Bom. 529.

(*q*) *Ghasi Ram v. Mangal Chand* (1906) 28 All. 41,

43.

(*r*) *Sadu v. Ram Bin Govind* (1892) 16 Bom. 608.

(*s*) *Kissorimohun v. Harsukh Das* (1890) 17 Cal. 436, 17 I. A. 17. See notes "character of suit under this rule."

(*t*) *Ambu v. Kettilamma* (1891) 14 Mad. 23, 25; *Kristnam v. Pathma Bee* (1906) 29 Mad. 151.

by this rule is not a personal one confined to the original claimant, a purchaser of the interest of the original claimant can also bring a declaratory suit under this rule (u). O. 21, r. 63.

3. A attaches a house in execution of a decree against B. The property is claimed by C. The Court allows C's claim, and the property is released from attachment. This is an order against A, the decree-holder (r. 60). Does it also amount to an order against the judgment-debtor? In other words, can it be said by reason of the fact that C's claim to the property is allowed that the order operates also against B, the judgment-debtor? Assuming that the order does operate against B, it can only be if B is deemed to be a "party against whom an order is made" within the meaning of this rule. If so, B must bring a declaratory suit against C within a year from the date of the order, otherwise the order against him would be conclusive. But it has been held that a judgment-debtor who is not *in fact* a party to the claim proceedings does not in the eye of the law become such by reason solely of his being the judgment-debtor. Unless therefore he is a party *in fact*, the order is not binding upon him, and he may institute a suit even after the lapse of one year from the date of the order provided he does so within the ordinary period of limitation applicable to the suit, to establish his title to, and recover possession of, the property from the claimant [C] (v). But if he was a party in fact, the order would be binding on him unless he brought the suit within the period of one year.

Period of limitation for suit under this rule.—The period of limitation for a suit under this rule is one year from the date of the order [Limitation Act, 1908, Sch. I, art. 11]. In *Sardhari Lal v. Ambika Pershad* (w), the Judicial Committee said: "It [that is, the order] is not conclusive; a suit may be brought to claim the property notwithstanding the order; but then the law of limitation says that the plaintiff must be prompt in bringing the suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as this time within which the suit must be brought." Where an appeal is preferred from the order, the period of one year is to be calculated from the date of the appellate order (x).

Character of suit under this rule.—This rule provides that a party against whom the order referred to in this rule is made may institute a suit "to establish his right to the property in dispute". The words "to establish his right to the property" are, it has been held, wide enough to cover a suit not only for a declaration, but a suit for a declaration and consequential relief. Thus a plaintiff may under this rule sue for a declaration of his right to moveables and for a direction also that the defendant at whose instance they were attached be ordered to pay to him the value of the moveables (y).

"Subject to the result of such suit, the order shall be conclusive."—This means that unless the suit is brought as provided by this rule, the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceedings, the right denied to him by the order (z). A obtains a decree against B, and in execution of the decree attaches certain property alleged to belong to B. C claims that he is in possession of the property under a sale from B of a date prior to the attachment, and applies that the property be released from

(u) *Ganesh v. Kasht Nath* (1904) 26 All 89.
(v) *Krishnasami v. Somasundaram* (1907) 30 Mad. 335; *Vadapalli v. Dronamraju* (1908) 31 Mad. 163; *Shivappa v. Dod* (1887) 11 Bom. 114; *Kedar Nath v. Rakhat Das* (1888) 15 Cal. 674; *Anant Ram v. Damodar Das* (1914) Punl. Rec. no. 84, p. 296.
(w) (1888) 15 I. A. 123, 15 Cal. 521.
(x) *Venugopal v. Venkatasubbiah* (1915) 39 Mad.

1196.
(y) *Basivi Reddi v. Ramayya* (1917) 40 Mad. 733.
See also *Abdul Rahim v. Sital* (1919) 41 All. 658.
(z) *Nilo v. Rama* (1885) 9 Bom. 35; *Baitur v. Lakshmona* (1882) 4 Mad. 302; *Nemagaua v. Paresha* (1898) 22 Bom. 640; *Surnamoy v. Ashutosh* (1900) 27 Cal. 714; *Koyyana v. Doory* (1908) 20 Mad. 225.

O. 21, r 63. attachment. The executing Court finds that *C* was in possession at the date of the attachment, but that the sale to him was fictitious and disallows *C*'s claim. No suit is brought by *C* within the period of a year to establish his right to the property. The property is then sold in execution, and purchased by *P*. *P* then sues *C* for possession. *C* is precluded in this suit from again asserting his right as purchaser from *B*. No suit having been brought by him within the period of limitation, the order disallowing his claim became *conclusive* against him under this rule.

The order is conclusive as against the party against whom it is made.—*A* obtains a decree against *B*, and attaches *B*'s property in execution of his decree. *C* claiming to be a mortgagee of the property puts in a claim under r. 58. *A* contends that the mortgage is not valid but his contention is disallowed. No suit is instituted by *A*, as required by the present rule, and the order becomes conclusive against him. The property is then sold subject to *C*'s mortgage, and it is purchased by *A*. Subsequently *C* sues *A* (purchaser) and *B* (mortgagor) to recover the mortgage debt by sale of the mortgaged property. *B*, not being a party to the claim proceedings, may contend in *C*'s suit that the mortgage is not valid, but *A* cannot raise that contention for the order has become conclusive against him. The fact that *B*, the judgment-debtor, can impeach the validity of the mortgage, and that the property purchased by *A* is the property which belonged to *B*, does not entitle *A* to be placed in *B*'s position so as to give him the same right to attach the mortgage as *B* has (a). See notes above, "Parties to suits under this rule," para. 3.

It is also to be noted that an order in a claim case is conclusive only as regards the particular property in dispute (b).

Order "against" party to a claim or objection:—

1. *Order dismissing a claim for default.* Section 283 of the Code of 1882 ran as follows: "The party against whom an order under sections 280, 281, or 282 is passed may institute a suit," etc. It was accordingly held in some cases that the order referred to in s. 283 must be one made *after investigation* of the claim *as contemplated by sections 280, 281 and 282*, and that an order dismissing a claim *for default and without investigation* did not come under that section. Such being the case, it was held that an order dismissing a claim for default did not become "conclusive" against the party against whom it was made so as to preclude him from instituting a suit more than one year after the date of the order, provided the suit was within the ordinary period of limitation (c). The language of the present rule is more comprehensive than the language of s. 283. There is no reference made to the previous rules, namely, rules 60, 61 and 62, and a corresponding change has also been made in art. 11 of the Limitation Act. The result is that the rule applies to every order made *against* a party to a claim preferred or an objection made under r. 58, even if the order was made *for default and without investigation* (d).

2. *Order refusing to investigate a claim.*—Where a claim or objection is preferred under r. 58, and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the order is one made "against" the claimant or objector within the meaning of this rule (e).

(a) *Ramu Aiyar v. Palaniappa* (1910) 35 Mad. 35.

(b) *Ashna Bibi v. Awaljadi Bibi* (1917) 44 Cal. 698.

(c) *Sarala v. Kamsala* (1908) 31 Mad. 5; *Sarat Chandra v. Tarini Prosad* (1907) 11 C. W. N. 487.

(d) *Nagendra Lal v. Fani Bhusan Das* (1918) 45 Cal. 785 *Gopal Singh v. Ganpatrai* (1916)

Punj. Rec. no. 66, p. 201; *Venkataraman v. Ranganayakamma* (1918) 41 Mad. 985, 995-996; *Gulab v. Mutassadi Lal* (1915) 41 All. 623. *contra Gokul v. Mohri Bibi* (1918) 40 All. 325, which decision, it is submitted, is erroneous.

(e) *Venkataraman v. Ranganayakamma* (1918) 41 Mad. 985 [F. B.].

3. An order on a claim petition stating that as it was filed late it will be notified to the bidders, is in effect an order rejecting the claim. Such an order is one made "against" the claimant within the meaning of this rule (j). **O. 21, r. 63.**

Orders in proceedings for attachment before judgment.—This rule applies to orders on claims preferred to property attached before judgment (g).

Payment by claimant under protest.—If the claimant fails, and the attachment is not removed, he is not compelled to bring a suit under this rule for a declaration of his title to the property: he may prevent the sale of the property by paying the decretal amount to the decree-holder, and then sue for it as money paid under compulsion of law, i.e., under pressure of execution proceedings (h). Further, the claimant is not bound to take proceedings at all under the Code to set aside the attachment. He may pay the amount of the decree under protest, and then sue as stated above (i).

Jurisdiction.—In a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property is in excess of the amount claimed in execution of the decree, the value of the suit for purposes of jurisdiction is not the value of the property, but the decretal amount (j). But where the plaintiff seeks not only for a declaration that the property is not attachable, but for a declaration of his title to the property as against the decree-holder and the judgment-debtor, the value of the suit for purposes of jurisdiction is the value of the property (k).

Burden of proof.—The burden of proof in a suit under this rule lies on the plaintiff as in other cases, and not on the defendant (l).

Fraudulent transfer by judgment-debtor.—In execution of a decree obtained by A against B, B's property is attached. C claims the property as having been purchased by him from B before A obtained the decree against B, but the claim is disallowed. C then sues A and B under this rule to establish his right to the property. A pleads in defence that the transfer by B to C was made with intent to defraud B's creditors. It has been held by a Full Bench of the Madras High Court that it is not open to an attaching creditor [A] in a suit under this rule to plead in defence the fraudulent character of the alienation. The alienation, being merely fraudulent (as distinguished from 'sham'), must be held to continue in force until it is set aside in proceedings properly instituted for the purpose (m). According to the Calcutta High Court, the attaching-creditor [A] is entitled to plead the fraudulent character of the alienation in defence to the suit (n). But it has been held by the Madras High Court, that if in the case put above C's claim is allowed and the attachment is raised, it is competent to A, the attaching creditor, to sue C, the transferee, under this rule to establish his right to attach the property, and to allege and prove in such suit that the transfer by B to C was fraudulent (o).

(f) *Venkataram v. Ranganayakamma* (1918) 41 Mad. 985 [F. B.].

(g) *Prasada Nayudu v. Virayya* (1918) 41 Mad. 849 [F. B.].

(h) *Dulichand v. Ramkishan* (1881) 7 Cal. 648, 8 I. A. 98; *Jugdeo v. Rajah Singh* (1888) 15 Cal. 656. See also *Jasvatsingji v. Secretary of State* (1890) 14 Bom. 299.

(i) *Kanaya Lal v. National Bank of India* (1918) 40 Cal. 598, 40 I. A. 56.

(j) *Khetra v. Mumtaz Begam* (1916) 38 All. 72; *Anandi Kunwar v. Ram Narayan Das*

(1918) 40 All. 505. See also *Phul Kumari v. Ghanshyam Miera* (1907) 35 Cal. 202, 35 I. A. 22.

(k) *Sardar Begam v. Meher Chand* (1913) Punj. Rec. no. 82, p. 293.

(l) *Nannhi Jan v. Bhuri* (1908) 30 All. 321.

(m) *Subramania Ayyar v. Muthia Chettiar* (1918) 41 Mad. 612 [F. B.].

(n) *Abdul Kadir v. Ali Mia* (1912) 15 Cal. L. J. 649.

(o) *Pokker v. Kunhamad* (1919) 42 Mad. 143.

O. 21,
rr. 64, 66.

Sale generally.

64. [S. 284.] Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Power to order property attached to be sold and proceeds to be paid to person entitled.

Sale of goods not belonging to judgment-debtor.—*A* obtains a decree against *B*. In execution of the decree *A* points out to the sheriff's agent goods belonging to *C* as the property of *B*. *C*'s goods are thereupon attached by the sheriff's agent, and sold in execution. *C* is entitled to claim from *A* the market value of his goods as on the date of attachment. The sheriff is not liable in such a case (*p*).

65. [S. 286.] Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

Sales by whom conducted and how made.

"Save as otherwise prescribed."—See r. 76 below.

66. [S. 287.] (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Proclamation of sales by public auction.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold;
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
- (c) any incumbrance to which the property is liable;

(p) *Kissorimohun v. Harshukh Das* (1889) 17 Cal. 486, 17 I. A. 17; *Goma v. Gokaldas* (1879) |

| Bom. 74. See also *Dorab Ally v. Abdu Aziz* (1881) 5 I. A. 116.

(d) the amount for the recovery of which the sale is O. 21, r. 66. ordered ;

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

Alterations in the rule :—

1. The provision in sub-r. (2) for notice to be given to the decree-holder and the judgment-debtor is new.
2. Sub-r. (3) is also new.

Incumbrances to which the property is liable.—See notes to r. 62 of this order.

Value of the property.—Clause (e) of the rule provides that the proclamation shall specify as fairly and accurately as possible “every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property”. There can hardly be any doubt that the value of the property to be put up for sale is a material fact within the meaning of cl. (e).⁹ As stated by the Judicial Committee in *Saadatmand Mohan v. Hurruk Chand* (g), “Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of these things ‘which the Court considers material for a purchaser to know,’ and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated ‘as fairly and accurately as possible’”. If any enquiry into the value of the property is necessary, the Court should hold an enquiry (r). If the value is understated in the proclamation, and the understatement is such as is calculated to mislead bidders and to prevent them from offering adequate prices, and the sale results in a price altogether inadequate, the sale must be set aside on the ground of material irregularity in publishing or conducting the sale within the meaning of r. 90 below (s). In a Calcutta case it was said that the

(g) (1898) 20 All. 412, 418. 25 I. A. 146; *Munshi Raghunath v. Hazari* (1917) 2 Pat. L. J. 130; *Ranu Beni Prasad v. Eadal Singh* (1919) 4 Pat. L. J. 37.
(r) *Saurendra Mohan v. Hurruk Chand* (1908) 12

C. W. N. 542.
(s) *Saadatmand v. Phul Kuar* (1898) 20 All. 412, 25 I. A. 146; *Sivasami v. Ratnasami* (1900) 23 Mad. 568. See also *Dhanukhari Singh v. Mahabir Pershad Singh* 1907/34 I. A. 164.

O. 21, rr. 66, 67. Court was not bound to investigate the value of the property (t), but these remarks were *obiter dicta* (u), and it was held in a later case that the Court is bound under this clause to investigate the value and insert it in the sale proclamation (v). In view of the decision of the Judicial Committee in the case cited above, there is no doubt that the value of the property should be stated as fairly and accurately as possible in the sale proclamation.

Specification of property to be sold.—See notes to r. 90 below, "Material irregularity in publishing or conducting sale," No. 1.

Specification of revenue.—See notes to r. 90 below, "Material irregularity in publishing or conducting sale," Nos. 1 and 2.

Specification of incumbrances.—See notes to r. 90 below, "Material irregularity in publishing or conducting sale," No. 1.

Sale by Court—Duty of Court.—In a case in which the terms of the proclamation were not clearly explained by the officer of the Court conducting the sale to a person present at the sale who asked that the terms be explained, and such person was thereupon misled into buying property which was subject to mortgages amounting to more than its value, the Judicial Committee in setting aside the sale observed: "In sales under the direction of the Court it is incumbent of the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this" (w).

Irregularity in publishing sale.—See notes to r. 90 below, "Material irregularity in publishing or conducting sale."

Appeal.—An order fixing a valuation of the judgment-debtor's property under this rule is not an order relating to the execution, discharge or satisfaction of a decree within the meaning of s. 47, and no appeal lies from it (x).

67. [S. 289.] (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

Mode of making proclamation.

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

(t) *Kashi v. Jamuna* (1904) 31 Cal. 922.
 (u) *Saurendar v. Hurruk Chand* (1910) 12 Cal. W. N. 542.
 (v) *Lachman v. Ganga* (1912) 15 Cal. W. N. 713.
 (w) *Kala Nisa v. Harperink* (1908) 36 Cal. 323, 334, 36 I. A. 32, 37.
 (x) *Ajudhia Prasad v. Gopi Nath* (1917) 39 All.

415; *Sivagami v. Subrahmanya* (1908) 27 Mad. 259 [F. B.]; *Panch Dhar v. Mani* (1912) 16 Cal. W. N. 970; *Deokinandan v. Bansi Singh* (1912) 16 Cal. W. N. 124; *Deokinandan v. Rajah Dhakeswar Prasad* (1917) 2 Pat. L. J. 13.

Sub-rule (3): property divided into lots for separate sale.—This sub-rule is new. It incorporates the decision in the undermentioned case (y).

O. 21,
rr. 67-69.

Non-compliance with the provisions of this rule.—Omission to carry out the provisions of this rule does not render the sale *ipso facto* void. But such omission amounts to a "material irregularity within the meaning of r. 90 below, and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (z). [The reader is advised to read r. 90 at this stage, and note particularly the proviso to that rule].

Sub-r. (2).—Note that under this sub-rule the Court *may* direct publication of the proclamation; there is no obligation on its part to do so. (zz).

68. [S. 290.] Save in the case of property of the kind described in the proviso to the rule 43, no sale hereunder shall, without the consent

Time of sale.

in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale.

Non-compliance with the provisions of this rule.—If a sale is held before the expiration of the period prescribed by this rule, it is not void, but the case is one of material irregularity within the meaning of r. 90, and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (a).

69. [S. 291.] (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reason for such adjournment.

Adjournment or stoppage
of sale.

Provided that, where the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

(y) *De Penha v. Jalbhoy* (1888) 12 Bom. 368.

(z) *Nana Kumar v. Golam Chunder* (1891) 18 Cal. 422.

(zz) *Gopi Ohand v. Benarsi Das* (1919) 1 Lah. L.J. 197.

(a) *Tasadduk v. Ahmed* (1894) 21 Cal. 66, 20 I. A. 176; *Kokil v. Edai Singh* (1904) 31 Cal. 385.

O. 21. **Omission to fix hours for sale.**—Such an omission amounts to a rr. 69, 72. “material irregularity” within the meaning of r. 90 below (b).

Omission to issue fresh proclamation.—Such an omission amounts to a “material irregularity” within the meaning of r. 90 below (c).

Sale in execution of a mortgage-decree.—A mortgagor judgment-debtor is entitled to stop the sale of the mortgaged property in execution of a mortgage-decree by payment of the debt before the sale actually takes place even after a final decree for sale has been passed (d).

Rateable distribution.—Money paid into Court under sub-r. (3) to stop a sale is an asset available for rateable distribution (e); see s. 73.

70. [Cf. S. 287, last para.] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

Saving of certain sales.

Execution of decrees by Collector.—See ss. 68 to 72, and the third Schedule.

71. [S. 293.] Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Defaulting
answerable for purchaser
re-sale. loss on

Application of the rule.—This rule extends to all sales, whether of moveable or of immoveable property, and also to re-sales made under the Code, whether made in consequence of default of payment of deposit under r. 81 or of purchase money under rr. 85 and 86 (f). But the re-sale should only cover the property sold at the prior sale, and any substantial difference of description at the sale and re-sale in any of the matters required by r. 66 will disentitle the decree-holder to recover the deficiency of price under this rule. Thus where the defaulting purchaser had been induced to bid for the property as unincumbered by reason of the fact that the incumbrances were not mentioned in the proclamation of sale and the re-sale was on a proclamation in which the incumbrances were mentioned, it was held that he could not be made liable for the deficiency on re-sale under this rule (g). The same was held where the property was described as that of A in the first sale and as that of B in the second (h). It is different, however, if the property re-sold is substantially the same as that put up for sale at the first sale ;

(b) *Surno Moyee v. Dakkhina* (1897) 24 Cal. 291 ;
Mahabir v. Dhanukdhari (1904) 31 Cal. 815.
 (c) *Bagal Chandar v. Rameshwar* (1891) 18 Cal. 496.
 (d) *Bibijan v. Sachl* (1904) 31 Cal. 863 ; *Mieri Lal*
v. Mithu Lal (1906) 28 All. 28.
 (e) *Purshotamdas v. Surajbharthi* (1882) 6 Bom.

588, 589, a decision under s. 295 of the Code of 1882.

(f) *Ramdhani v. Rajrani* (1881) 7 Cal. 337 ; *Javher-
 bai v. Haribhai* (1888) 5 Bom. 575.
 (g) *Bajinath v. Moheep* (1889) 16 Cal. 535.
 (h) *Gangadas v. Bai Suraj* (1911) 36 Bom. 829.

in such a case the defaulting purchaser is liable, for the deficiency on re-sale (i) referred to in this rule is not a condition precedent to the recovery of the deficiency ; the deficiency may be recovered though the certificate is not issued (j). O. 21,
r. 71, 72.

It is to be noted that on the happening of any of the events that render a re-sale necessary, the decree-holder is not bound to have the same property re-sold ; he may proceed against any other property of the judgment-debtor, leaving the latter to his remedy against the defaulting purchaser (k).

Purchaser's default.—At a Court-sale *A* bids Rs. 5,000, *B* bids Rs. 6,000, and *C* bids Rs. 7,000. *C* dies before his bid is accepted by the Court. Can *B* be said in the circumstances to be the highest bidder ? No. *C*'s bid was revoked by his death before acceptance by the Court. *B*'s bid lapsed on the making of the subsequent higher bid of Rs. 7,000, and so did *A*'s bid. The property should therefore be put up afresh for sale (l).

Appeal.—An order under this rule allowing or disallowing an application for recovery of the loss by re-sale is appealable as a decree according to the Madras (m) and Calcutta (n) decisions, but not according to the Allahabad decisions (o).

72. [S. 294.] (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Decree-holder not to bid for or buy property without permission.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

Where purchases, amount of decree may be taken as payment.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale ; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

Alterations in the rule :—

1. The words "subject to the provisions of section 73" are new. See notes below under the head "Amount due on the decree."

(i) *Venkatachellamayya v. Nilkant* (1918) 41 Mad. 474.
(j) *Tapeari Lal v. Deoki* (1897) 19 All. 22.
(k) *Gour Chunder v. Chunder Coomar* (1882) 8 Cal. 291.
(l) *Raja of Bobbili v. Suryanarayana* (1919) 42

Mad. 776.
(m) *Amir Baksha v. Venkatachala* (1895) 18 Mad. 439.
(n) *Kali Kishore v. Guru Prosad* (1898) 25 Cal. 99.
(o) *Deoki v. Tapeari* (1892) 14 All. 201.

O.21, r.72.

2. The words "any other person whose interests are affected by the sale" in sub-r. (3) have been substituted for the words "any other person interested in the sale." This is merely a verbal alteration.

No separate suit.—Where a decree-holder without leave of the Court buys the property of the judgment-debtor at a Court sale, the remedy of the latter is by application under this rule and s. 47, and not by a separate suit: a separate suit is barred under s. 47. The question whether the sale should be set aside or not is a question between the "parties to the suit" relating to the "execution" of the decree within the meaning of s. 47, and it must therefore be decided by the Court executing the decree, and not by a separate suit (*p*). Note the words "may by order set aside the sale" in sub-r. (3).

"The Court may, if it thinks fit, set aside the sale."—Where a decree-holder purchases without the permission of the Court, the sale is not a nullity for want of jurisdiction: the case is one merely of irregularity in procedure (*q*). The words "the Court may, if it thinks fit, set aside the sale" clearly show that a purchase by a decree-holder without permission is not *ipso facto* void; such purchase is valid until it is set aside under this rule (*r*). In determining whether the sale should be set aside, the Court should take into consideration whether the property has been sold at an adequate or inadequate price (*s*). The sale may be set aside even after confirmation (*t*).

Setting off decretal amount against purchase money.—It may be one of the terms on which the permission to bid is granted that there should not be this right of set-off. In such a case no set-off can be directed (*u*).

Effect of leave to bid.—A decree-holder who has obtained leave to bid at a judicial sale is in the same position as any other purchaser; he is not bound more than any other person to disclose circumstances within his knowledge and bearing on the sale (*v*). Similarly, a mortgagee purchaser who has obtained leave to bid is in the same position as an independent purchaser (*w*); that is to say, he does not stand in the position of a trustee for the mortgagor, and he is only bound to give credit to the mortgagor for the actual amount of his bid, and not for what may be the actual value of the property (*x*). It may here be noted that if the decree-holder himself is the purchaser, and the decree is subsequently reversed, the sale to him will be set aside (*y*); but the sale cannot be set aside against a *bona fide* purchaser who is not a party to the suit (*z*). See notes to s. 65, "Effect of reversal of decree upon sale," etc., p. 182 above.

"Amount due on the decree."—When more than one decree-holder has applied or execution, the amount due on the decree to the decree-holder purchaser is the amount to which he would be entitled on a rateable distribution under s. 73 (*a*). This is now made clear by the addition of the words "subject to the provisions of s. 73" in sub-r. (2).

Interest.—A decree, the satisfaction of which has resulted from the decree-holder himself bidding the full amount of the decree at the execution sale, is not actually satisfied until the sale has been confirmed under r. 92 below (*b*). If, therefore, the

- (*p*) *Genu v. Sakharani* (1898) 22 Bom. 271; *Durga v. Balwant* (1901) 23 All. 478; *Viraraghava v. Venkata* (1893) 16 Mad. 287.
 (*q*) *Ganesh v. Gopal* (1917) 41 Bom. 357.
 (*r*) *Chintamanrao v. Vitthal* (1887) 11 Bom. 583.
 (*s*) *Mathura v. Nathani* (1885) 11 Cal. 731; *Thathu v. Kondu* (1909) 32 Mad. 242, 243, 248, 249.
 (*t*) *Thathu v. Kondu* (1909) 32 Mad. 242.
 (*u*) *Hazari v. Namdev* (1908) 32 Bom. 379.
 (*v*) *Mahomed v. Savvasi* (1900) 23 Mad. 227, 27

- I. A. 17; *Satis Chandra v. Porter* (1909) 36 Cal. 226.
 (*w*) *Mahabir Pershad v. Macnaghten* (1889) 16 Cal. 682, 16 I. A. 107.
 (*x*) *Gunga Pershad v. Jawahir* (1892) 19 Cal. 4.
 (*y*) *Set Umedmal v. Srinath Ray* (1900) 27 Cal. 810.
 (*z*) *Zainulabidin v. Asghar Ali* (1888) 10 All. 166, 15 I. A. 12.
 (*a*) *Sorabji v. Govind* (1892) 16 Bom. 91.
 (*b*) *Ganesh v. Purshottam* (1908) 33 Bom. 811, 316.

decree carries interest, the decree-holder is entitled to claim interest between the date of the sale and the date of its confirmation (c).

O. 21,
rr. 72-74.

Procedure.—Where a decree-holder purchases property in contravention of the provisions of this rule, and sues the judgment-debtor and transferees from him for possession, it is open to the judgment-debtor to have the sale set aside *in the suit* by way of answer to the plaintiff's claim. It is not necessary that the judgment-debtor should have previously *applied* to the Court under this rule and s. 47 to set aside the sale. The written statement of the judgment-debtor may be treated as an *application* to set aside the sale under s. 47 (d).

Appeal.—No appeal lies from an order refusing to give a decree-holder permission to purchase at the Court sale (c). But an appeal lies from an order setting aside or refusing to set aside a sale under this rule [O. 43, r. 1, cl. (j)].

73. [S. 292.] No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Restriction on bidding or purchase by officer.

Compare Transfer of Property Act, s. 136.

Sale of moveable property.

74. [New.] (1) Where the property to be sold is agricultural produce, the sale shall be held,—

Sale of agricultural produce.

- (a) if such produce is a growing crop, on or near the land on which such crop has grown, or,
- (b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(c) *Khalil-ur-Rahman v. Gokul* (1919) 41 All. 526.
(d) *Thachu v. Kondu* (1909) 82 Mad. 242 (Abdur Rahim, J., dissenting).

(e) *Jodoonath v. Brojo Mohun* (1886) 13 Cal. 174;
Ko Tha Hwayn v. Ma Hnin I. (1911), 38 Cal. 717, 38 I. A. 126.

O. 21,
rr. 74-77.

- (b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

75. [New.] (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

Special provisions relating to growing crops.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

76. [s. 296.] Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

Negotiable instruments and shares in corporations.

77. [s. 297.] (1) Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

Sale by public auction.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner,

respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner. **O. 21, rr. 77-79.**

Sub-rule (3).—This sub-rule is new. It gives a right of pre-emption to the co-owner. See as to immoveable property, r. 88 below.

78. [s. 298.] No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

Irregularity not to vitiate sale, but any person injured may sue.

Scope of the rule.—This rule provides for the case of irregularity in publishing or conducting the sale of *moveable* property. Rule 90 deals with irregularity in publishing or conducting the sale of *immoveable* property.

79. [Ss. 299, 300, 301.] (1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

Delivery of moveable property, debts and shares.

(2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

O. 21,
rr. 80-83.

80. [S. 302.] (1)^{*} Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely :—

A. B. by C. D., Judge of the Court of (or as the case may be), in a suit by E. F. against A. B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

81. [S. 303.] In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct: and such property shall vest accordingly.

Sale of immoveable property.

82. [S. 304.] Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

What Courts may order sales.

83. [S. 305.] (1) Where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on

Postponement of sale to enable judgment-debtor to raise amount of decree.

such terms and for such period as it thinks proper, to enable him to raise the amount. **O.21,r.83.**

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court:

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

Alterations in the rule :—

1. The words, " save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72 " in sub-r. (2), have been added to make it clear that where a decree-holder is entitled to a set-off under r. 72, he should not be required to pay in the monies. A similar saving has been introduced into r. 84, sub-r. 2, and r. 85.

Confirmation of sale by Court.—Where permission to raise the amount of decree by private sale has been granted to the judgment-debtor by two Courts in each of which there has been a decree passed against him, it is enough if the sale is confirmed by one Court : it is superfluous to apply to the other Court for confirmation of the same sale (*f*).

Guardian and Wards Act 8 of 1890, s. 29.—A private alienation of property, though confirmed by the *executing Court* under this rule, is not valid, if such alienation is made by a guardian and the sale is not confirmed by the *Court by which the guardian was appointed* (*g*).

Decree for the enforcement of a mortgage.—This rule does not apply to a sale of property directed to be sold in execution of a decree for the enforcement of a mortgage. The reason is that in the case of a mortgage-decree, the right of sale does not depend upon the *attachment* in execution, but is conferred by the decree itself (*h*).

Rateable distribution.—Money paid into Court under the proviso to sub-r. (2) is liable to rateable distribution under s. 73, as it is paid under a pending execution application (*i*).

(*f*) *Andanapa v. Bhimrao* (1895) 19 Bom. 539.

(*g*) *Dattaram v. Gangaram* (1899) 23 Bom. 287;
Sarju v. District Judge of Benares (1909) 31
 All. 378.

(*h*) *Womda Khanum v. Raj Roop* (1878) 3 Cal. 335.

(*i*) *Thiraviyam v. Lakshmana* (1918) 41 Mad.
 616; *Purshotamdass v. Surajbharthi* (1882)
 6 Bom. 588.

O. 21,
rr. 84-86.

84. [S. 306.] (1) On every sale of ~~immovable~~ property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale and, in default of such deposit, the property shall forthwith be re-sold.

Deposit by purchaser and
re-sale on default.

(2), Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

Material irregularity.—It has been held by the High Court of Allahabad that if the deposit of 25 per cent. is not made immediately, there is no sale, and that the property should be forthwith put up again and sold (*j*). On the other hand, it has been held by the High Courts of Calcutta and Madras that failure to deposit the 25 per cent. as required by this rule is no more than a “material irregularity” within the meaning of r. 90, which would render the sale voidable if substantial injury has resulted by reason of such irregularity (*k*).

Sub-rule (2).—This sub-rule is new. See notes to r. 83, “Alterations in the rule.”

85. [S. 307.] The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Time for payment in full
of purchase-money.

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

“Shall be paid by the purchaser.”—The purchaser is bound to see that the money reaches the Court in time to satisfy the requirements of this rule. If the purchase-money is not received by the Court in time, it will not avail him to say that he had posted the money in time, for the Post Office is not the agent of the Court (*l*).

Where the Court or office is closed on the fifteenth day.—In such a case the payment may be made on the next day on which the Court or office is open. See General Clauses Act 10 of 1897, s. 10.

Proviso—The proviso is new. See notes to r. 83, “Alterations in the rule.”

86. [S. 308.] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be

Procedure in default of
payment.

(j) *Intizam v. Narain* (1888) 5 All. 816; *Amir Begam v. Bank of Upper India, Ltd.* (1908) 30 All. 273.

(k) *Bhim v. Sarwan* (1899) 16 Cal. 38; *Venkata v. Sama* (1891) 14 Mad. 227.
(l) *Ramchandra v. Belya* (1898) 22 Bom. 415.

forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. **O. 21, rr. 86-89.**

Alteration in the rule.—The words “ may, if the Court thinks fit,” have been substituted for the word “ shall.” See notes below.

Forfeiture of deposit to Government.—The old section provided that the deposit “ shall be forfeited to Government.” This provision led to hardship in certain cases (*m*). To obviate any hardship that may arise, the words “ may, if the Court thinks fit,” have been substituted for the word “ shall.” It is no longer obligatory upon the Court to forfeit the deposit in every case.

87. [S. 309.] Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

Notification on re-sale.

Fresh notification.—A fresh notification is only necessary where the re-sale is in default of payment of the *purchase-money* within the time allowed by r. 85. No fresh notification is necessary for a re-sale in default of payment of the 25 per cent. deposit required by r. 84 (*n*).

88. [S. 310.] Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

Bid of co-sharer to have preference.

See as to moveable property, r. 77, sub-r. (3) above.

Co-sharer.—A *defeasible* title to a share is not sufficient to support a claim for pre-emption under this rule (*o*).

89. [S. 310A.] (1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court,—

Application to set aside sale on deposit.

m) See *Sambasiva v. Vyadinadasami* (1902) 25 Mad. 635.

n) *Wallabhan v. Pangunni* (1889) 12 Mad. 454.

o) *Kamta Prasad v. Mohan* (1909) 32 All. 45 : *Abdul Ghafur v. Ghulam* (1913) 35 All. 296.

O. 21, r.89.

- (a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Alterations in the rule :—

1. The words, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," have been substituted for the words, "any person whose immoveable property has been sold." See notes below, "Who may apply under this rule."
2. The words, "unless he withdraws his application," and the words, "or prosecute," in sub-r. (2) are new. See notes below under the head, "Sub-rule (2)."

Application of rule to mortgage-decrees.—The transfer into this Code (see O. 34) of the sections of the Transfer of Property Act relating to decrees in suits on mortgage shows clearly that the provisions of the present rule apply to mortgage-decrees as well. Hence a mortgagor whose immoveable property has been sold in execution of a decree for the sale of the mortgaged property passed under O. 34, r. 5, may apply under this rule to set aside the sale. As to the old section it was doubtful whether its provisions applied to mortgage decrees, the High Court of Calcutta holding that they did not (*p*), while the other Courts holding that they did (*q*). The Calcutta decisions are no longer law.

Who may apply under this rule.—Under the old section, the application to set aside a sale could only be made by "any person whose immoveable property has been sold" under the chapter relating to execution. Those words, it was held, included—

- (1) the judgment-debtor, and
- (2) any person though not a party to the suit or decree (*r*) whose interests were affected by the sale.

(*p*) *Kedar Nath v. Kali Churn* (1898) 25 Cal. 703.
 (*q*) *Raja Ram v. Ohunni Lal* (1897) 19 All. 205;
Krishnaji v. Mahadev (1901) 25 Bom. 104;

Mallickarjunadu v. Lingamurti (1902) 25 Mad. 244.
 (*r*) *Suchand v. Balaram* (1910) 38 Cal. 1, 6.

A person whose interests were not affected by the sale could not apply under that O. 21, r.89. section (s).

Under the present rule, the application to set aside a sale of immoveable property held in execution of a decree may be made by—

- (1) any person owning the property, or
- (2) any person holding an interest in such property by virtue of a title acquired before the sale.

It is not a necessary condition that the interests of the applicant should be affected by the sale.

“Any person either owning such property or holding an interest therein by virtue of a title acquired before such sale”.—Under the old section the application to set aside a sale on deposit could be made by “any person whose immoveable property has been sold.” Under the present rule the application may be made by “any person either owning such property or holding an interest therein by virtue of a title acquired before such sale.” There is no doubt that a judgment-debtor who has not transferred his interest in the property sold in execution of the decree against him may apply under this rule as a “person owning such property.” But the judgment-debtor may have transferred his interest in the property, and such transfer may have been made either before the Court-sale or after the Court-sale. This gives rise to the question whether a judgment-debtor who has transferred his interest in the property is entitled to apply under this rule either as a person “owning the property” or as a person “holding any interest therein.”

A—if the transfer was made *before* the Court-sale ;

B—if the transfer was made *after* the Court-sale.

A.—First, as regards transfer before Court-sale.—Under the old section there was a conflict of decisions whether, if the judgment-debtor had transferred his interest in the property before the Court-sale, the transferee could apply under that section to have the same set aside. In *Srinivasa v. Ayyathurai* (t), for instance, it was held that the transferee could apply, whereas, the contrary view was taken in *Ramchandra v. Rakhmabai* (u). Under the present rule it is clear that a transferee acquiring title before the Court-sale is competent to apply to have the sale set aside.

B.—Next, as regards transfer after Court-sale.—*A* obtains a decree against *J*. In execution of the decree certain immoveable property belonging to *J* is sold to *C* for Rs. 166. Subsequently, but before the sale to *C* is confirmed under r. 92, *J* sells the property to *P* for Rs. 500. It is clear that if *J* could apply under this rule to have the sale set aside on payment of the amount mentioned in the rule, the pecuniary benefit to him would be great, for while the property was sold at the Court-sale for Rs. 166, it realized Rs. 500 at the subsequent private sale. Is *J*, the judgment-debtor, entitled to apply under this rule to have the sale set aside ? Is *P*, the purchaser at the private sale, entitled to apply under this rule ? It has been held by the Allahabad High Court (v), that neither the judgment-debtor nor the subsequent purchaser is entitled to apply under this rule. The ground of the Allahabad decision is that the present rule gives judgment-debtors a last chance of saving the property for themselves and that it was no part of the Legislature's intention that the property should be saved for persons to whom it might be privately sold after the Court-sale had taken place. The Madras

(s) *Ramchandra v. Rakhmabai* (1899) 23 Bom. 450 ; (u) (1898) 23 Bom. 450.
Abdul v. Mattiyar (1903) 30 Cal. 425, 428. (v) *Ishar Das v. Asaf Ali* (1911) 34 All. 186.
 (t) (1897) 21 Mad. 416.

O. 21, r. 89. High Court has held that the judgment-debtor is not entitled to apply (w), but that the subsequent purchaser is entitled to apply (x). The ground of the Madras decisions is that the judgment-debtor having parted with his interest in the property before the application under this rule and so having no interest in the property at the date of the application, he is not entitled to apply under this rule, unless the sale to the subsequent purchaser was by an unregistered document in which case the judgment-debtor would continue to be the owner of the property and could as such owner apply under this rule (y). On the other hand, it has been held by the High Court of Bombay that the judgment-debtor is entitled to apply under this rule, but that the subsequent purchaser is not so entitled (z). The ground of the Bombay decision is that the sale to the auction purchaser being still unconfirmed, the judgment-debtor remains the owner of the property, and that he is therefore entitled to apply as a "person owning the property" within the meaning of this rule. As regards the ground of decision of the Allahabad High Court, the Bombay Court said that the object of the present rule was not only to preserve the property in the hands of the judgment-debtor, but also to save the judgment-debtor from monetary loss that might be occasioned to him if the property was sold at the auction-sale at an inadequate price. As regards the ground of decision of the Madras High Court, the Bombay Court observed that it was not necessary for the purposes of this rule that the judgment-debtor should own or have an interest in the property at the date of the application under this rule, and that it was sufficient if he owned the property or had an interest in it at the date of the Court-sale. The High Court of Patna has followed the Bombay decision (a). It is submitted that the view taken by the High Court of Bombay is the correct one.

The present rule is not confined to transferees from the judgment-debtor. The words of the rule are "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale." Therefore a co-heir (b) or a co-sharer (c) may apply under this rule. A person who has obtained a mortgage of the property before the Court-sale may also apply under this rule. But a person who has merely agreed to purchase the property cannot apply under this rule for a mere agreement for sale of immoveable property does not of itself create any interest in the property (d). Similarly a person who is out of possession of the property, and is litigating to establish his right thereto, is not entitled to apply under this rule (e).

Deposit of five per cent.—This deposit must be made though the decree-holder may himself be the purchaser. The five per cent. is intended as a compensation to the purchaser for his trouble and disappointment for the loss of that which was, perhaps, a good bargain (f).

Mistake in calculating amount to be deposited.—No sale will be set aside under this rule unless the whole amount specified in sub-r. (1) is deposited by the applicant within thirty days from the date of sale. If the full amount is not deposited within the aforesaid period, though it may be owing to a mistake on the part of an officer of the Court in calculating the amount, the sale cannot be set aside

(w) *Subbarayadu v. Lakshminarasamma* (1918) 38 Mad. 775.

(x) (1918) 38 Mad. 775, 777 *supra*; *Anantha v. Kunnanchand* (1913) Mad. W. N. 101.

(y) *Sethuramasami v. Syed Mir Hussein* (1919) 42 Mad. 503.

(z) *Pandurang v. Govind* (1916) 40 Bom. 557.

(a) *Dhanwanli v. Sheo Shankar* (1919) 4 Pat. L. J. 840.

(b) See *Abdul v. Mateyar* (1908) 30 Cal. 425.

(c) *Tuhi Ram v. Izzat Ali* (1908) 30 All. 192, 195-196.

(d) *Mahadeo v. Vasudeo* (1899) 23 Bom. 181.

(e) *Nand Kishore v. Parao. Mian* (1917) Pat. L. J. 876.

(f) *Tirumal v. Syed Dastaghiri* (1899) 22 Mad. 286; *Chundi Charan v. Banks Behary Lal* (1889) 26 Cal. 449, 451-52.

under this rule unless the officer was charged by the Court to make the calculation **O.21,r.89.** and to inform the parties as to the amount to be deposited (g).

Less amount "received" by decree-holder.—The term "received" contemplates an actual receipt of the amount by the decree-holder. A mere payment into Court of the sale-proceeds does not constitute receipt within the meaning of this rule (h).

In determining what amount has been "received" by the decree-holder, the Court should not give credit to the judgment-debtor for any amount paid by a co-judgment-debtor who has not joined in the application under this rule (i).

"For payment to the decree-holder"—Rateable distribution.—The expression "decree holder" in cl. (b) of sub-sec. (1) refers to that person alone for satisfaction of whose decree the sale had been ordered. It does not include other decree-holders who would have a right to claim rateable distribution out of the sale proceeds under sec. 73. It is therefore enough if the judgment-debtor deposits such amount as is sufficient to satisfy the claim of the decree-holder at whose instance the property was sold. It is not necessary that the amount deposited by him should be sufficient to satisfy decrees held against him by other decree-holders also (j). Further, when a judgment-debtor deposits in Court a sum sufficient to satisfy the claim of the person for satisfaction of whose decree the property was ordered to be sold, the other decree-holders are not entitled to a rateable distribution thereof under s. 73 (k).

Sub-rule (2).—Where a person applies to set aside a sale under this rule, and subsequently applies under r. 90, he is not entitled to prosecute the application made by him under this rule (l). But an application, though purporting to be made under r. 90, may not really be one under that rule, but one under s. 47; the provisions to sub-r. (2) do not apply to such a case (m).

Court.—The word "Court" in this rule means the Civil Court, and not, in the case of decrees transferred to the Collector for execution, the Collector (n).

Sale of property by separate lots.—Where property is sold by separate lots in execution of a decree, it is not open to the judgment-debtor to apply under this rule to set aside the sale of some only of such lots. The application must be to set aside the sale of all the lots (o).

Necessary parties.—The auction-purchaser as well as the decree-holder are necessary parties to an application under this rule. See the proviso to r. 92, sub-r. (2).

Limitation.—The application under this rule must be made within 30 days from the date of sale [Limitation Act, 1908, sch. I., art. 166]. The Court has no power to extend the time under s. 148 (p). The words "date of sale" mean the date on which the property is put up for sale and knocked down to the highest bidder, and not the date on which the sale is confirmed [r. 92] (q). At the same time it is to be remembered that if for any reason the final bid remains unaccepted

(g) *Chundi Charan v. Banke Behary Lal* (1899) 26 Cal. 449, distinguishing *Makbool v. Bazle Sahban* (1898) 25 Cal. 609; *Ugrah Lal v. Radha Pershad* (1891) 18 Cal. 255.
(h) *Trimbak v. Ramchandra* (1899) 23 Bom. 723; *Karunakara v. Krishna* (1916) 39 Mad. 429.
(i) *Karunakara v. Krishna* (1916) 39 Mad. 429.
(j) *Ganesh v. Pithal* (1912) 37 Bom. 387; *Pita v. Chumilal* (1906) 31 Bom. 207.
(k) *Hajrat v. Fatehur* (1913) 40 Cal. 619.

(l) *Rajendra v. Nil Ratan* (1896) 23 Cal. 958.
(m) *Harihar Kant v. Rama Pandu* (1909) 33 Bom. 698.
(n) *Fazal v. Manzur* (1918) 40 All. 425.
(o) *Kripanath v. Ram Lakshmi* (1897) 1 C. W. N. 703.
(p) *Chaudhry Rameshwar v. Chaudhry Sureshwar* (1917) 2 Pat. L. J. 164.
(q) *Chowdhry Kesri v. Giani Roy* (1902) 29 Cal. 626, 631.

O. 21. for some days by the sale officer, the period of 30 days does not begin to run until **rr. 89, 90.** such bid is accepted by him (r).

The words "may apply to have the sale set aside on his depositing in Court," etc., show that not only the application, but also the deposit, should be made within 30 days from the date of sale (s). At the same time it is to be noted that it is not enough to make the deposit within 30 days; the application to set aside the sale should also be made within 30 days from the date of sale (t).

Appeal.—The law as regards appeals from an order *setting aside or refusing to set aside a sale* passed on an application under the present rule is quite different from what it was under the Code of 1882. Such an order under the Code of 1882 [s. 310 A] was not appealable *as an order*, for it was not included in the list of appealable orders given in s. 388 of that Code [now O. 43, r. 1]. But the order being one made in proceedings in execution (u), it was appealable *as a decree*, if the question as to whether the sale should be set aside or not was one between "the parties to the suit or their representatives" within the meaning of s. 244 [now s. 47] (v), and in such a case a *second appeal* also lay from the order passed in first appeal. And it was held that if the question was one between the judgment-debtor and the decree-holder, in other words, between the parties to the suit, it did not cease to be such merely because the auction-purchaser (not a party to the suit) was interested in the result (w). But where the question was one between a party to the suit on the one hand and the auction-purchaser on the other, there was a conflict of opinion as to whether an appeal lay from the order (x). In those cases, however, in which it was held that no appeal lay from the order, it was held that the party aggrieved might apply to the High Court for a *revision* of the order (y). Under the present Code, however, an order *setting aside or refusing to set aside a sale* [r. 92], passed on an application under this rule [r. 89], is appealable *as an order*, for it is included in the list of appealable orders given in O. 43, r. 1 [see cl. (j)]. The result is that under the present Code *only one appeal* lies from such an order (z) [see s. 104, sub-s. (1), cl. (i), and sub-s. (2)]. But though only one appeal is allowed under this Code, the appeal lies in every case, and is not limited to cases in which the question was between the parties to the suit or their representatives. An auction-purchaser, therefore, can also appeal from the order.

Dismissal of application for default.—Where an application under this rule is dismissed for default of appearance, and the Court refuses to restore it to the file, no appeal lies from the order refusing to restore the application (a).

90. [S. 311.] (1) Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale,

Application to set aside sale on ground of irregularity or fraud.

- (r) *Munshi Lal v. Ram Narain* (1912) 35 All. 65.
 (s) *Mahomed Akbar v. Sukhdeo* (1911) 13 Cal. L. J. 467; *Munna Lal v. Radha Kishan* (1915) 37 All. 591. See O. 21, r. 92 (2).
 (t) *Raoji v. Bansilal* (1919) 43 Bom. 735.
 (u) *Pita v. Chunital* (1907) 31 Bom. 207, 214.
 (v) *Murtidhar v. Anandrao* (1901) 25 Bom. 418; *Srinivasa v. Ayyathorai* (1898) 21 Mad. 416; *Phul Chand v. Narsingh* (1901) 28 Cal. 73. In the last two cases, the decree holder himself was the purchaser, and it was held that he was a party to the suit. But see *Bhagwati v. Banwari Lal* (1909)

- 31 All. 82 [F. B.].
 (w) *Pita v. Chunital* (1907) 31 Bom. 207; *Harihar Kant v. Rama Pandu* (1909) 33 Bom. 698.
 (x) *Krishna v. Saravathula* (1908) 31 Mad. 177; *Maganlal v. Doshi* (1901) 25 Bom. 631; *Bashir-ud-Din v. Jhori Singh* (1897) 19 All. 140; *Anand Kunwar v. Ajudhia Nath* (1903) 30 All. 379.
 (y) *Maganlal v. Doshi* (1901) 25 Bom. 631; *Ram Singh v. Satig Ram* (1906) 28 All. 84.
 (z) *Asimadati v. Sundari* (1911) 38 Cal. 889.
 (a) *Ghasiti Bibi v. Abdul Samad* (1907) 29 All. 596.

may apply to the Court to set aside the sale on the ground of **O. 21, r. 90.** a material irregularity or fraud in publishing or conducting it :

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Alterations in the rule :—

1. The words, "or any person entitled to share in a rateable distribution" have been added to give effect to decisions under the old section. See notes below, "Who may apply under this rule."
2. The words, "any person whose interests are affected by the sale," have been substituted for the words "any person whose immoveable property has been sold under this chapter." The expression now substituted is what the Courts held in several cases was the meaning of the expression "any person whose immoveable property has been sold." See notes below "Who may apply under this rule."
3. The words "or fraud" have been added after the word "irregularity." The addition of these words affects the *right of appeal* as will be seen from the notes below under the head "Fraud in publishing or conducting sale."
4. The words, "unless upon the facts proved the Court is satisfied," have been substituted for the words "unless the applicant proves to the satisfaction of the Court." This alteration has been made with a view to set at rest the doubts raised under the old section as to the *evidence* upon which the Court could act. See notes below, "Unless upon the facts proved the Court is satisfied," etc.

Who may apply under this rule.—The only persons that may apply under this rule are—

- (1) the decree-holder ;
- (2) any person entitled to share in a rateable distribution of assets under s. 73 ;
- (3) any person whose interests are affected by the sale—an expression obviously of a wider import than the expression "a person holding an interest in the property sold" used in r. 89 above (b).

The words, "any person entitled to share in a rateable distribution of assets" did not occur in the old section, but it was held that the expression "decree-holder" included such person (c).

The expression "any person whose interests are affected by the sale," has been substituted for the expression "any person whose immoveable property has been sold," which occurred in the old section. The latter expression was construed as meaning "any person whose interests are affected by the sale" in the Full Bench case of *Ammunnissa Begum v. Ashruff Ali* (d), and this interpretation has now been substituted for

(b) *Abdul Aziz v. Tajazuddin* (1914) 19 C. W. N. 326, 328.

(c) *Lakshmi v. Kuttani* (1887) 10 Mad. 57; *Chakrapani v. Dhanji* (1901) 24 Mad. 311; *Bejoy*

Singh v. Hukum Chand (1902) 29 Cal. 548; *Ajudhia Prasad v. Nand Lal* (1898) 15 All. 318.

(d) (1888) 15 Cal. 488, 492

O. 21. r. 90. the original expression, that expression being rather obscure. Where an application, therefore, is made by a person other than a decree-holder or one entitled to share in a rateable distribution of assets, that person must be one *whose interests are affected by the sale*. It cannot be said of a person that his interests are affected by a sale of property, unless his *title* to the property or any part thereof is affected by the sale (e). A person who claims to be a purchaser of immoveable property from the judgment-debtor prior to attachment cannot apply under this rule, for the sale being prior to the attachment, his interest cannot be legally affected by the sale, though such person can apply under the preceding rule (f). But a person who claims to be the purchaser of a *tenure* prior to attachment from the judgment-debtor whose interest in the tenure has been sold in execution of a decree *for its own arrears of rent*, is entitled to apply under this rule, for his interests are certainly affected by the sale (g). Similarly, where immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to apply under this rule (h), unless his right to the property is in dispute and a suit by him for a declaration of his right is still pending at the date of the application (i). But a co-sharer cannot apply under this rule, for his share does not pass under the sale (j). A purchaser at a Court sale, who seeks to set aside the sale on the ground that he was induced by fraud to pay a larger price for the property, is not entitled to apply under this rule (k), for though he may sustain injury by reason of the fraud, it cannot be said that his *title* to the property is affected by the sale. An attachment before judgment does not create any *interest* in the property attached; therefore a person who has obtained an attachment before judgment is not entitled to apply under this rule (l). It is expressly provided by this rule that a person entitled to share in a rateable distribution of assets under s. 73 is entitled to apply under this rule; a person, therefore, who is not entitled to a rateable distribution, as where the application for execution is not made *until after* the receipt of assets by the Court, cannot come in under this rule as a "person whose interest is affected by the sale" (m). A reversioner entitled to succeed on the death of a Hindu widow is entitled to apply under this rule as a person whose interests are affected by the sale (n).

Scope of the rule.—A sale held in execution of a decree can be set aside under this rule only if the following conditions concur :—

1. There must be a *material irregularity or fraud*.
2. The material irregularity or fraud must be in *publishing or conducting the sale*.
3. The applicant must have sustained *substantial injury*.
4. Such injury must have been caused by *reason of* the material irregularity or fraud.

Material irregularity in publishing or conducting sale.—The following are instances of material irregularity in publishing or conducting a sale in execution:—

1. Omission to specify in the proclamation of sale the extent of the property to be sold, or the revenue assessed on it (o), or the amount of income

(e) *Asmutunnissa Begum v. Ashruff Ali* (1888) 15 Cal. 488, 491-492.

(f) (1888) 15 Cal. 488, *supra*; *Subbarayadu v. Pedda Subbarazu* (1893) 16 Mad. 476.

(g) *Aubhaya Dass v. Pudmo Lochun* (1895) 22 Cal. 802.

(h) *Abdul Gani v. Dunne* (1893) 20 Cal. 418; *Timmanna v. Mahabala* (1896) 19 Mad. 167.

(i) *Hardwar Lal v. Salamat-ul-lah Khan* (1910) 38 All. 358.

(j) *Bisheshwar Kuar v. Hari Singh* (1883) 5 All. 42. (k) *Birj Mohun v. Rai Uma Nath* (1898) 20 Cal. 8, 10 I. A. 154.

(l) *Jogendra v. Monmotha* (1913) 17 C. W. N. 80.

(m) *Kathiresan v. Ramasami* (1914) 27 Mad. L. J. 302.

(n) *Brij Kishore v. Pratab* (1910) 4 Pat. L. J. 360.

(o) *Aithaya v. Ramakrishna* (1898) 21 Mad. 51; *Madarsah v. Palaniappa* (1900) 23 Mad. 628.

derived from it, or the incumbrances to which the property is subject (p) O. 21, r. 90- see r. 66 of this Order.

2. Misstatement of the value of the property or of Government revenue in the proclamation of sale such as is calculated to mislead intending bidders (q), see r. 66 of this Order.
3. Omission to affix a copy of the sale proclamation as required by r. 67 of this Order (r).
4. Omission to have a drum beaten as required by r. 67 of this Order read with r. 54 (s).
5. Holding a sale of immovable property before the expiration of 30 days from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale (t) : see r. 68 of this Order.
6. Non-specification of the hour to which a sale is adjourned (u) : see r. 69 of this Order.
7. Omission to issue a fresh proclamation where a sale is adjourned for more than seven days (v), unless the proclamation has been waived (w). Where sale proclamation had been issued at the instance of the judgment-debtor six times, and a fresh proclamation was subsequently issued notifying that "in the absence of any order of postponement, the sale would be held at the monthly sales commencing on 13th July 1903 at Monghyr," but the monthly sales did not begin until 17th July owing to the absence of the presiding officer from the station, and the sale in question was held on 20th July in the course of the monthly sales, without a fresh proclamation their Lordships of the Privy Council expressed the opinion that in holding the sale on 20th July, the Court did not act in contravention of the provisions of the Code, and that there was no irregularity in publishing the sale, and held that assuming there was irregularity, there was no evidence of substantial injury, and that the sale was therefore valid (x) ; see r. 69 of this Order.
8. Default in payment of the deposit of 25 per cent. as required by r. 84 of this Order (y). See notes to r. 84.
9. Omission on the part of the plaintiff to have a *guardian ad litem* appointed of a defendant, where *after* decree, but before sale, the defendant has been adjudged to be of unsound mind (z) : see O. 32, r. 15.
10. Where property belonging to a judgment-debtor was attached, and the judgment-debtor died pending the attachment leaving a widow and a minor son, but no notice of the subsequent proceedings in attachment was served on any person representing the minor ; further, though the property consisted of 109 mouzahs, the proclamation of sale was read out without beat of drum in one only of the mouzahs, and affixed to a tree in that village ;

(p) *Moti Lal v. Bhawani* (1902) 6 C. W. N. 836.

(q) *Saadatmand v. Phul Kuar* (1898) 20 All. 412, 25 I. A. 146 ; *Mahabir Pershad v. Olpherts* (1883) 9 Cal. 656, 10 I. A. 25 ; *Girdhari Singh v. Hurdeo Narain* (1876) 26 W. R. 44, 3 I. A. 250 ; *Umad v. Sri Raja Velugoti* (1913) 38 Mad. 387.

(r) *Nana Kumar v. Golam Chunder* (1891) 18 Cal. 422.

(s) *Trimbak v. Nana* (1886) 10 Bom. 504 ; *Gopi Chand v. Benarsi Das* (1919) 1 Lah. L. G. 197, 199-200.

(t) *Tasadduk v. Ahmad* (1894) 21 Cal. 66, 20

I. A. 176.

(u) *Surno Moyee v. Dakhina* (1897) 24 Cal. 291 ; *Bhikhari v. Surja Moti* (1901) 6 C. W. N. 48.

(v) *Gopes Nath v. Luchmeeput* (1878) 3 Cal. 542.

(w) *Biptin Behari Mitra v. Jatindranath* (1910) 37 Cal. 897.

(x) *Rang Lal Singh v. Ravaneshwar* (1911) 39 Cal. 26, 38 I. A. 200.

(y) *Ahmad Bakhsh v. Lalta* (1906) 28 All. 238 ; *Bhim Singh v. Sarwan* (1889) 16 Cal. 33.

(z) *Narayana v. Kallanasundaram* (1896) 19 Mad. 219.

O. 21, r. 90.

and further, the proclamation did not specify the encumbrances to which the property was liable, but stated merely the annual profit income and the value of the property, and the property was sold at a gross undervaluation, their Lordships of the Privy Council held that the above irregularities were all material irregularities, and they accordingly set aside the sale (a).

It is to be noted in this connection that if the act or omission complained of amounts to a *material irregularity*, the sale is not void, but voidable. Being voidable, it is liable to be set aside under this rule on the application of any of the persons mentioned in the rule. But it is important to note that it will not be set aside unless it is proved that *substantial injury* has resulted from the irregularity: see the proviso to the rule. But where the act or omission complained of amounts to an *illegality*, it renders the sale void *ab initio*, and no proof of *injury* is required. In cases (3), (5), (8) and (9) above, it was contended that the omission complained of amounted to an *illegality*, and that the sale was therefore void *ab initio*, and that it should therefore be declared void without proof of substantial injury. But it was held that the omission amounted to a *material irregularity* only, and that the sale was not void but voidable only, and it could not therefore be set aside unless *substantial injury* was proved. For instances of sales void *ab initio*, see notes to s. 65, "Sale when void and when voidable," p. 181. See also notes to s. 47, p. 123, case (4), and notes to O. 21, r. 22 "Consequences of omission to give notice," p. 572, and "Notice to wrong person," p. 572.

"Publishing or conducting the sale".—This rule applies only where an irregularity has been committed in *publishing or conducting the sale*. Hence this rule does not apply, if the sale is sought to be set aside on the ground that the decree in execution of which the property was sold was obtained without service of summons on the judgment-debtor (b), or that it was obtained by fraud (c), or that the Court that sold the property had no jurisdiction to sell the same (d), or that execution of the decree was time-barred (e), or that the property sold in execution was not saleable property within the meaning of s. 60 (f). None of these cases involves any "irregularity in publishing or conducting the sale." In all these cases the remedy of the party seeking to set aside the sale is by a *regular suit*.

Irregularity in attaching property.—The question whether an irregularity in *attaching* the property, as where the attachment is not properly notified, is an irregularity in "conducting the sale" within the meaning of this rule, was left open by the Judicial Committee in the undermentioned case (g). In a recent case, the High Court of Allahabad held that the *omission* to attach immoveable property prior to sale amounts to a material irregularity in "conducting the sale." "An attachment," it was said, "is a step towards the sale of the judgment-debtor's property" (h). On the other hand, in a case decided under the Code of 1859, the High Court of Bengal expressed the opinion that an attachment is not an essential preliminary in sales in execution of decrees: it is merely a measure for the protection of the decree-holder and the purchaser of the property, and the absence of attachment is not, therefore, an objection which the judgment-debtor is competent to raise (i). If it be true, as observed by Mahmood, J., that

(a) *Krishna Pershad v. Motichand* (1913) 40 Cal. 685, 40 I. A. 140.

(b) *Net Lal v. Sheikh Kareem* (1896) 23 Cal. 686, 689.

(c) *Khagendra v. Pran Nath* (1902) 29 Cal. 395, 29 I. A. 99.

(d) *Shirin v. Agha Ali Khan* (1898) 18 All. 141, 145.

(e) *Gangathra v. Rathabi* (1883) 6 Mad. 237

(f) *Ramchandra Mier v. Bechu Bhagat* (1885) 7. All. 641; *Umed v. Jas Ram* (1907) 29 All. 612, 614.

(g) *Macnaghten v. Mahabir Pershad* (1883) 9 Cal. 658, 660, 10 I. A. 25.

(h) *Sheodhyani v. Bholanath* (1899) 21 All. 311.

(i) *Sharada Moyee v. Wooma Moyee* (1867) 8 W. R. 9, 10.

the expression "conducting the sale" does not refer to anything done *antecedent* to the order of sale (j), it is difficult to see how the omission to attach can be said to be an irregularity either in *publishing* or in *conducting* the sale. It has been recently held by the High Court of Bombay that a sale without an attachment is void *ab initio* (k).

Fraud in publishing or conducting sale.—The words "or fraud" are new. The present rule requires that an application to set aside a sale on the ground of *fraud* in publishing or conducting the sale must be made *under this rule*. In the absence of these words in the corresponding s. 311 of the Code of 1882, it was held that an application to set aside a sale on the ground of fraud could only be made under s. 244 [now s. 47]. Had it not been for the newly added words "or fraud" in this rule, such applications would have to be made under s. 47 of this Code. The result would then have been, as under the Code of 1882, that a *second appeal* would lie from an order made on such applications, for an order made under s. 47 has the force of a decree (s. 2), and every decree is open to second appeal, subject, of course, to the provisions of ss. 100-102 (l). The effect of adding the words "or fraud" into the present rule is to transfer applications setting up fraud in publishing or conducting the sale from s. 47 to the present rule. The result is that *no second appeal will now lie* from an order made on such applications, whether the order be one setting aside the sale or refusing to set aside the sale, for the order is no longer one under s. 47, but one under r. 92, and only one appeal lies from an order made under r. 92 (m) [see O. 43, r. 1, cl. (j), and s. 104, sub-s. (2)]. It will thus be seen that the object of the Legislature in requiring applications to set aside a sale on the ground of fraud in publishing or conducting the sale to be made under the present rule, instead of under s. 47, is to exclude the right of second appeal from orders made on such applications with a view to bring proceedings on such applications to a speedy termination. But though only one appeal is allowed, an appeal now lies in every case from an order made under this rule and r. 92, even at the instance of an auction-purchaser though he may not be a party to the suit in which the sale was held. See notes to s. 47, "Execution-purchaser," ill. (a), p. 132.

It may here be observed that in a large majority of reported cases in which applications were made to set aside a sale on the ground of fraud in publishing or conducting the sale, the applicant was the judgment-debtor, and the fraud alleged was that the decree-holder had fraudulently kept him in the dark by omitting to serve him with the writ of attachment (r. 54), and that no copy of the proclamation of sale was affixed on the property so as to inform him of the execution proceedings. In all these cases it was further alleged that the fraud first became known to the judgment-debtor when the auction-purchaser instituted proceedings to recover possession of the property. In some of these cases, again, the auction-purchaser was charged with collusion with the decree-holder in perpetrating the fraud upon the judgment-debtor (n). The observations of their Lordships of the Privy Council in *Lalla Bunseedhur v. Koonwar Bindeseree* (o) have

(j) *Ramchaitbar Mier v. Bechu Bhagat* (1885) 7 All. 641, 645.

(k) *Sorabji v. Kala* (1911) 36 Bom. 156.

(l) *Nemai Chand v. Deno Nath* (1898) 2 C. W. N. 691; *Bhubon Mohun Pal v. Nunda Lal* (1899) 26 Cal. 324; *Hira Lal Ghose v. Chandra Kanto Ghose* (1899) 26 Cal. 539. In all these cases it was held that a second appeal would lie.

(m) *Sheikh Maula Bux v. Raghubar* (1918) 3 Pat. L. J. 645; *Sheo Prasad v. Premna Kunwar* (1918) 40 All. 122.

(n) *Golam Ahad v. Judhister* (1903) 30 Cal. 142, 153; *Durga Charan v. Kall Prasanna* (1899) 26 Cal. 727, 732; *Wahid-un-nissa v. Giridhari* (1905) 27 All. 702, 709 (application to set aside sale on ground of fraud after

confirmation of sale); *Nemai Chand v. Deno Nath* (1898) 2 C. W. N. 691; *Bhubon Mohun Pal v. Nunda Lal* (1899) 26 Cal. 324; *Hira Lal Ghose v. Chandra Kanto Ghose* (1899) 26 Cal. 539 (cases raising question of second appeal from order on application to set aside sale on ground of fraud); *Prosunno Kumar v. Kali Das* (1892) 19 Cal. 633, 19 I. A. 166; *Sadho v. Abhenandan* (1904) 26 All. 101; *Gaya Prasad v. Randhir Singh* (1906) 23 All. 681; *Mathura Das v. Lachman* (1902) 24 All. 239; *Durga Kumbar v. Baiwant* (1901) 23 All. 478 (cases raising question of a regular suit to set aside sale on ground of fraud).

(o) (1866) 10 M. I. A. 454, 473-474.

O. 21, r. 90. a material bearing on the question now under consideration (p). In that case their Lordships said that where a sale is impeached on the ground of fraud, a difference must be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale. "The question is, in the former case, which of two innocent parties shall suffer: in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other."

A charge against a decree-holder that he and those who acted in concert with him have acted in such a manner as to prevent the best price from being obtained *does not of itself* amount to a charge of fraud within the meaning of this rule. A obtains a decree against B, and obtains leave to bid at the auction sale. A then enters into an agreement with a third person that if that person would not bid at the sale, A would sell the property to him if A should become the purchaser. The property is put up for sale and purchased by A. The agreement does not constitute a fraud within the meaning of this rule, though it may have discouraged competition at the auction (q). In a recent case Sir Lawrence Jenkins, C.J., said: "The word 'fraud' is very loosely used in this class of cases [that is, cases under r. 90]: any irregularity is taken to be fraud with the consequences that such a finding involves. But a finding of fraud should be reserved for that which is dishonest and morally wrong: and it is not sufficient to come to a *vague* finding of fraud: actual fraud must be established" (r). The Patna High Court has recently held that where after the publication of the sale proclamation, the decree-holder agrees with the judgment-debtor not to hold the sale if payment was made within a specified time, and he then proceeds to sell the property in contravention of the agreement, it amounts to fraud in the matter of the conduct of the sale within the meaning of this rule (s).

Substantial injury.—Material irregularity or fraud standing by itself is no ground for setting aside a sale. There must be *substantial injury* occasioned by the irregularity or fraud (t). The substantial injury alleged by the applicant must be *proved*: it cannot be *assumed* from the mere fact that there was a material irregularity or fraud in publishing or conducting the sale. The mere fact that there was a material irregularity or fraud in publishing or conducting the sale, will not justify the Court in assuming that substantial injury has thereby been caused. Hence although an applicant under this rule may prove material irregularity, such as non-specification of Government revenue in the proclamation of sale (u), or inadequate description of the property sold (v), or the holding of the sale before the expiry of the period prescribed by r. 68 of this order (w), the sale will not be set aside, unless it is *proved* that had it not been for the irregularity the property would have realized a substantially larger price than what it did at the sale. The same rule applies where the sale is impeached on the ground of fraud.

"Unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud"—These words form part of the proviso to the rule. The language of the

(p) *Pareesh Nath v. Hari Charan* (1911) 38 Cal. 622, 626.

(q) *Mahomed Mitra Ravuther v. Savasi Vijaya Raghunadha* (1900) 23 Mad. 227, 27 I. A. 17.

(r) *Pareesh Nath v. Hari Charan* (1911) 38 Cal. 622, 626.

(s) *Sheikh Maula Bux v. Raghubar* (1918) 3 Pat. L. J. 645.

(t) *Harbans Lal v. Kundan Lal* (1890) 21 All. 140.

(u) *Macnaghten v. Mahabir Pershad* (1883) 9 Cal. 658, 10 I. A. 25.

(v) *Arunachellam v. Arunachellam* (1889) 12 Mad. 19, 15 I. A. 171.

(w) *Tasadduk v. Ahmad* (1894) 21 Cal. 66, 20 I. A. 176.

proviso to this rule differs from the language of the proviso to the corresponding O. 21, r. 90. section 311 of the Code of 1882, which ran as follows :—

“ But no sale shall be set aside on the ground of irregularity *unless the applicant proves to the satisfaction of the Court* that he has sustained substantial injury by reason of such irregularity.”

The words “ unless upon the facts proved the Court is satisfied ” have been substituted for the words “ unless the applicant proves to the satisfaction of the Court.” We proceed to note the object and effect of the alteration in the language of the proviso.

Suppose that an applicant under this rule proves “ *material irregularity* ” or “ *fraud*.” Suppose, further, that he proves gross inadequacy of price realised at the sale, in other words, he proves “ *substantial injury*.” Is this sufficient to entitle him to succeed under this rule ? The answer is that it is not : he must further prove that the inadequacy of the sale price has been caused “ *by reason of* ” the material irregularity or fraud. Now there are two possible modes in which this may be proved, namely :—

- (a) by *direct* evidence, that is, by evidence connecting the material irregularity or fraud with the inadequacy of price as cause and effect : or
- (b) by *circumstantial* evidence, that is, by evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy of price was the result of the irregularity or fraud complained of.

In *Tasadduk v. Ahmad* (x), where a sale was sought to be set aside under the corresponding s. 311 of the Code of 1882 on the ground that it was held before the expiration of 30 days from the date of the proclamation [r. 68], their Lordships of the Privy Council, after referring to that section, said :—

“ In the application of that section [that is, s. 311] it was incumbent on the [applicants] to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence, and it would be extremely improbable that injury could have happened from the non-compliance with the strict letter of s. 290 [now r. 68]. Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was held without full compliance with the provisions of s. 290 [now r. 68]. The section [that is, s. 311] clearly contemplates *direct evidence* on the subject.”

Relying on the above passage, it was held by the High Court of Allahabad that to succeed under that section the applicant must prove a grossly inadequate sale-price resulting from a material irregularity, and that the co-existence of an irregularity and an inadequacy however gross in the sale-price was not sufficient in the absence of *direct evidence* to establish a casual connection between the irregularity and the inadequacy. In other words, the applicant must connect the irregularity with the inadequacy of price as cause and effect *by means of direct evidence* (y). On the other hand, it was held by the High Courts of Madras (z) and Calcutta (a) that the fact that the inadequacy of price fetched at the sale was the result of the irregularity complained of might be established *either* by direct evidence, *or* it might be inferred when such inference was reasonable from the *nature* of the irregularity and the *extent of the inadequacy* of price. As regards the word “ direct evidence ” in the passage cited above, it was observed by the High

(x) (1894) 21 Cal. 66, 20 I. A. 176.

(y) *Jagan Nath v. Makund* (1896) 18 All. 37 ;
Shirin v. Agha Ali Khan (1896) 18 All. 141.

(z) *Venkatasubbaraya v. Zemindar of Karveti-*

nagar (1897) 20 Mad. 159.

(a) *Sheorutton v. Nel Loll* (1908) 30 Cal. 1 ; *Mahabir Pershad v. Dhanukdhari* (1904) 31 Cal. 815.

- O. 21, r. 90. Court of Calcutta that what their Lordships intended to say by using those words was that there must be evidence showing that substantial injury was the *necessary* result of the irregularity complained of (b).

The distinction between the Allahabad decisions on the one hand and the Madras and Calcutta decisions on the other, may be explained by an illustration. In execution of a decree obtained by A against B, B's one-fourth share in certain property is sold for Rs. 200. B seeks to set aside the sale alleging that the property was sold at an adjourned sale, that no hour was fixed for the sale as required by r. 69, that consequently there were only three bidders at the sale, and that owing to that circumstance the property fetched the grossly inadequate price of Rs. 200. It is proved that the hour to which the sale was adjourned was not fixed; in other words, *material irregularity* is proved. *Substantial injury* is also proved by evidence of the sale of a share smaller than one-fourth of the same property for Rs. 4,000. The fact that there were only three bidders is also proved. In such a case, the High Courts of Madras and Calcutta would, under the old section, set aside the sale on the ground that the paucity of bidders *could reasonably be* ascribed to the non-specification of the hour, and the low price *could reasonably be inferred* from the fact of the paucity of bidders (c). But the High Court of Allahabad would not set aside the sale on a mere *inference* such as the above. It would require *direct evidence* to show that the paucity of bidders was due to the non-specification of the hour, and that the inadequacy of price was due to paucity of bidders.

The words "unless upon the facts proved the Court is satisfied" have been substituted in the proviso to give effect to the Madras and Calcutta decisions. What is necessary under the proviso is that the Court should be satisfied that the applicant has sustained substantial injury by reason of the irregularity or fraud complained of, and the Court should be satisfied *upon the facts proved* before it. It is no longer necessary to connect the irregularity (or fraud) with the inadequacy of price as cause and effect by means of *direct evidence*.

Necessary parties.—The decree-holder is a necessary party to an application under this rule (d). But beneficial owner is not, and a sale can be set aside although his *benamidar* only is a party (e). Under the Code of 1882 there was a conflict of opinion as to whether an auction purchaser was a necessary party to an application under the corresponding s. 311 (f). Under the present Code he is clearly a necessary party; see the proviso to r. 92, sub-r. (2).

Waiver and estoppel.—If the judgment-debtor lies by, and knowing of an irregularity or fraud allows the sale to proceed without objection, he will be estopped from impeaching the sale on the ground of irregularity or fraud though substantial injury has been caused. "It would be very difficult indeed to conduct proceedings in execution of decree by attachment and sale of property, if the judgment-debtors could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which they knew well, but of which the execution-creditor or decree-holder might be perfectly ignorant, that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were

(b) *Surno Moyee v. Dakkhina* (1897) 24 Cal. 291.
 (c) *Surno Moyee v. Dakkhina* (1897) 24 Cal. 291;
*Venkatasubbaraya v. Zamindar of Kavet-
 tinagar* (1897) 20 Mad. 159. Distinguish
Mahabir Pershad v. Dhanukdhari 1904)
 31 Cal. 815

(d) *Ali Gauhar v. Bansidar* (1893) 15 All. 407.
 (e) *Baroda v. Chunder Ranta* (1902) 29 Cal. 882.
 (f) *Karamat v. Mir Ali* (1891) All. W. N. 121;
Surendra Mohini v. Amarendra Chandra
 (1912) 39 Cal. 687; *Monajjudi v. Toom*
Mandal (1911) 39 Cal. 881.

vitiated" (g); But the fact that a judgment-debtor, who applies under this rule to set aside a sale on the ground of irregularity, had applied before for an adjournment, and did not in that application make any mention of the irregularity, does not create an estoppel. There could be no occasion for making mention of the irregularity in an application for adjournment (h).

Where no application is made under this rule.—It is provided by r. 92 below that if no application is made to set aside a sale under the present rule, an order will be made confirming the sale, and once such an order is made, no suit will lie to set aside the order (i).

Objections not taken in application.—The Court should not consider objections not expressly taken in the application (ii).

Limitation.—An application under this rule must be made within 30 days from the date of sale [Limitation Act, 1908, sch. I, art. 166]. But where the irregularity affecting the sale has by the fraud of the decree-holder or other parties to the sale been kept concealed from the judgment-debtor, he is entitled to apply under this rule, whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him (j). A suit to set aside a sale must be instituted within one year from the date of the confirmation of the sale [*ib.*, art. 12, cl. (a)].

The only point of distinction as regards procedure and limitation between the old law and the new law is this, that while under the Code of 1882 the application to set aside a sale on the ground of fraud in publishing or conducting a sale was to be made under s. 244 [now s. 47], and the period of limitation for the application was 3 years from the date of the sale (k), such application must now be made under the present rule, and the period of limitation is 30 days from the date of the sale. In other respects the law is not altered. Under the old law also, if the fraud did not become known to the applicant until after the expiration of 3 years from the date of the sale, he could apply after that period, provided the application was made within three years from the date the fraud first became known to him (l). And where the application to set aside a sale alleged fraud in publishing or conducting the sale, it could be made even after confirmation of the sale. The right to proceed by an application was not gone merely because the sale was confirmed: a regular suit was not necessary, nay, a regular suit, it was held, was barred by the provisions of s. 244 (m), as, it is conceived, it would now be barred by the provisions of this rule read with s. 47.

Appeal.—An appeal lies from an order under this rule and rule 92 setting aside or refusing to set aside a sale [O. 43, r. 1, cl. (j)]. But no second appeal lies from the order of the first appellate Court: see s. 104, sub-sec. (2), and notes above under the head "Fraud in publishing or conducting sale." Nor does an appeal lie from the order of the first appellate Court under the Letters Patent (n).

(g) *Arunachellum v. Arunachellam* (1889) 12 Mad. 19, 15 I. A. 171; *Girdhari Singh v. Hurdeo Narain* (1878) 8 I. A. 230; *Umadi v. Sri Raja Velugoti* (1913) 38 Mad. 387; *Behari Singh v. Mukat Singh* (1906) 28 All. 273; *Ulam Chandra v. Khetra Nath* (1902) 29 Cal. 577.

(h) *Raman v. Kunhayan* (1894) 17 Mad. 804.
(i) See *Bhim Singh v. Sarvean* (1889) 16 Cal. 33, 59-40.

(ii) *Herbans v. Kundan* (1898) 21 All. 140; *Gopi Chand v. Benarsi Das* (1919) 1 Lah. L.J. 197.

(j) *Mohendra Narain v. Gopal* (1890) 17 Cal. 769 [F. B.]; *Golam Ahad v. Judhister* (1908) 30 Cal. 142, 153.

(k) Limitation Act, 1908, sch. I, art. 181; *Nemai Chand v. Deno Nath* (1898) 2 O. W. N. 691; *Heera Lal Ghose v. Chundra Kanto Ghose* (1899) 26 Cal. 539.

(l) *Hira Lal Ghose v. Chundra Kanto Ghose* (1899) 26 Cal. 539, 542, 545 (where the application to set aside the sale was made about 12 years after the date of the sale).

(m) *Durga Charan v. Kali Prasanna* (1899) 26 Cal. 727; *Golam v. Judhister* (1903) 30 Cal. 142; *Wahib-un-nissa v. Girdhari* (1905) 27 All. 702.

(n) *Naim-ullah v. Ihsan-ullah* (1892) 14 All. 226 [F. B.]; *Piari Lal v. Madan Lal* (1916) 39 All. 191.

O. 21, rr. 90-92. No appeal lies from an order refusing to restore to the file an application made under this rule and dismissed for non-appearance of the applicant (o).

Appeal to the Privy Council.—See notes to r. 92 under the same head.

91. [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

Scope of the rule.—This rule enables the Court to relieve a purchaser on the ground that the judgment-debtor had no saleable interest in the property. It does not apply where a sale is sought to be set aside by an auction-purchaser on the ground that he had been induced by *misrepresentation or concealment* to buy the property for more than its real value (p). The remedy of the purchaser in such a case is by a regular suit. As to return of purchase-money when a sale is set aside on the ground that the judgment-debtor had no saleable interest, see r. 93 below.

Saleable interest.—This rule applies only where a judgment-debtor has no saleable interest at all. Hence the rule does not apply if the judgment-debtor has even a partial interest in the property sold (q), however small that interest may be. In other words, a purchaser is not entitled to have a sale set aside under this rule on the ground that the judgment-debtor had a saleable interest in a very small portion of the property, and had no saleable interest in a *major* portion of the property (r).

For the purposes of this rule, a mortgagor has a saleable interest in the mortgaged property, even though a decree has been obtained by the mortgagee for the enforcement of the mortgage (s), and although the amount due under the mortgage may exceed the value of the property (t).

Necessary parties.—See the proviso to r. 92, sub-r. (2).

Limitations.—The application under this rule must be made within 30 days from the date of sale: Limitation Act, 1908, sch I, art. 166.

Appeal.—An appeal lies from an order setting aside or refusing to set aside a sale made under this rule and rule 92 [O. 43, r. 1, cl. (j)].

Withdrawal of purchase-money by auction-purchaser from Court.—See notes to s 151, case (bb).

92. [Ss. 312, 314.] (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale shall become absolute.

Sale when to become absolute or be set aside.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit

(o) *Jung Bahadur v. Mahadeo Prosad* (1904) 31 Cal. 207.
(p) *Durga Sundari v. Govinda* (1884) 10 Cal. 368;
Birji Mohun v. Rai Uma Nath (1898) 20 Cal. 8, 19 I. A. 154; *Shyogobinda v. Dhanukdhari* (1913) 19 C. W. N. 1291.

(q) *Ram Coomar v. Shushree* (1883) 9 Cal. 826;
Ram Narain v. Dwarkanath (1900) 27 Cal. 264.
(r) *Sonaram v. Mohiram* (1901) 28 Cal. 235.
(s) *Pratap Chunder v. Pantoty* (1883) 9 Cal. 508.
(t) *Sant Lal v. Ramji* (1887) 9 All. 167.

required by that rule is made within thirty days from the date O. 21, r. 92. of sale, the Court shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

Alterations in the rule :—

1. The corresponding s. 312 of the Code of 1882 applied only to applications referred to in r. 90. The present rule applies also to applications referred to in rr. 89 and 91 [Code of 1882, ss. 310A and 313].
2. In sub-rule (3), the words " on the ground of such irregularity," which occurred in the old section after the words " no suit to set aside," have been omitted. See notes below, " No suit will lie to set aside an order made under this rule."

No suit will lie to set aside an order made under this rule.—

No suit will lie to set aside an order made under this rule by any person against whom such order is made. The party against whom the order is made has a remedy by way of appeal under O. 43, r. 1, cl. (j). Now an order under this rule may be—

- (1) either an order confirming the sale, or
- (2) an order setting aside the sale.

Order confirming sale.—An order confirming the sale may be made—

- (i) either where no application is made at all to set aside the sale, or
- (ii) where an application is made and disallowed.

No suit will lie in either case to set aside an order confirming the sale (u).

Order setting aside sale.—The language of sub-rule (3) makes it quite clear that no suit will lie to set aside an order setting aside the sale. Under the old section it was held by a Full Bench of the Allahabad High Court that such a suit would lie. The decision proceeded on the words, " on the ground of such irregularity," which occurred in the old section after the words " no suit to set aside." Those words have now been omitted. The Allahabad decision is therefore no longer law (v).

"Court".—The word " Court " means the Civil Court, and not, in the case of decrees transferred to the Collector for execution, the Collector (w).

Plea of bar of limitation after confirmation.—No application can be entertained after confirmation of a sale to set aside a sale on the sole ground that the application for attachment and sale was barred by limitation (x).

(u) *Bhim Singh v. Sarwan* (1889) 16 Cal. 33, 40;
Damodar v. Vinayak (1902) 26 Bom. 40;
Gajrajmal Teorain v. Akbar Husain (1907)
 29 All. 196, 34 I. A. 97.
 (v) *Shiam Behari Lal v. Rup Kishore* (1898) 20

All. 379, 381.
 (w) *Fazal v. Manzur* (1918) 40 All. 425.
 (x) *Lakhu Rai v. Maharaja Kesho Prasad* (1917)
 2 Pat. L. J. 157.

O. 21, rr. 92, 93. **Appeal.**—An appeal lies from an order under this rule setting aside or refusing to set aside a sale [O. 43, r. 1, cl. (j)]. But no second appeal lies from the order passed on first appeal (y) [see s. 104 (2)].

Appeal to the Privy Council.—An appeal lies to His Majesty in Council from an order passed under this rule and r. 90 (z).

93. [S. 315.] Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

Return of purchase-money in certain cases.

Section 315 of the Code of 1882.—The corresponding s. 315 of the Code of 1882 ran as follows :—

“When a sale of immoveable property is set aside under s. 310 A [O. 21, r. 89], 312 or 313 [O. 21, r. 91],

or when it is found that the judgment-debtor had no saleable interest in the property which purported to be new, and the purchaser is for that reason deprived of it,

the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided for by this Code for the execution of a decree for money.”

The second and fourth paragraphs of s. 315 have been omitted in the present sections. Further, the words “shall be entitled to an order for repayment” have been substituted for the words “shall be entitled to receive back” which occurred in the third paragraph.

Repayment where no saleable interest.—An auction-purchaser may under r. 91 apply to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. If the sale is set aside, he may apply under this rule for an order for repayment of his purchase-money. But no sale can be set aside under r. 91 nor can any repayment be ordered under this rule if it is found that the judgment-debtor had some saleable interest in the property. The reason is that in the case of a sale under a decree of the Court there is no warranty of title either by the decree-holder or by the Court as there is in the case of private sales. The purchaser must be taken to pay for the property with all risks and all defects in the judgment-debtor's title. Such being the case, the purchaser would not be entitled to any refund, not even if the judgment-debtor had no saleable interest at all, but for the express provisions of rr. 91 and 93. Under those rules he is entitled to a refund only if the judgment-debtor had no saleable interest at all (a).

Under s. 315 of the Code of 1882 it was held, having regard to the express provisions of the second paragraph of that section and the words “may be enforced” which occurred in the last paragraph of that section, that an auction-purchaser at a sale in

(y) *Jiwan Singh v. Sawan Mal* (1919) Punj. Rec. no. 168, p. 446.
(z) *Krishna Pershad v. Motichand* (1913) 40 Cal. 635, 40 L. A. 140.

(a) *Kunhamad v. Chatlu* (1886) 9 Mad. 437; *Shanto Chander v. Nain Sukh* (1901) 23 All. 355, 356, 357; *Muhammad v. Baohcho* (1905) 27 All. 537, 539.

execution of a decree could maintain a suit against a decree-holder for recovery of his purchase-money, if it turned out that the judgment-debtor had no saleable interest in the property sold, and that he was not limited to the special procedure in the execution-department mentioned in that section (b). It was also held that whether he proceeded by an application for execution under that section or by a regular suit, he was not entitled to receive back his purchase-money unless the judgment-debtor had no saleable interest at all; if the judgment-debtor had some saleable interest in the property, however small, he could not by suit, any more than by application, obtain a refund of the purchase-money in proportion to the extent to which the judgment-debtor had no interest (c). It was further held, having regard to the words "and the purchaser is for that reason deprived of it" which occurred in the second paragraph of s. 315, that the cause of action did not arise and the period of limitation for a suit under that section did not commence until the purchaser was deprived of the property sold to him (d). In one case the Allahabad High Court held that the auction-purchaser may proceed even after rateable distribution against those among whom the purchase-money was distributed (e).

The leading case in which it was laid down that an auction-purchaser may proceed by a regular suit was a Full Bench decision of the Allahabad High Court (f). It was followed by the same Court in later cases, but with considerable hesitation. It was said in those cases that an auction-purchaser had no right, outside the provisions of the Code, to recover back the purchase-money where the judgment-debtor had no saleable interest in the property sold, and that the right being the creation of the Code the remedy ought also to be limited to the remedy provided by the Code (g).

Under the present rule it is quite clear that the purchase-money cannot be got back unless the sale is set aside (h). It is also clear that the application to set aside the sale under r. 91 must be made within 30 days from the date of sale [Limitation Act, 1908, sch. I, art. 166]. But the question remains whether, having regard to the omission of the second and fourth paragraphs of s. 315 in this rule and the substitution of the words "shall be entitled to an order for repayment" for the words "shall be entitled to receive back" which occurred in the third paragraph of that section, an auction-purchaser is entitled, after the sale is set aside, to bring a suit for recovery of the purchase-money or whether he is limited to the procedure prescribed by this rule, namely, to apply for an order from the executing Court, and then to execute it under s. 36 of the present Code. In *Rustomji v. Vinayak* (i), the High Court of Bombay held that the auction-purchaser may proceed by suit. The ground of the decision was that there was under the Code an implied warranty of some saleable interest in a sale held by the Court, that the decree-holder was therefore liable to refund the purchase-money if the judgment-debtor had no saleable interest in the property sold, and that the relations therefore of the parties,

(b) *Munna Singh v. Gajadhar Singh* (1883) 5 All. 577; *Kishun Lal v. Muhammad* (1891) 13 All. 383; *Sidheswari v. Goshain* (1913) 35 All. 419; *Muhammad v. Jas Narain* (1914) 86 All. 529; *Girhar Das v. Sidheswari* (1918) 40 All. 411; *Gurshidawa v. Gangaya* (1898) 22 Bom. 783; *Ram Kumar v. Ram Gour* (1909) 37 Cal. 67; *Pachayappan v. Narayana* (1887) 11 Mad. 269; *Nilakanta v. Imamsahib* (1892) 16 Mad. 361; *Mohideen v. Mahomed* (1912) 23 Mad. L. J. 487; *Pirumalaisami v. Subramanian* (1916) 40 Mad. 1009.

(c) *Shanto Chander v. Nain Sukh* (1901) 23 All. 355; *Muhammad v. Bachcho* (1905) 27 All. 537; *Sundara v. Venkata* (1894) 17 Mad. 228; *Bhagwan Das v. Allah Baksh*

(1919) Punj. Rec. no. 52, p. 130.

(d) *Gurshidawa v. Gangaya* (1897) 22 Bom. 783. See also *Nilakanta v. Imamsahib* (1892) 16 Mad. 361; *Mohideen v. Mahomed* (1912) 23 Mad. L. J. 487; *Sidheswari v. Goshain* (1913) 35 All. 419; *Ram Kumar v. Ram Gour* (1909) 37 Cal. 67; *Girhar Das v. Sidheswari* (1918) 40 All. 411.

(e) *Kishun Lal v. Muhammad* (1891) 13 All. 383.

(f) (1883) 5 All. 577, *supra*.

(g) (1891) 13 All. 383, 385, *supra*; (1913) 35 All. 419, 423, *supra*; (1914) 36 All. 529 531, *supra*.

(h) *Nannu Lal v. Bhagwan Das* (1916) 39 All. 114; *Parvathi v. Govindasami* (1915) 89 Mad. 803, 806; *Bhagwan Das v. Allah Baksh* (1919) Punj. Rec. no. 52, p. 180.

(i) (1910) 35 Bom. 29

O. 21, rr. 93, 94. namely, the decree-holder and the auction-purchaser, may be treated as relations in the nature of a contract so as to entitle the auction-purchaser to recover the purchase-money by suit on the ground of misrepresentation, however innocent, as to the interest of the judgment-debtor in the property sold. The alterations made in the present rule were not noticed. Nor was the sale in that case set aside before the suit was brought. It is submitted, with respect, that no such warranty as is assumed by the Bombay High Court can be implied from the provisions of this rule (r. 93). In two cases, the Madras High Court expressed the opinion that a suit does not lie under the present Code, and that the auction-purchaser can only proceed by an application under this rule (j). A similar view has also been expressed by the Allahabad High Court (k).

If the correct view be that an auction-purchaser is not entitled to a refund of the purchase-money unless the sale is *set aside* under rr. 91 and 92 (l), it follows that he is not entitled to a refund at all after the sale is *confirmed* under r. 92. This may happen when the auction-purchaser does not become aware of any adverse claim within 30 days from the date of sale, [being the period allowed for an application to set aside a sale under r. 91] and he is subsequently deprived of the property by a person declared entitled to it. This may work great hardship on an auction-purchaser. But the answer to that is that prior to the Code of 1877 an auction-purchaser was not entitled to a refund at all of the purchase-money if the judgment-debtor had no saleable interest in the property sold, and the right to such refund was first created by s. 315 of that Code. The right being created by the Code, it can only be exercised within the limits allowed by the Code (m).

Repayment where sale set aside on ground of material irregularity.—It has been held by the High Court of Madras that when a sale is set aside on the ground of material irregularity under rr. 90 and 92, the auction-purchaser may bring a suit for a refund of the purchase-money. Such a right existed independently of the Code, and the mere use of the expression “order” in this rule did not, it was said, take away that right (n).

Limitation.—The period of limitation for an application under this rule is three years from the accrual of the right under art. 181 of the Limitation Act, 1908 (o). The period of limitation for a regular suit to recover back the purchase-money is six years from the accrual of the right under art. 120 of the said Act (p).

“Be entitled to an order.”—Where an order is made under this rule, it may be executed in the manner prescribed for the execution of decrees. See s. 36 above.

94. [s. 316.] Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

Old section.—This rule corresponds with the first part of s. 316 of the Code of 1882. The second part of that section, relating to the vesting of title, has been

(j) *Mohideen v. Mahomed* (1912) 23 Mad. L. J. 487, per Napier, J.; *Tirumalaisami v. Subramanian* (1916) 40 Mad. 1009, 1011.
(k) *Nannu Lal v. Bhagwan Das* (1916) 39 All. 114, 118-119.
(l) (1916) 39 All. 114, *supra*.

(m) (1912) 23 Mad. L. J. 487, 489-492 *supra*; (1883) 5 All. 577, 586 *supra*.
(n) *Parvathi v. Govindasami* (1915) 39 Mad. 803.
(o) *Girdhari v. Sital* (1889) 11 All. 372.
(p) *Sidhewari v. Goshain* (1913) 35 All. 419.

reproduced in s. 65 of this Code with an important alteration as regards the time when the property vests in the purchaser **O.21, r. 94.**

Purchaser's title.—See s. 65 and notes thereto.

The Court shall grant a certificate.—The provisions of this rule are mandatory (q).

Certificate of sale.—A sale certificate does not transfer the title. It is evidence of the transfer (r).

Certificate to legal representative.—Where the purchaser is dead, the certificate may be granted to his legal representative (s). See s. 146 above.

What passes at a Court-sale.—As regards private sales, there is in the absence of a contract to the contrary, an implied covenant for title by the vendor as provided by the Transfer of Property Act, 1882, s. 55, sub-s. (2). But as regards sales under a decree of the Court, there is no warranty of title either by the decree-holder or by the Court. Rule 13 of this Order shows that the decree-holder, when applying for execution, has only to specify the judgment-debtor's share or interest in the property "to the best of his belief," and "so far as he has been able to ascertain the same." Rule 66 shows that the proclamation only professes to specify the particulars prescribed by that rule including the property to be sold and the judgment-debtor's interest therein "as fairly and accurately as possible." Hence what passes to a purchaser at a Court-sale is the "right, title and interest" of the judgment-debtor, whatever that interest may be. In other words, a purchaser at a Court-sale buys the property with all risks and all defects in the judgment-debtor's title, except where it is found that the judgment-debtor had no saleable interest at all (t). In the latter case, the purchaser may apply to have the sale set aside under r. 91 of this Order and he may then apply under r. 93 for a return of the purchase-money. If the purchase-money has been distributed amongst the creditors of the judgment-debtor under s. 73, he may follow the money in their hands (u). But,—and this is an important consequence of the purchaser buying only the right, title and interest of the judgment-debtor,—the sale will not be set aside, if the judgment-debtor has even a partial interest in the property, nor will the purchaser be entitled to a refund of the purchase-money to the extent to which the judgment-debtor had no interest, unless the case be one of fraud (v). On the same principles a purchaser in execution of a money decree is bound by the estoppel which binds the judgment-debtor whose interest he has purchased (w).

It has been stated above that what passes to a purchaser at a Court-sale in execution of a money decree is the "right, title and interest" of the judgment-debtor in the property sold. To determine the nature and extent of the judgment-debtor's right, title and interest in the property sold, the test is as stated by Lord Watson in the course

(q) *Baikunti v. Narinda* (1916) 1 Pat. L. J. 446.

(r) *Basir Ali v. Hafiz* (1915) 43 Cal. 124, 129; *Sawan Mal v. Shib Dyal* (1915) Punj. Rec. no. 81, p. 328.

(s) *Vinayak Narayan*, in re (1900) 24 Bom. 120.

(t) *Dorab Ally v. Executors of Khajah Mohesooddeen* (1878) 3 Cal. 806, 5 I. A. 116; *Shanto Chandar v. Nain Sukh* (1901) 23 All. 355; *Sundara v. Venkata* (1894) 17 Mad. 228; *Sobhagchand v. Bhaichand* (1882) 6 Bom. 193; *Mothienasa v. Apsa* (1911) 36 Mad. 194, 197 [Improvements by purchaser].

(u) *Kishun Lal v. Muhammad* (1891) 13 All. 383.

(v) *Shanto Chandar v. Nain Sukh* (1901) 23 All. 355; *Muhammad v. Bachcho* (1905) 27 All. 537; *Ram Narain v. Dwarkanath* (1900) 27 Cal. 264; *Doyal v. Amrita* (1902) 29 Cal. 370; *Administrator-General v. Aghore* (1902) 29 Cal. 420; *Dhondur v. Ramji* (1867) 4 B. H. C., A. C. 114.

(w) *Prayag Raj v. Sidhu Prasad* (1908) 35 Cal. 877; *Mahomed Mozuffer Hoossein v. Kishori Mohan Roy* (1895) 22 Cal. 909-919. See also *Poresh Nath v. Anath Nath* (1882) 9 Cal. 265. Contrast *Ganesh v. Purshottam* (1909) 33 Bom. 311.

O. 21, r. 94. of the argument in *Pettachi Chettiar v. Chinnatambiar* (x), what did the Court intend to sell, and what did the purchaser understand that he bought? These are questions of fact, or rather of mixed law and fact, and must be determined according to the evidence in the particular case (y). This test was applied in *Balvant v. Hirachand* (z), cited in the next following paragraph, and in *Abdul Aziz v. Appayasami* (a) cited in the paragraph after the next.

In this connection it may be noted that on a sale of mortgaged property in execution of a mortgage-decree obtained by the mortgagee against the mortgagor, the interest of both the mortgagor and the mortgagee passes to the purchaser (b). And where in execution of a simple money decree an undivided share in immoveable property, part of which is subject to mortgages, is sold, the presumption is, in the absence of specific indications to the contrary, that the share sold was, as far as might be, the share which was not encumbered (c).

Variance between proclamation of sale and sale-certificate.—It is provided by O. 21, r. 66, that where property is ordered to be sold in execution of a decree, the proclamation of sale should “specify as fairly and accurately as possible the property to be sold.” By the present rule it is provided that where property is sold, and the sale becomes absolute, the Court shall grant a certificate “specifying the property sold.” It sometimes happens that the property as described in the certificate of sale is different from that described in the proclamation of sale. In such a case the description of the property in the proclamation of sale is *conclusive* as to what was the subject-matter of the sale. As stated by their Lordships of the Privy Council in *Thakur Barnha v. Jiban Ram* (d), “that which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is *conclusively* described in and by the schedule to which the attachment refers,” that is, the schedule of the attached property in the proclamation of sale. Thus where a judgment-debtor owned a mahal of which a 10 annas share was mortgaged, and the proclamation of sale stated that what was to be sold was a 6 annas share in the mahal included in the mortgage, but the purchaser obtained a certificate of sale in which the property described was a 6 annas share in the mahal not included in the mortgage, it was held that the sale certificate should be set aside. The Court has no power to grant a certificate in which the property described is different from that specified in the proclamation of sale (e). Similarly where the proclamation of sale stated that the whole interest of five brothers in a mortgaged property was to be sold, and by a mistake on the part of the officer in charge of the sale, the certificate of sale omitted to mention the names of four of them, it was held that what was sold to the purchaser was the property as described in the proclamation of sale, and not the property as erroneously described in the sale-certificate (f). In the course of the judgment it was said: “The real question in such case, under the present Code of Civil Procedure, seems therefore to be what was the sale, i.e., what was bargained and paid for, and that must depend not on *erroneous statements* of what was offered for sale, but on what was *actually* offered for sale, and bid for. What [is actually] offered for sale [is] determined by the order of the Court and the proclamation.”

(x) (1887) 10 Mad. 241, 248, 14 I. A. 84. See also *Simbhunath v. Golap Singh* (1887) 14 Cal. 572, 579, 14 I. A. 77; *Mahabir Pershad v. Moheshwar Nath* (1890) 17 Cal. 584, 588-89, 17 I. A. 11.
(y) *Abdul Aziz v. Appayasami* (1904) 27 Mad. 181, 31 I. A. 1; *Tara Lal v. Sarobar Singh* (1900) 27 Cal. 407, 27 I. A. 33.
(z) (1908) 27 Bom. 384.
(a) 1904) 27 Mad. 181, 31 I. A. 1.

(b) *Maganiai v. Shakra* (1898) 22 Bom. 945.
(c) *Sheo Narain v. Nur Muhammad* (1907) 29 All. 403.
(d) (1913) 41 Cal. 590, 41 I. A. 38.
(e) *Thakur Barnha v. Jiban Ram* (1913) 41 Cal. 590, 41 I. A. 38; *Uma Churn v. Gobind Chunder* (1878) 1 O. L. R. 460; *Ramchandarra v. Haji Kassim* (1893) 18 Mad. 207.
(f) *Balvant v. Hirachand* (1903) 27 Bom. 334.

Effect of new interpretation of law on sale. *A* purchased at a Court-sale the "right, title and interest" of *B* in an impartible zamindari. By the law as then interpreted, the holder of such a zamindari was only entitled to a life-interest in the zamindari. [*A* must therefore be deemed to have purchased only the *life-interest* of *B*]. Subsequently this interpretation of the law was reversed by the Judicial Committee which decided that the holder of an impartible zamindari is entitled to an absolute interest in it, and that such interest is alienable. The new interpretation does not entitle *A* to claim that what he purchased at the sale was the *absolute* interest of *B* (*g*). O. 21,
rr. 94, 95.

Amendment of sale-certificate.—A purchaser at a Court-sale may apply to the Court for amendment of the sale certificate where the description of the property in the certificate differs from that in the proclamation. The Court may allow or refuse the amendment, but no appeal lies from the order in either case. Such an order is not appealable under s. 104. Nor is it appealable as a decree under ss. 47 and 96, for the question cannot be regarded as one relating to the "execution, discharge or satisfaction" of the decree, the decree being fully executed. The only question in such a case is whether the certificate given to the auction-purchaser gives a right description of the property sold (*h*).

Limitation.—The provisions of the Limitation Act do not apply to applications for a sale-certificate. The reason is that it is the duty of the Court on the sale becoming absolute to issue a sale-certificate and there is no duty imposed on the purchaser to *apply* for such a certificate. The action of the Court in granting the certificate is ministerial and not judicial. The Limitation Act does not apply to applications to the Court to do what it has no discretion to refuse, nor to applications for exercise of functions of a ministerial character. Hence if the Court fails to issue a sale-certificate, and the purchaser has thereupon to apply to the Court for a grant of the certificate, the application may be made *at any time* (*i*).

Effect of sale-certificate on irregularities.—All irregularities, though material, are cured by the certificate of sale (*j*).

95. [S. 318.] Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

Delivery of property
in occupancy of judgment-
debtor.

(*g*) *Abdul Aziz v. Appayasami* (1904) 27 Mad. 131, 31 I. A. 1.

(*h*) *Bhujia Roy v. Ram Kumar* (1899) 26 Cal. 529; *Sado v. Bansi* (1901) 23 All. 476; *Mammod v. Locke* (1897) 20 Mad. 487.

(*i*) *Kylasa v. Ramasami* (1882) 4 Mad. 172; *Vithal v. Vithojirav* (1882) 6 Bom. 586.

(*j*) *Balkrishna v. Masuma* (1883) 5 All. 142, 157, 9 I. A. 182; *Naigar v. Bhaskar* (1880) 10 Bom. 444.

O. 21, rr. 95-97. **Delivery of possession to purchaser.**—The possession contemplated by this rule is khas or actual possession. See notes to r. 35 of this Order. For the form of the order for delivery, see App. E, form No. 39.

Separate suit for delivery of possession.—See notes to s. 47, p. 124, case (5).

Appeal.—See notes to s. 47, p. 124, case (5).

Purchaser of undivided share.—A purchaser of an undivided share cannot apply under this rule. He must bring a regular suit for partition and for delivery of what may be allotted as the share of the undivided member (k).

Limitation.—The period of limitation for an *application* for delivery of possession is three years from the date when the sale becomes absolute [Limitation Act, 1908, sch. I, art. 181]. The period of limitation for a *suit* for delivery of possession is twelve years from the date when the sale becomes absolute [ib., art. 138]. The mere fact that an application by a purchaser for delivery of possession under this rule is rejected as made beyond the prescribed time is no bar to a suit for possession (l).

96. [s. 319.] Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Delivery of property in occupancy of tenant.

Delivery of possession to purchaser.—The possession contemplated by this rule is *symbolical* possession. See notes to r. 35 of this Order.

Limitation.—See notes to r. 95 above.

Resistance to delivery of possession to decree-holder or purchaser.

97. [Ss. 328-334.] (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

Resistance or obstruction to possession of immoveable property.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

(k) *Yelumalai v. Srinivasa* (1906) 29 Mad. 294.
(l) *Sheo Narain v. Nur Muhammad* (1907) 29

Regular suit.—The decree-holder may either resort to the summary remedy provided by this rule or he may bring a regular suit. Failure on the part of the decree-holder to avail himself of the remedy under this rule does not deprive him of the right of bringing a regular suit against the party obstructing execution of the decree (*m*). O. 21,
rr. 97, 98.

Limitation.—The period of limitation for an application complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree is 30 days from the date of the resistance or obstruction (Limitation Act, 1908, sch. I, art. 167).

Fresh application for delivery of possession.—Under the present Code a decree-holder applying for possession of immoveable property does so under O. 21, r. 35, while an auction-purchaser applying for such possession does so under O. 21, r. 95. The present rule deals with *obstruction or resistance* in obtaining possession. An important question that arises in this connection is whether if a decree-holder or auction-purchaser who is obstructed or resisted in obtaining possession omits to apply under this rule within 30 days from the date of obstruction or resistance, the only other remedy open to him is to proceed by a regular suit or whether he may make a fresh application for delivery of possession. It has been held by the High Courts of Madras (*n*) and Patna (*o*), that he may make a fresh application for delivery of possession. On the other hand, it has been held by the High Courts of Bombay (*p*) and Allahabad (*q*), that he is not entitled to make any such application and his only remedy is by a regular suit.

98. [Ss. 329, 330.] Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

Resistance or obstruction by judgment-debtor.

Purchaser from a judgment-debtor pending attachment.—It has been held by the High Court of Madras that proceedings can be instituted under this rule against a purchaser from a judgment-debtor pending attachment, though such a purchaser is not expressly mentioned in the rule. The reasons given are (1) that this rule is to be read with r. 95 which expressly provides for the institution of proceedings against such a purchaser under that rule, and (2) that such a purchaser is a "representative" of the judgment-debtor within the meaning of s. 146, so that just as proceedings could be instituted against a judgment-debtor under this rule, so they could be instituted against such a purchaser by virtue of the provisions of that section (*r*).

(*m*) *Balvant v. Babaji* (1884) 8 Bom. 602.
(*n*) *Muttia v. Appasami* (1890) 13 Mad. 504.
(*o*) *Raghunandan v. Ram Charan* (1919) 4 Pat. L. J. 94.

(*p*) *Vinayakrao v. Devrao* (1887) 11 Bom. 478.
But see *Balvant v. Babaji* (1884) 8 Bom. 602.
(*q*) *Kesri v. Abdul Hasun* (1904) 26 All. 386.
(*r*) *Kuvvana v. Kumara* (1909) 34 Mad. 450.

O. 21,
rr. 99,100.

99. [Cf. Ss. 331, 335.] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

Resistance or obstruction
by *bona fide* claimant.

Any person other than judgment-debtor claiming to be in possession of the property.—The word “possession” as used in this rule is not limited to actual *physical* possession. It includes also *constructive* possession, such as possession by a tenant. Thus if the property is in the actual possession of a tenant, and resistance or obstruction is offered by the landlord, the application must be dismissed under this rule, for the landlord is in *constructive* possession of the property by his tenant (a).

Where in a suit brought by a plaintiff against two defendants, a decree is passed, by consent against one of them only, the other defendant is not a judgment-debtor. He is a “person other than the judgment-debtor” within the meaning of this rule (t).

100. [S. 332.] (1) Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

Dispossession by decree-
holder or purchaser.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

“Any person other than the judgment-debtor.”—See notes to s. 47, “Representative,” p. 130 above, and cases (9) and (10) on p. 131.

“Is dispossessed.”—Where mere symbolical possession is delivered to the decree-holder or purchaser under r. 96, the person in possession cannot be said to be “dispossessed” within the meaning of this rule so as to entitle him to apply under this rule (u). It is the delivery of actual possession alone (r. 95) that can constitute dispossession within the meaning of this rule. A person who is in possession through his tenant will be said to be “dispossessed” within the meaning of this rule, if the tenant is ousted from the property by the delivery of actual possession to the decree-holder or purchaser (v).

(s) See *Mancharam v. Fakirchand* (1901) 25 Bom.

478.

(t) *Jathavedun v. Kunchu* (1907) 30 Mad. 72.

(u) *Ibrahim v. Ramjadu* (1903) 30 Cal. 710.

(v) *Brajabala v. Gurudas* (1906) 33 Cal. 487.

Dispossession under order of Collector.—When a person has been dispossessed under an order made by the Collector to whom execution proceedings are transferred, he should apply to the Collector, and not to the Court, complaining of such dispossession. This rule has no application when execution has been transferred to the Collector (*w*). O. 21,
rr. 100-103.

Limitation.—The application under this rule must be made within 30 days from the date of the dispossession; Limitation Act, 1908, sch. I, art. 165.

Dismissal of application for default.—It was held by the Patna High Court in the undermentioned case (*x*) that where an application made under this rule by a person not bound by the decree is dismissed for default, the order may be set aside under O. 9, r. 9, and the application may then be reheard. But this decision was disapproved by a Special Bench of the same Court in a later case (*y*). See p. 454 above.

101. [Ss. 332, 335.] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Bona fide claimant to be restored to possession.

“Was in possession on his own account.”—A member of a joint Hindu family cannot be said to be in possession of any particular portion of the joint property on his own account. His possession is the possession of the family (*z*).

Ex parte order for delivery of possession.—Where an order is made under rule 101, even though it be *ex parte*, the remedy of the other party is by way of suit under rule 103, and not by proceedings under O. 9, r. 13. O. 9, r. 13, does not apply to execution proceedings, in any event not to proceedings under rules 100 and 101 of the present Order (*a*).

Appeal.—No appeal lies from an order made under this rule (*b*); see r. 103 below.

102. [s. 333.] Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Rules not applicable to transferee pendente lite.

103. [s. 332, fourth para.; S. 335, second para.] Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to

Orders conclusive subject to regular suit.

(*w*) *Ragho v. Manmati* (1913) 37 Bom. 488.
(*x*) *Satya Narayan v. Govind* (1918) 3 Pat. 1, J. 250.
(*y*) *Bhu an swar v. Tilakdhari* (1919) 4 Pat. L. J.

135.
(*z*) *Cooverji v. Dewsey* (1893) 17 Bom. 718.
(*a*) *Hari Charan v. Manmatha* (1913) 41 Cal. 1.
(*b*) *Gulabi Bibi v. Aslam Khan* (1917) Punj Rec. no. 57, p. 201.

- O. 21, r. 103.** establish the right which he claims to the present possession of the property ; but, subject to the result of such suit (if any), the order shall be conclusive.

Suit to establish right to present possession.—The suit must be brought within one year from the date of the order : Limitation Act, 1908, sch. I, art. 11A. If no suit is brought within the aforesaid period, the order will be conclusive (bb).

This rule does not apply *unless there is an order made* under r. 98, r. 99 or r. 101. Therefore, where an application is made under r. 97 or r. 100, but the Court declines to pass any order upon the application thinking it best that the applicant should be referred to a separate suit, the present rule does not apply, and any suit which the applicant may subsequently institute for possession is not a suit under this rule, and it is not therefore governed by art. 11A of the Limitation Act (c). Not only is it necessary that there should be an actual order made for the application of this rule, but the order must be one *made after investigation* as contemplated by r. 97, sub-r. (2), and r. 100, sub-r. (2). An order dismissing an application for default of prosecution is not an order made after investigation. The present rule therefore does not apply to such an order (d).

Party against whom an order is made under rule 101.—The order may be one directing the applicant to be put into possession or it may be one refusing to put him into possession (e).

Additional rules made by the High Court, N. W. P., under s. 122.—See Appendix IV below.

ORDER XXII.

Death, Marriage and Insolvency of Parties.

- O. 22, r. 1.** 1. [s. 361.] The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

No abatement by party's death, if right to sue survives.

Application of Order to appeals.—The provisions of this order apply to appeals. See s. 107, sub-s. (2), and r. 11 below.

Application of Order to execution proceedings.—The provisions of this order apply to execution-proceedings except rr. 3, 4 and 8. See r. 12 below.

“Right to sue.”—The right to sue means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death (f).

In what cases the right to sue survives and in what cases it does not.—To answer this question, we must turn to the provisions of—

- I. the Indian Contract Act 9 of 1872, s. 37, and

(bb) *Chall Behari v. Kidar Nath* (1909) 1 Lah. L. J. 14.

(e) *Moerudin v. Raktez* (1904) 27 Mad. 25.

(d) *Sarat Chandra v. Tarini Prasad* (1907) 84 Cal.

491.

(e) *Zipru v. Hari* (1918) 42 Bom. 10.

(f) *Sarat Chandra v. Nani Mohan* (1909) 36 Cal. 799, 801.

- II. the Indian Succession Act 10 of 1865, s. 268, in cases to which the O. 22, r. 1. Succession Act applies, and the Probate and Administration Act 5 of 1881, s. 89, in cases to which the Probate Act applies [see notes to O. 7, r. 4]. Sec. 89 of the Probate Act is a reproduction of s. 268 of the Succession Act.

I. *Contract Act*, s. 37.—Section 37 of the Contract Act runs as follows: "Promises bind the representatives of the promisors in case of the death of such promisors before performance *unless a contrary intention appears from the contract.*" Expanding the italicized words, we may say that contracts involving the exercise of special skill or involving special personal confidence are not binding on the representatives of the promisors. *A* promises to paint a picture for *B* by a certain day at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives against *B* or by *B* against *A*'s representatives. The reason is that the right to sue does not survive to or against the representatives of *A*.

II. *Succession Act*, s. 268 and *Probate Act*, s. 89.—The following are the provisions of the Indian Succession Act, s. 268, and the Probate and Administration Act, s. 89: "All demands whatsoever, and all rights to prosecute or demand any action or special proceeding, existing *in favour of or against* a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory."

Analysing the above section, we may say that the right to sue does not survive in the following cases:—

(i) Suits for defamation, assault or other personal injuries not causing the death of the party. [Where death is caused by a personal injury, the legal representative of the deceased may sue wrong-doer for damages; see Act 13 of 1855.]

(ii) Cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Illustrations.

of cl. (i).—1. *A* sues *B* for defamation. *A* dies before decree. The right to sue does not survive, and the suit abates. That is to say; *A*'s representative is not entitled to prosecute the suit.

2. *A* sues *B* for damages for assault. *A* dies before decree. [It is assumed that the death has not been caused by the assault.] The right to sue does not survive and the suit abates.

of cl. (ii).—3. *A* sues *B* for divorce. *A* dies. The cause of action does not survive to his representative: *Stanhope v. Stanhope* (1886) 11 P. D. 103.

4. *A* sues *B* to recover possession of his minor daughter illegally detained by *B*. *B* dies before decree. The cause of action does not survive against *B*'s representative, and the suit abates: *Sharifa v. Munekhan* (1901) 25 Bom. 574.

5. *A*, claiming to be the nearest reversionary heir of a deceased Hindu, brings suit to set aside alienations made by the widow of the deceased. *A* dies before decree. It has been held by the High Court of Madras that the suit abates, and that it cannot

O. 22, r. 1. be continued by the next reversioner: *Sakyahani v. Bhavani* (1904) 27 Mad. 588; *China v. Lakshminarasamma* (1912) 37 Mad. 406. But this, it would seem, is no longer law: *Venkatanarayana v. Subbammal* (1915) 38 Mad. 406, 411-414, 42 I. A. 125, 129-132.

6. A applies to be appointed guardian of the person of X. The application is opposed by B who claims that he has been appointed guardian by the will of X's father. B dies. B's representative is not entitled to prosecute the proceedings. "A claim based on personal trust does not survive to the claimant's representative": *Gangabai v. Khashabai* (1899) 23 Bom. 719.

7. A sues B to establish his right to the office of *Mahant*. A dies before decree. The suit abates, for the right claimed is a personal right to an office: *Sham Chand v. Bhayaram* (1895) 22 Cal. 92.

8. The right of an unmarried Hindu daughter to claim the property left by her father to the exclusion of her married sister is not a personal right. If a suit is brought to establish such a right, and the plaintiff dies pending the suit, the suit does not abate: *Jadubansi v. Mahpal Singh* (1915) 38 All. 111, dissenting from *Balak Puri v. Durga* (1908) 30 All. 49.

9. A, as the sole executor and residuary legatee under the will of X, applies for probate of the will. B files a caveat, and the proceedings are thereupon converted into a suit. Pending the hearing A dies. Thereupon C, A's widow, applies to have her name substituted for that of A, and to have the petition amended by asking for letters of administration with the will annexed instead of probate. The application must be rejected, for A's right to apply for probate became extinguished on his death: *Sarat Chandra v. Nani Mohan* (1909) 36 Cal. 799; *Haribhusan v. Manmatha Nath* (1918) 45 Cal. 862.

10. A sues B for an injunction to restrain him from preventing A from enjoying the honour of standing at a particular place in a temple. B dies pending the suit. The suit abates: *Josiam v. Swami* (1910) 34 Mad. 76.

11. A, a Sunni Mahomedan, sues B for pre-emption. A dies pending the suit. It is not settled whether the right to sue is extinguished, or whether it survives to his heirs or legal representatives: *Muhammad v. Niamat-un-Nissa* (1897) 20 All. 88; *Sayyad Jiaul v. Sitaram* (1912) 36 Bom. 144.

In cases other than those comprised in clauses (i) and (ii), the right to sue does survive. Thus the case of malicious prosecution is not comprised either in cl. (i) or clause (ii); hence if A sues B for damages for malicious prosecution, and dies before decree, it has been held by the Calcutta High Court that the right to sue survives, and A's representative is entitled to prosecute the suit (g). In a Bombay case (h), however, where the suit was by A against B for malicious prosecution, and B died pending the suit, it was held that the right to sue did not survive against B, and that A was not entitled to prosecute the suit against B's representative, and that the suit abated. The reason given was that B's estate did not derive any direct benefit from the alleged wrong committed by him and hence the cause of action did not survive against his representative according to the principle laid down in *Phillips v. Homfray* (i).

(g) *Krishna v. Corporation of Calcutta* (1904) 31 Cal. 993. See *Paramen v. Sundararaja* (1908) 26 Mad. 499.

(h) *Haridas v. Ramdas* (1889) 13 Bom. 677.
(i) (1883) L. R. 24 Ch., D. 439.

In the Calcutta case cited above, however, the Court observed that it was unnecessary to deal with the English authorities upon the question whether or not the cause of action survived to the representative of a deceased plaintiff for malicious prosecution, and that the matter was governed by s. 89 of the Probate and Administration Act.

The right to sue for damages for breach of contract, the right to sue on a promissory note, the right to sue for a debt, the right to sue on a mortgage, the right to sue for wrong done to property, are all instances of rights that are not extinguished on the death of the plaintiff or defendant. In all these cases the suit does not abate on the death of the plaintiff or defendant. An agreement referring matters in dispute to arbitration is not in this country revoked by the death of any of the parties thereto before the award is made. Hence the question whether the legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a purely personal nature or is one which survives to the legal representative (j).

Death of either party pending appeal.—Where a *decree* has been passed for the plaintiff in a suit in which the right to sue would not survive if the plaintiff died before decree, and either party dies pending an appeal preferred by the defendant from the decree, the appeal does not abate (k). But if the plaintiff's suit is *dismissed*, and the plaintiff has appealed from the decree, and either party dies pending the appeal, the appeal will abate (l).

Illustrations.

1. A sues B for damages for defamation, and obtains a decree for Rs. 5,000. B appeals from the decree. A dies pending the appeal. The appeal does not abate, and B may continue the appeal against A's representatives. If B dies pending the appeal, B's representative may continue the appeal against A.

2. A sues B for damages for defamation, but the suit is *dismissed*. A appeals from the decree. Pending the appeal A dies. A's representative is not entitled to prosecute the appeal. The reason is that the decree in the original suit being against A, what is sought to be enforced in appeal, is A's *right to sue*. But the right to sue in a suit for defamation does not survive to the legal representative; hence the appeal abates. Similarly if B dies pending the appeal, A is not entitled to continue the appeal against B's representative, not even if A's suit was dismissed *with costs* (m).

2. [S. 362.] Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Procedure where one of several plaintiffs or defendants dies and right to sue survives.

(j) *Perumalla v. Perumalla* (1904) 27 Mad. 112; *Dulla v. Khedu* (1911) 33 All. 645.
(k) *Muhammad v. Khushalo* (1887) 9 All. 131; *Gopal v. Ramchandra* (1902) 26 Bom. 597; *Paraman v. Sundararaja* (1903) 26 Mad. 499.
(l) *Gopal v. Ramchandra* (1902) 26 Bom. 597, at p. 601, lines 33-35; *Sakyahant v. Bhavani* (1904) 27 Mad. 588.
(m) *Jostam v. Swami* (1910) 34 Mad. 76.

O. 22, rr. 2, 3. **Cases where right to sue survives to surviving plaintiff alone.**—Where a suit is brought by several joint-owners of any land for damages for trespass, and one of the plaintiffs dies during the pendency of the suit, the suit may be continued by the surviving joint-owners, and the legal representative of the deceased joint-owner is not a necessary party to the suit (a).

Cases where right to sue survives against surviving defendants alone.—Where the defendants are executors or trustees, and are sued in their representative capacity, if any one of them dies before decree, the suit may be continued against the surviving executors or trustees, and the legal representative of the deceased executor or trustee is not to be added as a defendant. Similarly where the defendants are joint tort-feasors, the cause of action on the death of one survives as against the other (o).

Suit.—The word “suit” includes an appeal: see r. 11 below.

3. [Sr. 363, 365, 366.] (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

Procedure in case of death of one of several plaintiffs or of sole plaintiff.

(2) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on his application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Alterations in the rule :—

1. The words “so far as the deceased plaintiff is concerned” in sub-rule (2) are new. See notes below “The suit shall abate so far as the deceased plaintiff is concerned.”
2. The words “the suit shall abate” in sub-rule (2) have been substituted for the words “the Court may pass an order that the suit shall abate” which occurred in s. 366 of the Code of 1882. The latter words gave rise to a conflict of opinion as to whether an order that a suit shall abate was appealable. The High Courts of Bombay and Madras held that such an order was a decree and was therefore appealable. The Allahabad High Court held that the order was not appealable. No such question can arise under the present rule, for it is no longer necessary to make any order that a suit shall abate. The suit abates *ipso facto*, if no application is made under sub-rule (1) within the time limited by law.

(a) *Chandramohan v. Bisambhar* (1868) 1 Beng. L. R., O. C. 42.

(o) *Bishen Das v. Ram Labbaya* (1915) Pun Rec. no. 106 p. 413.

Limitation.—The application under this rule must be made within six months **O. 22, r. 3.** from the date of the death of the deceased plaintiff or appellant: Limitation Act, 1908, sch. I, art. 176.

"Suit."—The word "suit" in this rule includes an appeal, and the word "plaintiff" includes an appellant: see r. 11 below.

"Dies."—The word "dies" in this rule refers to death *before* decree. This rule, therefore, does not apply to cases in which a plaintiff dies after decree and before appeal (*p*).

The suit shall abate "so far as the deceased plaintiff is concerned."—Where one of two or more plaintiffs dies and the right to sue *survives* to the surviving plaintiffs or plaintiff alone, as where the right is a *joint* right, the surviving plaintiff or plaintiffs may proceed with the suit. This case has been dealt with in r. 2 above. The present rule provides *inter alia* that where one of two or more plaintiffs dies and the right to sue *does not survive* to the surviving plaintiff or plaintiffs alone, the legal representative of the deceased plaintiff ought to be made a party to the suit. For this purpose an application should be made to the Court, and such application must be made within 6 months from the date of the death of the deceased plaintiff. Sub-rule (2) provides that where no such application is made, the suit shall abate *so far as the deceased plaintiff is concerned*. The words italicized above mean that the suit shall *primarily* abate so far as the deceased plaintiff is concerned, but they do not mean that the suit shall in no case abate *as a whole*. If the suit is of such a nature that it can proceed in the absence of the legal representative of the deceased plaintiff, it will abate so far only as the deceased plaintiff is concerned. But if it is of such a character that it cannot proceed in the absence of the legal representative, it will abate as a whole. See notes above "Alterations in the rule."

The provisions of this rule apply not only to the case of a deceased plaintiff, but to the case of a deceased appellant [see s. 107 and r. 11 below]. Therefore, where one of two or more appellant dies and the right to appeal does not survive to the surviving appellant alone, the legal representative of the deceased appellant ought to be brought on the record. If this is not done, the appeal will abate *so far as the deceased appellant is concerned*. But the appeal will abate *as a whole*, if the case is of such a nature that the appeal cannot proceed in the absence of the legal representative of the deceased appellant. There is particularly one class of cases in which an appeal cannot abate as a whole, but abates only so far as the deceased appellant is concerned, and these are cases which come within O. 41, r. 4, corresponding with s. 544 of the Code of 1882. O. 41, r. 4 provides that where there are two or more plaintiffs or defendants in a suit, and the decree appealed from proceeds on any ground *common* to all the plaintiffs or to all the defendants, *any* one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of *all* the plaintiffs or *all* the defendants, as the case may be. Where several plaintiffs or defendants jointly appeal from a decree in a case to which O. 41, r. 4 of the Code applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought upon the record within the limitation, can only have the effect of causing the appeal to abate so far only as the deceased appellant is concerned: it cannot have the effect of causing the appeal to abate as a whole. *A* and *B* sue *C*, *D* and *E* for possession of certain lands, alleging that they have been unlawfully dispossessed by the defendants. The defence is that the land belongs to *C*, *D* and *E*. The Court finds that the land belongs to the plaintiffs, and

O. 22, r. 3. a decree is passed in favour of the plaintiffs. *C, D* and *E* appeal from the decree. *E* dies pending the appeal, but his legal representative is not brought on the record within the period of limitation. *A* and *B* (respondents) contend that the appellate Court should not proceed with the appeal, on the ground that the appeal has abated as whole. But the appeal in such a case does not abate as a whole, but abates only so far as the deceased appellant is concerned. The appellate court should therefore hold that the appeal has abated so far as the deceased appellant is concerned [see sub-r. (2)], and it should then proceed with the hearing of the appeal. The reason is that the ground of appeal being common to all the appellants, *viz.*, that they were the lawful owners of the land, any one of them might have appealed from the whole decree under O. 41, r. 4; if so, the death of one of the appellants could not affect the right of the other appellants to proceed with the appeal (*q*).

Two or more legal representatives.—We next proceed to consider the question whether, if there are two or more legal representatives, they should all be made parties? A Mahomedan plaintiff dies pending a suit brought by him, leaving three sons, *A, B* and *C*. *A* alone applies to be brought on the record in place of the deceased, and he is brought on the record as plaintiff. No application is made to bring *B* and *C* on the record within 6 months from the date of the death of the deceased plaintiff. Does the suit abate? It does, according to the Allahabad High Court (*r*). According to that Court, the words "legal representative" must, when there is more than one legal representative, be read in the plural. It has accordingly been held by that Court that all the legal representatives must be brought on the record as plaintiffs, and if any of them refuses to be joined as a plaintiff, he should be joined as a defendant. The same view has been taken by the High Court of Madras (*s*), except that according to that Court if any of the legal representatives refuses to be joined as a plaintiff, and he is brought on the record after the period of limitation, the suit does not abate though he is brought on the record after the period of limitation. In Bombay it has been held that an application by one of several legal representatives is sufficient, and that the suit does not abate if others are not brought on the record (*t*). The same principles apply to appeals.

Dispute as to representative of deceased plaintiff.—The present rule pre-supposes that the party claiming to represent the deceased plaintiff is his legal representative, but if a question arises as to whether any person is or is not the legal representative of the deceased plaintiff, such question should be determined by the Court under r. 5 below (*u*).

Legal representative.—On the death of a Hindu widow pending a suit to recover property belonging to her deceased husband, the reversionary heirs of the husband are her legal representatives within the meaning of this rule (*v*). Similarly on the death of a Hindu female to recover her father's property from strangers, the next heirs of the father are her legal representatives within the meaning of this rule (*w*). On the death of a reversioner pending a suit for a declaration that an alleged adoption is invalid, the

- (*q*) *Chandarsing v. Khimabhai* (1898) 22 Bom. 718; *Ram Sewak v. Lamber* (1903) 25 All. 27; *Chintaman v. Gangabai* (1903) 27 Bom. 284; *Somasundaram v. Vaidhilinga* (1916) 40 Mad. 846, 868; *Med Singh v. Kabir-un-nissa* (1914) Punj. Rec. no. 88, p. 323; *Ptware Lal v. Churamant* (1918) Punj. Rec. no. 84, p. 279
(*r*) *Ghamandi v. Amir Begam* (1894) 16 All. 211; *Haidar Husain v. Abdul Ahad* (1908) 30 All. 117.

- (*s*) *Musala v. Ramayya* (1900) 23 Mad. 125.
(*t*) *Bhikaji v. Purshotam* (1885) 10 Bom. 220.
(*u*) *Oula v. Beepathe* (1894) 17 Mad. 209.
(*v*) *Fremmoyi v. Preonath* (1896) 23 Cal. 636; *Tribhuvan v. Sri Narain* (1898) 20 All. 341; *Rikhai Rai v. Sheo Pujan Singh* (1910) 33 All. 15.
(*w*) *Ramaswami v. Padamunayya* (1916) 39 Mad. 382; *Jadubansi v. Mahpal Singh* (1915) 38 All. 111.

next reversioner is the legal representative, and he is entitled to be brought on the record as such (x).

O. 22,
rr. 3,4

It is to be noted that the legal representative of a deceased plaintiff can only prosecute the cause of action as originally framed (y). Likewise, the defendant can raise no defence against the legal representative other than what he could have raised against the deceased plaintiff himself (z). See s. 2, cl. (11).

It has been held by the High Court of Madras that where a suit is brought by a minor Hindu for partition, and the minor dies pending the suit, his legal representatives are not entitled to continue the suit, the reason given being that the rule that the institution of a suit for partition effects a severance of the joint estate is not applicable to a suit by a minor, it being for the Court to determine in such a suit whether a decree for partition will be beneficial to the minor (a).

"The suit shall abate."—See notes above, "Alterations in the rule," no. 2.

Death of pauper applicant.—Where there is only an application for leave to sue in *forma pauperis*, but no suit pending in Court, and the applicant dies before the leave is granted, the right to sue as a pauper, being a personal right, cannot survive to his legal representative. But the legal representative may present a *fresh* application for leave to sue in *forma pauperis*, or he may institute a suit for the same relief that the deceased claimed, if the right to sue survives (b).

Revision.—When the legal representative of a deceased plaintiff applies within the prescribed period to have his name entered on the record, the Court is bound under this rule to enter his name. If the Court fails to do so, it amounts to a failure to exercise jurisdiction vested in it by law under this rule, and the High Court may interfere in revision under s. 115 (c).

Execution proceedings.—This rule does not apply to proceedings in execution: see r. 12 below.

Appeal.—No appeal lies from an order made under this rule (d). See O. 43 below.

4. [S. 368.] (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to

Procedure in case of death of one of several defendants or of sole defendant.

sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(x) *Venkatanarayana v. Subbammal* (1915) 38 Mad. 408, 42 I. A. 125.
(y) *Sham Chand v. Bhayaram* (1895) 22 Cal. 92.
(z) *Subbaraya v. Manika* (1896) 19 Mad. 345.

(a) *Chelimi v. Subbamma* (1917) 41 Mad. 442.
(b) *Lalit v. Satish* (1906) 33 Cal. 1163.
(c) *Janardhan v. Ramchandra* (1902) 28 Bom. 317.
(d) *Lakshmi v. Subbarama* (1916) 39 Mad. 488.

- O. 22, r. 4. (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

Alterations in the rule :—

1. Sub-rule (2) is new.
2. The words "as against the deceased defendant" in sub-rule (3) are also new.
See notes below, "The suit shall abate as against the deceased defendant."

Suit.—The word "suit" in this rule includes an appeal, and the word "defendant" a respondent; see r. 11 below.

Legal representative.—See s. 2, cl. (II).

Limitation.—The application under this rule must be made within six months from "the date of the death of the deceased defendant or respondent:" Limitation Act, 1908, sch. I, art. 177. The alteration in the language of art. 177 [Limitation Act, 1877, art. 175 C], clearly shows that the word "respondent" in that article is not confined only to a respondent in first appeal as was held by the High Court of Madras under the old article (e), but that it also includes a respondent in second appeal as held by the High Courts of Calcutta and Allahabad (f). See also r. 11 below.

Sub-rule (2).—See note to r. 3 above, "Legal representative," p. 664 above.

Where no application is made within the period of limitation.—The application to bring the legal representative of the deceased defendant on the record should, as stated above, be made within 6 months from the date of the death of the deceased defendant. If no such application is made within the aforesaid period, the suit abates as against the deceased defendant [sub-rule (3)], though the plaintiff was ignorant of the death of the deceased (g). After abatement, the only course open to the plaintiff is to make an application under r. 9, sub-r. (2), to have the abatement set aside. Such an application should be made within 60 days from the date of the abatement [Limitation Act, 1908, sch. I, art. 171], but the Court may entertain the application even after 60 days if sufficient cause is shown (h) [see r. 9, sub-r. 3, and Limitation Act, 1908, s. 5]. As to the inherent power of the Court to bring the legal representative of a deceased defendant on the record after abatement, see notes below.

The suit shall abate "as against the deceased defendant."—Where one of two or more defendants dies, and the right to sue survives against the surviving defendant or defendants *alone*, as where the liability is a *joint* one, the suit should be proceeded with as against the surviving defendant or defendants. This case has been dealt with in r. 2 above. The present rule provides *inter alia* that where one of two or more defendants dies, and the right to sue *does not survive* against the surviving defendant or defendants *alone*, as in a suit for partition, the legal representative of the deceased defendant ought to be made a party to the suit. For this purpose an application should be made to the Court, and such application must be made within six months

(e) *Susya Pillai v. Aiyakannu Pillai* (1906) 29 Mad. 523.

(f) *Upendra Kumar v. Sham Lal* (1907) 34 Cal. 1020; *Madhuban Das v. Narain Das* (1907) 29 All. 535.

(g) *Sayad Mir Nawab v. Hardeo* (1911) Punj. Rec. no. 60, p. 235; *Hadu v. Lala* (1915) Punj. Rec. no. 41, p. 197; *Jamna v. Sarjit*

(1919) Punj. Rec. no. 67, p. 166. Ignorance of death may, however, be a good ground for setting aside the abatement: *Days Singh v. Bula Singh* (1916) Punj. Rec. no. 118, p. 389.

(h) *Secretary of State v. Jawahar L* (1914) 36 All. 235.

from the date of the death of the deceased defendant. Sub-rule (3) provides that where **O. 22, r. 4.** no such application is made, the suit shall abate *as against the deceased defendant*. The words, "as against the deceased defendant are new. In the absence of these words in the corresponding section 368 of the Code of 1882, it was contended in a large number of cases governed by that section that where no application was made to bring the legal representative of a deceased defendant or respondent on the record within the period of 6 months, the suit or appeal abated not only as against the deceased defendant or respondent, but as a whole. But this contention did not prevail, and the Courts held that a distinction ought to be made between cases in which a suit or appeal could proceed in the absence of the legal representative and those in which it could not so proceed. In the former case it was held that the suit or appeal abated only as against the deceased defendant or respondent (i); in the latter case, that it abated as a whole (j). Sub-r. (3) of the present rule makes it clear that where no application is made to bring the legal representative on the record within the time limited by law, the suit or appeal abates primarily as against the deceased defendant or respondent only. At the same time there is nothing in this rule to preclude the Courts from holding, as they did under the last Code, that a suit or appeal abates as a whole where the facts of the case are such that the suit or appeal cannot proceed in the absence of the legal representative. It is submitted that the only effect of the newly added words "as against the deceased defendant," is to make it clear that failure to make the necessary application within the time allowed by law does *not necessarily* cause the suit or appeal to abate *as a whole*, and thus to give legislative recognition to the rulings under the last Code. The said words do not mean that the suit or appeal shall *in every case* abate as against the deceased defendant or respondent *only*, and proceed against the other defendants or respondents. Such a construction would lead to absurd results in many cases. It is, therefore, submitted, that the distinction drawn by the Courts under s. 368 of the Code of 1882 between cases in which a suit or appeal abates as against the deceased defendant or respondent only and those in which it abates as a whole, still holds good. The subject being one of some difficulty, we proceed to illustrate it in the light of decided cases.

Formal defendant.—The absence of representatives of a defendant who is merely a formal party to the suit affords no ground for the abatement of a suit (k).

1. Cases in which suit or appeal held to abate as against the deceased defendant only.—(1) *A* mortgages certain property to *B*. *C* stands surety for repayment of the mortgage-debt. *B* sues *A* and *C*, praying as against *A* for a sale of the mortgaged property, and as against *C* for a decree for the payment of the mortgage debt. *C* dies pending the suit. No application is made by *B* to bring on the record the legal representative of *C* within 6 months from the date of *C*'s death. The suit abates as against *C* only, and not as a whole: *Mehdi Husain v. Sugra Begam* (1902) 25 All. 206. [In this case it is clear that *B* could have abandoned his claim against *C*, and sued *A* alone on the mortgage.]

(2) *A* lets certain lands to *B* and *C*. *A* then sues *B* and *C* for arrears of rent, but the suit is dismissed. *A* files an appeal from the decree against *B* and *C*. *C* dies pending

(i) *Chandraseang v. Khimabhai* (1898) 22 Bom. 718; *Bat Full v. Adesang* (1902) 26 Bom. 208; *Joy Gobind v. Monmotha* (1906) 33 Cal. 580; *Upendra Kumar v. Sham Lal* (1907) 34 Cal. 1020; *Mehdi Husain v. Sugra Begum* (1902) 25 All. 206; *Ranga v. Gnanaprakasam* (1906) 30 Mad. 67; *Abdul Aziz v. Basdeo Singh* (1912) 34 All. 604; *Zainah Bibi v. Rohila* (1917) Punj. Rec. no. 28, p. 90.
(j) *Raj Chunder v. Ganga Das* (1904) 31 Cal. 487,

31 I. A. 71; *Hem Kunwar v. Amba Prasad* (1909) 22 All. 430; *Imam-ud-Din v. Sadarath Rai* (1910) 32 All. 301; *Dharanjit v. Chandeshwar* (1907) 11 C. W. N. 504; *Khuda Baksh v. Mathra Das* (1913) Punj. Rec. no. 62, p. 234; *Sardari Lal v. Ram Lal* (1919) 1 Lah. L. J. 225.
(k) *Brij Indar Singh v. Kanshi Ram* (1917) 44 I. A. 218, 228; 45 Cal. 94, 110, (1917) Punj. Rec. no. 104, p. 398, at p. 407.

O. 22, r. 4. the appeal. No application is made by *A* to substitute *C*'s legal representative in *C*'s place within 6 months, from the date of *C*'s death. The appeal does not abate as a whole but against *C* only: *Joy Gobind v. Monmotha* (1906) 33 Cal. 680. [In this case it is clear that *A* could have sued *B* alone without joining *C* as a party defendant: see Contract Act, 1872, s. 43.]

II. Cases in which suit or appeal held to abate as a whole:—

(1) *A, B, and C* are joint owners of certain property. The property is sold for arrears of Government revenue and purchased by *D*. *A, B, and C* sue *D* to set aside the sale on the ground of fraud and irregularities, and a decree is passed in their favour. *D* files an appeal from the decree against *A, B, and C*. *C* dies pending the appeal, but no application is made by *D* to bring *C*'s legal representative on the record within the period of limitation. The appeal abates not only as against *C*, but as a whole. In this case it is clear that *A, B, and C* being joint owners, the suit would have been bad if *C* were not joint as a party to the suit. Further, suppose that the appeal were heard and that the appellate Court came to the conclusion that the decree of the lower Court should be reversed; the decree could then be reversed only as to *A* and *B*, but it could not be reversed as to *C*, for *C*'s representative is not on the record. This conclusion is preposterous, for the case is one in which the decree, if it is set aside, must be set aside as to the sale of the entire estate. Under no circumstances could it be reversed as to the unascertained shares of some joint-holders [that is, *A* and *B*], and confirmed as to the unascertained share of other joint-holders [that is, in this case, *C*]. The case therefore is one in which the appeal could not proceed in the absence of *C*'s legal representative. The appeal therefore must abate as a whole: *Dharanjit v. Chandeshwar* (1907) 11 Cal. W. N. 504; *Bejoy Gopal v. Umesh Chandra* (1901) 6 C. W. N. 196; *Hadu v. Lala* (1915) Punj. Rec. no. 41, p. 197; *Jamna v. Sarjit* (1919) Punj. Rec. no. 67, p. 166.

(2) *A* sues his partners *B, C, D* and *F* for dissolution and for accounts of the partnership. A decree is passed in the suit by which it is ordered that a sum of Rs. 9,000 should be contributed by *A, B* and *C*, and that out of that sum Rs. 1,740 should be paid to *D* and the rest to *F*. *A* appeals from the decree making *B, C, D* and *F* party respondents. *B* and *C* also appeal from the decree making *A, D* and *F* party respondents. Pending the appeal *D* dies. No application is made by the appellants in either appeal to bring on the record the legal representative of *D* within the period of limitation. The appeal abates as a whole, for it is not a case in which the appeals could proceed in the absence of the legal representative of *D*, as the suit is one for partnership accounts: *Raj Chunder v. Gunga Das* (1904) 31 Cal. 487, 31 I.A. 71.

Power of Court to add legal representative as a party after abatement.—Notwithstanding the abatement of a suit, the Court has the power, in a proper case, to bring on the record the representative of a deceased defendant under s. 151 and O. 1, r. 10. *A* sues *B* and *C* for partition of joint family property. A preliminary decree is passed and a commissioner is appointed to make a partition according to the rights declared in the decree. *B* then dies, but no application is made to bring his legal representative on the record within the period of limitation. Though the suit abates as regards *B*, the Court may add *B*'s representative as a defendant (1).

Effect of decree against a person alleged to be the legal representative of the deceased defendant.—Where a defendant in a suit dies, and the

(1) *Lackmichand v. Kachubhai* (1911) 18 Bom. L. R. 517, s. c. 35 Bom. 393; *Chandar-*

sang v. Khatmabhai (1898) 22 Bom. 718, 721-722.

plaintiff, under this rule, brings a person on the record whom he alleges to be the legal representative of the deceased defendant, such person sufficiently represents the estate of the deceased for the purposes of the suit, and, in the absence of fraud or collision, the decree passed in the suit will bind the estate (*m*).

O. 22,
rr. 4, 5.

Rehearing of suit or appeal.—A plaintiff whose suit is heard and dismissed is not entitled to a rehearing of the suit on the ground that one of the defendants had died previous to the hearing of the suit and that the suit was heard without bringing the legal representative of the deceased defendant on the record. The right to have the suit reheard is the right of the legal representative [which he would not care to exercise, the suit being dismissed], and not the right of the unsuccessful plaintiff. The same rule applies to appeals (*n*).

Death of defendant after preliminary decree.—This rule applies though the death of a defendant may take place after the passing of a preliminary decree, as in a partnership suit (*o*).

Execution proceedings.—This rule does not apply to proceedings in execution of a decree : see r. 12 below.

Application of this rule to appeals.—This rule applies to appeals : see r. 11 below. But an appellate Court has no power under this rule to declare that a suit as distinct from an appeal has abated, in a case in which a decree has already been passed before the death (in consequence of which the suit is alleged to have abated) took place (*p*).

5. [s. 367.] Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

Determination of question as to legal representative.

Alterations in the rule .—

1. The words "where a question arises as to whether any person is or is not the legal representative," have been substituted for the words "if any dispute arises as to who is the legal representative." The object is to make it clear that this rule applies not only where two or more persons claim to be the legal representatives of a deceased party but where there is only one claimant and his representative character is denied. This is in accordance with the interpretation put upon the words of the old section in the undermentioned cases (*q*).
2. Under the old section where a question arose as to whether any person was or was not the legal representative of a deceased party, the Court had the power either to stay the suit until the question was determined in another suit, or to determine the question itself. Under the present rule the Court is bound to determine the question itself (*r*).
3. It is provided by rules 3 and 4 of this Order that once a person is brought on the record under those rules as the legal representative of a deceased party,

(*m*) *Kadir v. Muthukrishna* (1903) 26 Mad. 230.
(*n*) *Vellayam v. Jothi* (1915) 28 Mad. L. J. 138.
(*o*) *Moti Lal v. Ram Narain* (1910) 39 All. 551.
(*p*) *Sundar v. Musammam Kumari* (1910) 41 All. 288.

(*q*) *Oula v. Beepathes* (1894) 17 Mad. 209, 210;
Subbaya v. Saminadayyar (1895) 18 Mad. 496; *Hanwant Singh v. Ram Gopal* (1908) 30 All. 348.
(*r*) *Raoji v. Anant* (1913) 42 Bom. 535, 542.

O. 22,
rr. 5, 6.

"the Court *shall* proceed with the suit." No objection therefore as to the representative character of such person can be entertained after he is brought on the record, *though the hearing of the suit has not commenced*. Under the old section the objection could be taken "at or before the first hearing of the suit." But the words "at or before the first hearing" have been omitted in the present rule, the object being that the objection as to whether any person is or is not the legal representative of a deceased party should be taken before such person is made a party to the suit under rules 3 and 4 (s).

"**Legal representative.**"—As to the definition of this expression, see s. 2, cl. (11).

Objection as to representative character, when to be taken.—See notes above, "Alterations in the rule," No. 3.

Effect of order under this rule.—This rule provides a summary procedure for appointing a person to be the legal representative of the deceased plaintiff for the purpose of prosecuting the suit. Hence an order admitting a person to be the legal representative for the purpose of prosecuting the suit does not operate as a final determination of the representative character of such person, in other words it does not operate as *res judicata* (t). This rule, it is conceived, must be read as if it contained the words "for the purposes of rules 3 and 4" after the word "shall." Compare s. 47, sub-s. (3).

Power of Court to correct its order.—If an *ex parte* order is made under this rule, and it is found to be a mistaken order, the Court has the power to correct it (u).

Appeal.—No appeal lies from an order under this rule (v). But a party aggrieved by the order may object to the order in an appeal from the decree, provided he was a party to the decree (w). But the order will not be set aside unless it is shown that it has affected the decision of the case (x). See s. 105 above.

6. [New.] Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

No abatement by reason of death after hearing.—This rule is new. It gives effect to the decisions in the undermentioned cases (y). See notes to s. 47, case (4), p. 123 above.

(s) See *Meenatchi v. Ananthanarayana* (1903) 26 Mad. 224; *Balabai v. Ganesh* (1903) 27 Bom. 162, 187. In both these cases the objection was taken at a late stage of the hearing.
(t) *Parotam v. Janki* (1906) 28 All. 109.
(u) *Valsalabai v. Sambhaji* (1919) 48 Bom. 168.
(v) *Dumti Chand v. Arja* (1915) 87 All. 272.
(w) See *Har Narain v. Kharag* (1887) 9 All.

447; *Sankait v. Murtidhar* (1890) 12 All. 200; *Vithu v. Bhima* (1890) 15 Bom. 145.
(x) *Balabai v. Ganesh* (1903) 27 Bom. 162.
(y) *Surendro v. Doorga Soondery* (1892) 19 Cal. 513, 588, 19 L. A. 108; *Ramacharya v. Anantacharya* (1897) 21 Bom. 314; *Chetan v. Balbhadra* (1899) 21 All. 314; *Raghunatha v. Venkatesa* (1903) 26 Mad. 101; *Goda v. Soondaramall* (1909) 33 Mad. 167.

O. 22,
rr. 6-8.

In a mortgage suit the "judgment" referred to in this rule is the judgment supporting the final decree and not the judgment supporting the preliminary decree, and the "hearing" referred to in the rule is the hearing of issues upon which judgment is to be delivered determining the plaintiff's right to a final decree. The result is that this rule does not apply where a party to a mortgage suit dies before the application for a final decree is made and heard (z).

7. [s. 369.] (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and where the decree is against a female defendant, it

Suit not abated by
marriage of female
party.

may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

Liability for wife's debts.—See Pollock and Mulla's Indian Contract Act, s. 187, and notes thereto.

8. [s. 370.] (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless

When plaintiff's insol-
vency bars suit.

such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant, may apply for the dismissal of the suit on the ground of the plaintiff's insolvency and

Procedure where assignee
fails to continue suit or give
security.

the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

This rule applies to the case of a plaintiff insolvent.—This rule lays down the procedure to be followed where a *plaintiff* becomes insolvent.

O. 22,
rr. 8, 9.

Insolvency of defendant.—As to the case of the insolvency of a *defendant* in a presidency-town it is now provided by sec. 18 of the Presidency-Towns Insolvency Act, 1909, that where a defendant to a suit has been adjudged an insolvent, the Court may, at any time after the making of the order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court. It is further provided by the same section that any Court in which proceedings are pending against a debtor may on proof that an order of adjudication has been made against him under the Act, either stay the proceedings or allow them to continue on such terms as it may think just. As to cases governed by the Provincial Insolvency Act, 1907, see sec. 16, sub-sec. (2). See also notes to r. 10 below, "Insolvency of defendant: joinder of Official Assignee."

"Insolvency."—This rule does not apply to a case where there has been only an application to declare the plaintiff an insolvent and a vesting order made, but the proceedings are subsequently annulled and the party is not declared an insolvent. Therefore in such a case, where a suit has been dismissed for the non-appearance of the plaintiff or the Official Assignee on the date fixed for the hearing, it is rule 9 of Order 9 that applies (a).

Costs payable by plaintiff prior to his insolvency.—The general principle is "that a person who comes in by representation, whether it be an assignee in bankruptcy or as an executor or administrator of an original plaintiff, where costs are due by the person whom he represents, the suit cannot be carried on except upon the costs of the original suit being paid." It has accordingly been held that where a plaintiff, who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, the Court will stay proceedings until payment of the costs which the plaintiff has been ordered to pay (b).

Costs of successful defendant.—Where a suit is continued by the assignee in bankruptcy, and the defendant obtains judgment with costs, the defendant is entitled to be paid all his costs in full, and not merely the costs as from the date of insolvency with liberty to prove for the costs previously incurred (c).

Practice.—As to the proper order to be made under this rule, see the under-mentioned case (d).

Execution proceedings.—This rule does not apply to proceedings in execution: see r. 12 below.

Cause of action arising after insolvency.—A, an undischarged insolvent, sues B for brokerage earned by him subsequent to his adjudication. B applies for security for costs. If the Official Assignee has not intervened, no order should be made for security for costs. Even if he has intervened, no order should be made if the amount of the claim exceeds the plaintiff's liability (e).

9. [Ss. 371, 372A.] (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

Effect of abatement or dismissal

(a) *Amrita Lal v. Rakhal* (1900) 27 Cal. 217.
(b) *Cook v. Hathway* (1869) L. R. 8 Eq. Cas. 612.
(c) *London Drapery Stores, in re* [1898] 2 Ch. 684, following *Boynton v. Boynton* (1879)

4 App. Cas. 733 (a case of executors). See also *Datobhoy v. Vallu* (1899) 1 Bom. L. R. 828.
(d) *Lekhray v. Shamlal* (1892) 18 Bom. 404.
(e) *Murray v. East Bengal Mahajan Flotilla Co. Ltd.* (1919) 46 Cal. 156.

(2). The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877, shall apply to applications under sub-rule (2).

No fresh suit on the same cause of action.—This rule prohibits a fresh suit on the same cause of action. As to the meaning of cause of action, see notes to s. 20, "Cause of action," p. 86 above.

A, a member of a joint Hindu family, sues *B* for redemption of a mortgage of ancestral property executed by *A* to *B*. *A* then dies. *A*'s heirs are not brought on the record, and the suit abates. Subsequently *A*'s son and grandsons institute another suit against *B* for redemption of the mortgage. There is no indication that *A*'s suit was brought by him in a representative capacity, that is, as representing the joint family. The second suit is not barred (*f*).

Who may apply under this rule.—The following persons may apply under sub-r. (2), namely, (1) *the plaintiff*, where a suit has abated under r. 4, sub-r. (3) (*g*), (2) *the legal representative of a deceased plaintiff*, where a suit has abated under r. 3, sub-r. (2); *the assignee of an insolvent plaintiff*, where a suit is dismissed under r. 8, sub-r. (2).

"Sufficient cause."—This rule provides that the Court shall set aside the abatement if the applicant proves that he was prevented by any sufficient cause from continuing the suit, that is, if he satisfies the Court that he had sufficient cause for not applying in time to bring the legal representatives of the deceased on the record (*h*). Thus the ignorance of the death of the deceased may be a sufficient cause unless the ignorance implied negligence (*i*).

Cause of action of original and revived suit must be the same.—No fresh cause of action can be imported into the revived suit, for the proceedings in the revived suit are a continuation of the proceedings in the original suit (*j*).

Limitation.—An application under this rule for an order to set aside an abatement must be made within 60 days from the date of the abatement [Limitation Act, 1908, sch. I, art. 171]. The application for an order to set aside dismissal of a suit must also be made within the same period [*ib.*, art. 172]. In either case, the provisions of s. 5 of the Limitation Act will apply to the application, and the Court may admit the application even after 60 days, if the applicant satisfies the Court that he had sufficient

(*f*) *Ramchandra v. Shripatrao* (1916) 40 Bom. 248.

(*g*) *Secretary of State v. Jawahar Lal* (1914) 38 All. 235; *Brij Indar Singh v. Kanesh Ram* (1917) 44 I. A. 218, 227, 45 Cal. 94, 108-109; (1917) Punj. Rec. no. 104, p. 393.

(*h*) *Daya Singh v. Buta Singh* (1916) Punj. Rec. no. 118, p. 369.

(*i*) *Daya Singh v. Buta Singh* (1916) Punj. Rec. no. 118, p. 369. See also *Chandra Kumar v. Sandhyamani* (1909) 36 Cal. 418; *Zainah Bibi v. Rohilla* (1917) Punj. Rec. no. 23, p. 90.

(*j*) *Sham Chand v. Bhayaram* (1895) 22 Cal. 92.

O. 22,
rr. 9, 10.

cause for not making the application within 60 days. See notes to r. 4 above, "Where no application is made within the period of limitation," p. 666 above.

Appeal.—An appeal lies from an order *refusing* to set aside the abatement or dismissal of a suit [O. 43, r. 1, cl. (k)].

10. [s. 372.] (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

Procedure in case of
assignment before final
order in suit.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

Sub-rule (2) is new. See notes below under the head "Sub-rule (2)."

Other cases of assignment, creation or devolution of interest.—It will be observed that the preceding rules deal with certain specified cases of assignment, creation and devolution of interest. Rule 8 deals with the case of assignment on the insolvency of a plaintiff, rule 7 with the case of creation of an interest to a husband on marriage, and rules 2, 3 and 4 with the case of devolution of interest on the death of a party to a suit. The present rule provides for cases of assignment, creation and devolution of interest *other than* those mentioned above (k).

Assignment of interest.—This includes a *lease* granted by the defendant during the pendency of a suit (l).

Devolution of interest.—The phrase "devolution of interest" is not confined in its meaning to devolution by *death*. This clearly appears from the words "to whom such interest has come" in the latter part of the rule. Hence where during the pendency of a suit instituted by the manager of an encumbered estate, the estate is released from management and restored to the owners, it is open to the owners to apply to be made plaintiffs in place of the manager under this rule (m).

Assignment of interest.—The word "interest" in this rule means interest in the property, the subject-matter of the suit (n).

Illustrations.

1. A sues B for recovery of possession of certain property. Pending the suit, A sells his interest in the property to C. C may apply under this rule to have his name substituted as plaintiff in A's place.

2. A sues the firm of BC to recover Rs. 5,000. Pending the suit the firm of BC transfers all its assets and liabilities to the firm of XY. Thereupon A applies to the Court under this rule to have the firm of XY joined as a party defendant. The application should be refused, for the assignment cannot be said in any sense to be

(k) *Bhugwan Das v. Nilkanta* (1904) 9 C. W. N.

171, 173.

(l) *Ram Kumar Lal v. Raja Mukund Sakt* (1916)

1 Pat. L. J. 596.

(m) *Sourindra v. Siromoni* (1901) 23 Cal. 171;

Macleod v. Kissan (1906) 30 Bom. 250.

(n) *Harish Chandra v. Chandpore Co. Ltd.* (1903)

30 Cal. 961.

an assignment of the defendant's interest in the *subject-matter of the suit*: *Harish Chandra v. Chandpore Co., Ltd.* (1903) 30 Cal. 961. [Here the subject-matter of the suit is the amount claimed by A, namely, Rs. 5,000].

Insolvency of defendant : Joinder of Official Assignee.—This section applies to the devolution of an interest by reason of an adjudication in insolvency and a vesting order thereunder (o).

(a) A sues B to recover Rs. 5,000. Pending the suit B is adjudged an insolvent, and his property vests in the Official Assignee under a vesting order made by the Insolvency Court. The Official Assignee should not be added as a party defendant, for though the vesting order has the effect of an assignment of the estate of the insolvent to the Official Assignee, it could not be said, when an action purely *in personam* (as distinguished from an action relating to the insolvent's property) is brought against the insolvent, that any part of the *subject-matter of the suit* has been assigned to the Official Assignee: see *Miller v. Budh Sing* (1891) 18 Cal. 43; *Chandmull v. Ranee Soondery* (1895) 22 Cal. 259; *Punithavelu v. Bhashyam* (1902) 25 Mad. 406, 421.

(b) A sues B for recovery of possession of certain immoveable property. The defence is that B is the full owner of the property. Pending the suit, B is adjudged an insolvent and his property vests in the Official Assignee. This is a case in which the Court may add the Official Assignee as a party defendant under this rule. The reason is that the property which forms the *subject-matter of the suit* is part of the property which has passed to the Official Assignee under the vesting order: see *Punithavelu v. Bhashyam* (1902) 25 Mad. 406. If the Official Assignee refuses to defend the suit, the insolvent is not entitled to defend the suit independently of the Official Assignee: *Tribhovandas v. Abdulally* (1914) 39 Bom. 568. As to the old law on the subject, see the undermentioned case (p).

Note.—It will be noted that the above illustrations are confined to the case of an insolvent defendant. The reason is that the case of an insolvent plaintiff is dealt with in r. 8, and the present rule deals with cases of assignment other than those specified in the preceding rules.

“During the pendency of a suit.”—These words mean “before a final decree or order has been passed or made in the suit” [see the marginal note to the rule]. Hence the provisions of this rule apply if the assignment, creation or devolution of interest takes place before a final decree or order is passed or made in the suit. In the case of an appeal, the provisions of this rule apply if the assignment, etc., takes place before a final decree or order is passed or made in the appeal [see r. 11 below]. In the case of an assignment, etc., pending a suit, the application must be made *pending the suit*. The reason is that the applications contemplated by this rule are applications to *continue the suit*, applications made after the termination of the suit are not within this rule (q). Similarly, in the case of an assignment, etc., pending an appeal, the application must be made *pending the appeal*.

Illustrations.

1. A decree is passed in a suit respecting a will that a scheme should be settled. Before the scheme is settled and a final order made, the interest of one of the parties to the suit passes by devolution to AB. AB may be brought on the record under this rule: *Gocool Chunder v. Administrator-General* (1880) 5 Cal. 726.

(o) *Punithavelu v. Bhashyam* (1902) 25 Mad. 406, 418.

(p) *Hunt in re* (1864) 1 Bom. H. C. A. C. 251.

(q) *Sitaramagowami v. Lakshmi* (1918) 41 Mad. 510; *Collector of Muzaffernagar v. Husaini Begam* (1898) 18 All. 86.

O. 22, r. 10.

2. The devolution of interest of a party to a suit after an order has been made directing the Commissioner to take accounts, but before the passing of the *final* decree, is within this rule : *Keshub Roy v. Krishto Mitter* (1903) 30 Cal. 609.

3. The assignment of the interest of a mortgagee in a suit for sale of the mortgaged property after a preliminary decree for sale, but before the passing of the *final* decree, is within this rule : *Chunni Lal v. Abdul Ali Khan* (1901) 23 All. 331.

4. In a suit by *A* against *B* to recover certain immoveable property a decree is passed for *A*. *B* appeals from the decree. Pending the appeal, *A* sells the property to *C*. *C* may be made a party to the appeal under this rule : *Rajaram Bhagvat v. Jibai* (1885) 9 Bom. 151; *Pandit Gocul Chand v. Kuar Sarat* (1896) 18 All. 285.

5. *A* sues *B* to recover Rs. 5,000, and a decree is passed for him. *B* appeals from the decree. Pending the appeal, *A* assigns the decree to *C*. *C* may be made a party to the appeal under this rule : *Durga Prasad, in the matter of* (1900) 22 All. 231.

6. *A* sues *B* for redemption of a mortgage. A preliminary decree for redemption is passed, and a time is fixed within which the mortgage money is to be paid by *A* into Court. The money is not paid in by *A* by that date, nor is any application made by *B* under cl. (4) of O. 34, r. 8, for a decree for sale. *A* then sells the mortgaged property to *C*. This amounts to an assignment pending the suit so as to entitle *C* to be brought on the record as a party under this rule : *Muhammad v. Jarao* (1915) 37 All. 226.

7. *A* sues *B* to establish his right to certain property. Pending the suit *B* mortgages the property to *C*. A decree is then passed in favour of *A*. *B* does not appeal from the decree. *C*, being desirous of appealing from the decree, applies to be made a party to the suit. The suit having terminated, *C* should not be joined as a party to the suit. He may, however, appeal from the decree under s. 146 as a person claiming under *B* within the meaning of that section : *Sitaramaswami v. Lakshmi* (1918) 41 Mad. 510.

Sub-rule (2).—*A* obtains a decree against *B*. *B* appeals from the decree. Pending the appeal *C*, who holds a decree against *A*, attaches the decree obtained by *A* against *B*. *C* may be made a party under this rule. See O. 21, r. 53.

No new suit.—It is clear from the terms of this rule that when a party is brought on the record under this rule, there is, as regards him, no new suit at all. He is added in the suit already instituted, and that suit is continued by or against him. The essence of this rule, whether applied to proceedings in the Court of first instance or proceedings in appeal, is that the suit is *one* from the beginning and that the addition of the transferee does not initiate, as regards him, a new proceeding (*r*).

Doctrine of lis pendens.—In this connection may be noted the provisions of s. 52 of the Transfer of Property Act, 1882, which run thus : "During the active prosecution . . . of a contentious suit or proceeding in which any right to any immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose."

Limitation.—The right to apply under this rule accrues from day to day, and is not therefore barred by lapse of time. An application therefore to be added or substituted as a party under this rule may be made at any time (*s*).

(*r*) *Chunni Lal v. Abdul Ali* (1901) 23 All. 331,
335.

(*s*) *Kedarnath v. Harra Chand* (1882) 8 Cal. 420 ;

Keshub Roy v. Krishto Mitter (1903) 30
Cal. 609.

Effect of adding or substituting new plaintiff or defendant under this rule.—As to this it is now provided by the Limitation Act, 1908, s. 22, that in the case of substitution or addition of any party owing to an assignment or devolution of any interest during the pendency of a suit, the suit should, as regards such party, be deemed to have been instituted *when it was commenced*. O. 22.
rr. 10-12.

Appeal.—An appeal lies from an order under this rule *giving or refusing* to give leave [O. 43, r. 1, cl. (1)]. Under s. 588 of the Code of 1882 an appeal was allowed only from an order *giving* leave to be joined as a party. But it was held that though no appeal lay under that section from an order *refusing* leave to be joined as a party (*t*), the order was appealable as a “judgment” under cl. 15 of the Letters Patent (*u*). It is no longer necessary to resort to the Letters Patent, having regard to the wide language of O. 43, r. 1, cl. (1).

11. [S. 582, 1st para.] In the application of this Order to appeals, so far as may be, the word “plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.

Application of Order to proceedings.

12. [New.] Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

This rule sets at rest the conflict on the question whether the provisions relating to the abatement of suits and appeals apply to proceedings in execution.

ORDER XXIII.

Withdrawal and Adjustment of Suits.

1. [S. 373.] (1) At any time after O. 23, r. 1. the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

Withdrawal of suit or abandonment of part of claim.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

(i) *Jamna Bibi v. Shaikh Jan* (1902) 24 All. 582.
(u) *Commercial Bank of India v. Subju Sahab* |

(1900) 24 Mad. 252.

O. 23, r. 1. it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

Sub-rule (1).—This sub-rule is new. It does not create any new right. It merely affirms the right of a plaintiff to withdraw a suit in whole or in part against all or any of the defendants, and is added here to make the rule a complete enunciation of the law relating to the withdrawal of and from suits. Sub-r. (1) contemplates a withdrawal of the suit, sub-r. (2) a withdrawal from the suit. If a party desires to withdraw from the suit with liberty to institute a fresh suit he must apply to the Court under sub-r. (2) to permit him so to withdraw. If he does not desire to have that liberty, then he can withdraw the suit of his own motion under sub-r. (1) and no order of the Court is necessary (v).

Non-suit.—There is no power in the Courts of India, similar to that exercised by Courts of Equity or Common Law in England, to enter a non-suit (w).

“Formal defect”—“Or other sufficient grounds.”—A suit may fail by reason of some *formal defect* or it may fail *on the merits*. Leave may be granted under this rule where the suit must fail by reason of some formal defect or there are “other sufficient grounds” within the meaning of sub-r. (2) (b) for granting the leave (x). Thus a misjoinder of parties or of causes of action is a formal defect; so is the improper valuation of the subject-matter of a suit. In such cases leave may be granted to the plaintiff to withdraw from the suit with liberty to institute a fresh suit (y). Similarly, leave may be granted where a material document is not properly stamped (z), or registered (a), for these are in the nature of formal defects. But the Court has no power under this rule to grant permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit in a case where issues have been joined and the plaintiff fails to produce evidence in support of the issues, or, where evidence has been adduced, but the evidence is not such as to support the plaintiff's case; the reason is that in cases of this character the suit must fail not by reason of some *formal*

(v) *Mahant v. Purshotamdas* (1908) 32 Bom. 345, 347.

(w) *Watson v. Collector of Rajshahye* (1869) 13 M. I. A. 160, 3 Beng. L. R. P. C. 48.

(x) *Zahurunnissa v. Khuda* (1881) 3 All. 528.

(y) *Watson v. Collector of Rajshahye* (1869) 13 M. I. A. 160; *Ganesht v. Khatri* (1894) 16 All. 279; *Kannuswami v. Jagathambal*

(1918) 41 Mad. 701, 707 [insufficient court-fees]; *Afsal Shah v. Lachmi Narain* (1918) 40 All. 7, 11 [misjoinder].

(z) (1869) 13 M. I. A. 160, 3 Beng. L. R. P. C. 48, *supra*.

(a) *Missor Debes v. Buldeo* (1873) 5 N. W. P. 116.

defect, but on the merits, and the apprehension of failure in the suit cannot be said to constitute a "sufficient ground" for allowing the plaintiff to institute a fresh suit (b). "It is impossible" said Scott, C.J., in a recent case, "to lay down any exhaustive definition of what are 'sufficient grounds' within the meaning of [this rule] but I think that the Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant" (c). *A fortiori*, the Court should not grant leave with liberty to bring a fresh suit in a case where after the case for both the plaintiff and the defendant has been closed the Court gives time to the plaintiff to produce documents to counteract the effect of documents produced by the defendant and the plaintiff fails to produce the documents on the appointed day. The plaintiff's failure to produce the documents is not "sufficient ground" for allowing him to withdraw from the suit (d). The words "other sufficient grounds" mean grounds analogous to a "formal defect" (e).

"May grant such permission."—Where leave is granted to the plaintiff to withdraw from the suit, the order must not be one dismissing the suit with liberty to bring a fresh suit, but one permitting the plaintiff to withdraw from the suit with liberty to bring a fresh suit (f). Where leave is refused the Court should simply dismiss the application. It should not make an order disposing of the suit on the assumption that the plaintiff would withdraw the suit if the application was refused (g). It may here be noted that the permission given by the Court must be in *express* terms and cannot be implied (h).

"Withdrawing without permission."—If a plaintiff withdraws from a suit without the permission of the Court, he is precluded from instituting a fresh suit in respect of the same subject-matter (i). But if the subject-matter of the second suit is different from that of the first (j), or if the second suit is not against the same parties (k), the second suit will not be barred. When the parties to a suit presented a joint petition praying that the suit might be struck off, which was done, it was held that the plaintiff must be taken to have withdrawn from the suit without permission to institute a fresh suit (l).

Same subject-matter.—As stated above, if a suit is withdrawn without the permission of the Court, the plaintiff is precluded from bringing a fresh suit in respect of the same subject-matter. The expression "subject-matter" does not mean property. It has reference to the right in property which the plaintiff seeks to enforce. Thus in a Calcutta case, where A instituted a suit to establish his right to sell certain property in satisfaction of a decree against B, but withdrew the suit without obtaining leave to bring a fresh suit, and subsequently instituted another suit to establish his right to sell the same property in satisfaction of another decree against B, it was held that the second suit was not barred. The Court said: "Now, though the property in respect of which

b) *Watson v. Collector of Rajshahye* (1869) 13 M. I. A. 100; *Banwari Das v. Muhammad* (1887) 9 All. 690; *Sukh Lal v. Bhikhi* (1889) 11 All. 187; *Kali Prasanna v. Panchanan* (1917) 44 Cal. 367; *Burathagunta v. Kurlapati* (1911) 1 Mad. W.N. 105; *Jhunku Lal v. Bisheshar Das* (1918) 40 All. 612; *Padma v. Girish Chandra* (1919) 46 Cal. 168.
(c) *Mahipati v. Nathu* (1909) 33 Bom 722, 726.
(d) *Bai Kashibai v. Shivappa* (1913) 37 Bom. 682; *Aiya v. Gopanna* (1914) 27 Mad. L. J. 480.
(e) *Kharda Co. Ltd. v. Durga Charan* (1910) 11 Cal. L.J. 45, per Mookerjee J.; *Mabulla v. Rani Hemangini* (1910) 11 Cal. L. J.

512; *Kali Prasanna v. Panchanan* (1918) 44 Cal. 367; *Mahendra Ram v. Singi Lal* (1918) 3 Pat. L. J. 651. Contra *Kannuswami v. Jagathambai* (1918) 41 Mad. 701, 706.
(f) See *Banwari Das v. Muhammad* (1887) 9 All. 690.
(g) *Mahant v. Parshotamdas* (1908) 32 Bom. 345.
(h) *Jita Singh v. Hari Singh* (1916) Punj. Rec. no. 97, p. 294.
(i) See *Kavshi Ram v. Rao Baldeo* (1919) Punj. Rec. no. 136, p. 352.
(j) *Kamini v. Ram Nath* (1894) 21 Cal. 265; *Gopal v. Purna* (1898) 4 Cal. W. N. 110.
(k) *Mukhoda v. Ram Churn* (1892) 8 Cal. 871.
(l) *Gulkanas v. Mannilal* (1901) 23 All. 219.

O. 23, r. 1. the present suit is brought is the *same* as that in respect of which the former suit was brought, still that would not be sufficient to make the present suit one for the *same matter* as that for which the former suit was brought, within the meaning of s. 373 " (m). Similarly, when the next reversionary heir of a deceased Hindu instituted a suit against his widow and an alienee from her of her husband's property for a declaration that the alienation was not binding on him, and the widow died pending the suit, and the reversioner withdrew the suit without obtaining leave to bring a fresh suit, and subsequently brought a suit against the alienee for possession of the same property, it was held that the second suit was not barred. Wallis, C.J., in delivering the judgment of the Court, said: "The terms 'subject-matter' and 'the same matter' which occurred in the corresponding section 373 of the old Code have not been defined, and must, we think, be construed strictly in a penal provision of this character. Without attempting an exhaustive definition of all that may be included in the term 'subject-matter,' we are of opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit" (n). The contrary, however, has been held by the Chief Court of the Punjab (o). In a recent Bombay case (p), A sued to eject B. Finding, however, that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Subsequently A gave a formal notice to quit and brought a fresh suit for ejectment. It was held that the suit was not barred under this section as the previous suit was not for the *same subject-matter* as the second suit, Scott, C.J., said, "We are of opinion that 'subject matter' means, to use the words of Order I, Rule 1, 'the series of acts or transactions alleged to exist giving rise to the relief claimed.' Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree. It was incomplete because there was no notice to quit. The second series of acts or transactions, is complete because the notice to quit has been given, and, therefore, the two suits are not in respect of the same subject-matter."

Withdrawing without leave of Court, but with consent of defendant.—In a case decided under s. 97 of the Code of 1859 it was observed by Norman, J., that where a plaintiff withdraws his suit without the permission of the Court, but with the consent of the defendant, he is not precluded from instituting a fresh suit in respect of the *same subject-matter* (q). The observations of Norman, J., on this point have been doubted in a recent case (r). The doubt seems to be well founded.

Withdrawing with permission.—Where a suit is withdrawn with the permission of the Court, the effect is to leave the parties in the same position as that in which they stood before the suit was brought. The plaintiff can, therefore, include in the fresh suit a relief which he might have included in the first suit, but which he had omitted to include therein (s).

"On such terms as to costs."—Where leave is granted to a plaintiff to withdraw from the suit with liberty to institute a fresh suit on condition that he should

(m) *Kamini v. Ram Nath* (1894) 21 Cal. 265 followed in *Gopal Chandra v. Purna Chandra* (1898) 4 Cal. W. N. 110.

(n) *Singha Reddi v. Subba Reddi* (1916) 39 Mad. 987, overruling *Achuta v. Achutan* (1898) 21 Mad. 35.

(o) *Jita Singh v. Hari Singh* (1916) Punjab Rec. no. 97, p. 294.

(p) *Rakhmabai v. Mahadeo* (1918) 42 Bom. 155.

(q) *Juggobundo v. Watson & Co.*, Bourke's Rep. Part VII, p. 162.

(r) *Gopalchandra v. Purna Chandra* (1898) 4 Cal. W. N. 110.

(s) *Behari Lal v. Srimati Baram* (1895) 17 All. 53.

pay the costs of the defendant on or before a certain date, but the amount of costs could not be ascertained before the specified date, the Court may extend the time for payment (t). In a recent case permission was granted to a plaintiff to withdraw from the suit with liberty to bring a fresh suit on the terms that he should pay Rs. 500, being the costs of the defendant. The payment of costs was made a condition precedent to the institution of a fresh suit. The plaintiff instituted a fresh suit without payment of costs, but he paid the amount of costs before the hearing of the suit. It was held that this did not make the suit void *ab initio*, and that the non-payment amounted to a mere irregularity which was cured by subsequent payment (u). But if the costs are not paid before the hearing, the suit must be dismissed (v).

Defendants in fresh suit.—Where a suit has abated as against one of several defendants, and it is then withdrawn with permission to bring a fresh suit, such permission does not entitle the plaintiff to join the legal representatives of the deceased defendant as party defendants to the fresh suit, the suit having abated as against him (w).

Arbitration.—When the matters in dispute in a suit are referred to arbitration by an order of the Court made under Schedule II, para. 3, the Court has no power under this rule to grant permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit. The provisions of this rule do not apply to such a case, for when once a matter is referred to arbitration, the Court is precluded from dealing with it in the same suit save in the manner and to the extent provided in Schedule II. A sues B for possession of certain property. The matters in difference between the parties are referred to arbitration by an order of the Court. The Court has no power, either before or after the award is made, to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit (x). But where a reference to arbitration has been made without the intervention of the Court (that is, not by an order of the Court under Schedule II, para. 3), and one of the parties to the reference applies to the Court under Schedule II, para. 20, to file the award, the provisions of this rule are applicable, and it is open to the applicant to withdraw the application (numbered and registered as a suit under the said para. 20) under sub-r. (1) of this rule (y).

Power of appellate Court to give leave to plaintiff to withdraw from suit.—It has been held by the High Court of Bombay (z) that the present rule applies only to pending suits, and not to suits already disposed of. Therefore, where a plaintiff's suit is dismissed, and the plaintiff appeals from the decree, the appellate Court has no power to allow the plaintiff-appellant to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. On the other hand, it has been held by the Allahabad High Court, following the long-standing practice of that Court, that the appellate Court has such power (b). In a recent case a Full Bench of the Madras High Court held, after a review of all the authorities, that it is open to an appellate Court in proper cases, when reversing the decree of the lower Court, to give leave to the plaintiff to withdraw from the suit with liberty to file a fresh suit (c). The view taken by the Madras High Court is supported by the provisions of s. 107, sub-s. (2).

Withdrawal of suit pending appeal.—Where a decree is passed in a suit for partition under which the defendants have acquired by concession of the plaintiff rights

(t) *Peria Muthirian v. Karappaanna* (1906) 29 Mad. 370.

(u) *Abdul Aziz v. Ebrahim* (1904) 31 Cal. 965.

(v) *Robert Fischer v. Nagappa* (1909) 38 Mad. 255.

(w) *Seshama v. Suryanarayana* (1913) 38 Mad. 643.

(x) *Shoamber v. Deodat* (1887) 9 All. 168; *Debi Churn v. Bipra* (1902) 7 Cal. W. N. 168.

(y) *Gauri Shankar v. Maida Koor* (1904) 31 Cal. 516.

(z) *Eknath v. Banoji* (1911) 35 Bom. 261. See also *Choragudi v. Appa Row* (1914) 27 Mad. L. J. 244.

(b) *Astal v. Akbari* (1915) 37 All. 326.

(c) *Kamayya v. Papayya* (1917) 40 Mad. 259 [F. B.].

O. 23,
rr. 1, 2.

which otherwise could not have existed, *e.g.*, where instead of providing merely for the maintenance of widows of deceased co-parceners they are given their respective husbands' share in the joint property, it is not open to the plaintiff who has made that concession afterwards to annul its effect by withdrawing the suit of his own free will in the appellate Court. If he does so, the proper course for the appellate Court to follow is to dismiss the appeal so as to leave the decree of the lower Court intact (*d*).

Appal and revision.—A decision under this rule granting leave to a plaintiff to withdraw from a suit or to abandon a part of his claim with liberty to institute a fresh suit is not a decree, and is not therefore appealable. See the last illustration on p. 5 above and the cases there cited. Since the order is not appealable, it is subject to revision if s. 115 otherwise applies to the case (*e*).

It has been held by the High Court of Calcutta that if leave is granted to a plaintiff to withdraw from a suit with liberty to bring a fresh suit on a ground *erroneously* held by the Court granting leave to be a "sufficient ground" within the meaning of sub-r. (2), the order is one made *without jurisdiction* and the High Court has power to revise it under s. 115 (*f*). On the other hand, it has been held by the Allahabad High Court that such an order, though erroneous, is not one made without jurisdiction and that the High Court has no power to interfere in revision (*g*).

When an order is made under this rule granting leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the alleged ground of a "formal defect," but there is no defect in fact, and the order was made by the lower Court without any enquiry as to the existence of the alleged defect, the High Court may set aside the order in revision (*h*).

Effect of reversal of order granting leave to withdraw.—Where an order granting leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit is reversed by the High Court in revision, but before the reversal of the order a fresh suit is filed, the procedure is to declare the fresh suit null and void and to direct the lower Court to proceed with the original suit from the stage which it had reached when the order granting leave was made by that Court (*i*).

Does not apply.—The provisions of this rule do not apply to suits instituted under the Bengal Rent Act 10 of 1859, which is a complete Code by itself (*j*).

2. [S. 374.]

Limitation law not affected by first suit.

In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Limitation.—The fresh suit must be instituted within the period of limitation; it will not lie after the period of limitation even though the suit that was permitted to be

(*d*) *Satyabhamabai v. Ganesh* (1905) 20 Bom. 13.

(*e*) *Dick v. Dick* (1893) 15 All. 169; *Rajendra Lal v. Atal* (1917) 44 Cal. 454, dissenting from the dictum of Coxe, J., in *Bansi Singh v. Kishun Lal* (1918) 41 Cal. 682; *Bisheshan v. Bhrijra* (1918) 3 Pat. L. J. 680.

(*f*) *Kali Prasanna v. Panchanan* (1918) 44 Cal. 307; *Kharda Co. Ltd. v. Durga Charan* (1910) 11 O. L. J. 45.

(*g*) *Jhunku Lal v. Bisheshar Das* (1913) 40 All. 612.

(*h*) *Nathuni Ram v. Sheo Koer* (1918) 3 Pat. L. J. 460.

(*i*) *Nathuni Ram v. Sheo Koer* (1918) 3 Pat. L. J. 460.

(*j*) *Gulam Mahomed v. Shibendra* (1908) 35 Cal. 990.

O. 23,
rr. 2, 3.

withdrawn was within the period of imputation (k). But if the first suit was brought in a Court having no jurisdiction to entertain it, that Court has no power under rule 1 above to make any order under that rule. If the Court does not make an order under that rule, and gives leave to the plaintiff to withdraw the suit with liberty to bring a fresh suit the order is *ultra vires*, and if a fresh suit is then brought, the case will be governed not by the provisions of this rule, but by sec. 14 of the Limitation Act, which provides that in computing the period of limitation the time during which a plaintiff has been prosecuting his suit in good faith in a Court having no jurisdiction to entertain the suit, shall be excluded (l).

3. [S. 375.]

Compromise of suit.

Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith, so far as it relates to the suit.

Alterations in the rule.—This rule differs from the corresponding s. 375 of the Code of 1882 in three respects, namely :—

1. The words "where it is proved to the satisfaction of the Court that" have been added into the rule to set at rest the conflict of opinion noted below in the commentary under the head "Where a compromise set up by one party is denied by the other."
2. The words "the Court shall order such agreement.....to be recorded" have been substituted for the words "such agreement.....shall be recorded." The object is to bring out the word "order" prominently, as an appeal is now given from an order made under this rule recording or refusing to record an agreement. See O. 43, r. 1, cl. (m), and notes below under the head "Appeal."
3. The words, "and such decree shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction," which occurred in the old section after the words "so far as it relates to the suit" have been omitted. See notes to s. 96 under the head "Sub-s. (3): consent decree not appealable."

Scope of the rule.—The agreement, compromise or satisfaction contemplated by this rule may (1) relate *wholly* to the suit, or (2) it may relate only to a *part* thereof or (3) it may also comprise *matters that do not relate to the suit*. Where the agreement *wholly* relates to the suit, the Court must, on being invited by the parties, record the agreement, and pass a decree in accordance with the agreement, and the suit stops there. Where the agreement relates to a *part only* of the suit, the Court must, on the application of the parties, pass a decree in accordance with the agreement, and the suit may be proceeded with as respects the rest of the suit. Where the agreement, besides relating to the suit or a part thereof, also comprises matters that do not relate to the suit, the decree must comprise only such terms of the agreement as relate to the suit, but not the rest. As to the case where a decree comprises matters not relating to the suit, see below notes "Where the decree comprises matters that do not relate to the suit."

(k) *Varajlal v. Shomeshwar* (1905) 29 Bom. 219. | (l) *Ramdeo v. Goneshnarain* (1908) 35 Cal. 921.

- O. 23, r. 3. It is important to note that a consent decree under this rule can be passed only after an order is made directing the compromise to be recorded. This is not a mere matter of form, as the aggrieved party has a right of appeal against such order under O. 43, r. 1, cl. (m) (m). See notes below under the head "Appeal."

Where a compromise set up by one party is denied by the other.—Suppose that a party to a suit, alleging that the suit has been adjusted by a lawful agreement, applies to the Court to record the agreement and to pass a decree in accordance therewith. Suppose, further, that the opposite party to the suit denies that there was any such agreement as alleged, or, while admitting that there was such an agreement, alleges that he wishes to recede from it. Has the Court power, if the fact of the agreement is denied, to determine whether as a fact the alleged agreement adjusting the suit was made, and to pass a decree if it finds as a fact that the alleged agreement was made? Further, if the opposite party, while admitting that there was such an agreement, alleges that he wishes to recede therefrom, has the Court power under this rule to pass a decree in accordance with the agreement? Both these questions were, under the old section, answered in the affirmative by the High Courts of Bombay, Madras and Calcutta (n), but in the negative by the High Court of Allahabad (o). According to the Allahabad decisions, the Court had no power under the old section to record an agreement and to pass a decree in accordance therewith, unless both the parties consented before the Court to have the agreement recorded; that is to say, even where there had been an agreement to adjust the suit, the Court could act under that section only if both the parties were in agreement at the moment of moving the Court, and if they were not then in accord, the agreement could only be enforced by a fresh suit for specific performance. The conflict arose from the words "if a suit be adjusted wholly or in part by any lawful agreement or compromise" with which s. 375 commenced. The present rule gives effect to the Bombay, Madras and Calcutta decisions. The words "*where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part*" clearly show that the Court has power under this rule, where an agreement or compromise is denied, to decide whether, as a fact, the alleged agreement or compromise was made, and if it is satisfied that it was made, to record it (p).

Adjustment: submission and award.—It was held in two Bombay cases under the Code of 1882 that when the matters in difference in a suit are referred to arbitration *without the intervention of the Court*, and the arbitrator makes his award, the submission and the award may be treated as an "adjustment of the suit by an agreement" within the meaning of s. 373 of that Code, and the same may be recorded as an adjustment under that section (q). In the later of the two cases (r) Starling, J., said that it was open to the plaintiff to proceed under s. 525 [now sch. II, para. 20], but that it was not obligatory upon him to do so, as there was no express provision in the Code 1882 that no other course than that prescribed by s. 525 should be followed. The present Code does contain such a provision, for it is enacted by s. 89 that save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force all references to arbitration should be governed by the provisions of Schedule II. In a Bombay case, however, decided under this Code, it was held that para. 20 of Schedule II did not apply to a reference in a pending suit, and that the

(m) *Paban Sardar v. Bhupendra Nath* (1916) 43 Cal. 85.

(n) *Goolidas Manufacturing Co. v. Scott* (1892) 16 Bom. 202; *Sambas v. Premji* (1896) 20 Bom. 804; *Appasami v. Varadachari* (1896) 19 Mad. 419; *Sridharan v. Purnamathan* (1900) 25 Mad. 101; *Brojodurishah v. Ramanath* (1897) 24 Cal. 908.

(o) *Bandhu v. Shah Muhammad* (1892) 14 All. 350.

(p) *Sital v. Lal Bahadur* (1915) 38 All. 75, 80-81.

(q) *Sambas v. Premji* (1896) 20 Bom. 804; *Pragdas v. Giridharas* (1902) 26 Bom. 76. These decisions were doubted in *Rukhanbhai v. Adamji* (1909) 33 Bom. 69.

(r) (1902) 26 Bom. 76, 80, *supra*.

submission and the award could be recorded as an adjustment under this rule. As to O. 23, r. 3, s. 89, it was said, that the words "any other law for the time being in force" were wide enough to include the provisions of O. 23, r. 3 (s). Four years later the same High Court held that having regard to the provisions of s. 89 the submission and award could not be recorded as an adjustment under this rule, and that the correct procedure was to apply to the Court to file the award under paragraphs 20 and 21 of Sch. II (t). The above decisions were reviewed by Sir Norman Macleod in a recent case (u), and it was laid down that where parties enter into an agreement to refer the matters in dispute between them in a pending suit to arbitration, they may make the agreement an order of Court by an application under para. 1 of Sch. II in which case paras. 1 to 16 of that schedule would apply. They are not entitled in such a case to have the agreement filed under para. 17, or, if an award is made, to have the award filed under paras. 20 and 21. If the agreement is not made an order of Court, and if an award is made and both parties accept the award, they can apply for a consent decree in terms thereof and there is no need to apply for an order recording the terms of the adjustment. If the plaintiff disputes the award for any reason and proceeds with the suit, the defendant may plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment if the defendant disputes the award, the plaintiff may have the case set down for trial on the issue whether the adjustment could be recorded; or either party may file a suit to enforce the award, and apply for a stay of the original suit. In any event it is clear that a mere agreement to refer to arbitration matters in difference in a pending suit, where the parties have not gone beyond the agreement to refer and no award has been made, cannot be treated as an "adjustment" of the suit within the meaning of this rule (u). A decree obtained upon an award on a reference to the presiding judge and another individual must be regarded as a consent decree, and it is not subject to the provisions of the Sch. II. (v).

The agreement must be one adjusting a suit.—In the course of a suit the pleaders for both parties agreed that if a certain fact appeared upon a certain document, the Court should decree the suit, otherwise the suit should be dismissed. Held that this was not an agreement adjusting the suit within the meaning of this rule, for it was not complete, and left something to be done by the Court, viz., to ascertain whether a certain fact appeared upon a certain document (w).

Agreement to take oath under the Oaths Act 10 of 1873.—Where it is agreed in the course of the hearing of a suit between the plaintiff and the defendant that the plaintiff should take a certain oath on a certain date, and that if he did so, there should be a decree for him, but that if he failed to do so, his suit should be dismissed, and the plaintiff fails to take the oath, the agreement does not amount to an adjustment of the suit so as to entitle the defendant to have the suit dismissed. In such a case the Court should not dismiss the suit, but should record the refusal and the reasons thereof under s. 12 of the Oaths Act, and proceed with the trial of the suit (x).

Court cannot refuse to record a compromise except where it is unlawful.—Where both parties to a suit apply to the Court under this rule to pass a decree in accordance with the terms of a compromise, the Court has no power to refuse to pass the decree, merely because in its view the compromise is too

(e) *Harakhbai v. Jannabai* (1912) 37 Bom. 639.
See also *Chinna v. Venkatasami* (1919)
42 Mad. 625, 627-628.

(t) *Shavakshaw v. Tyab Haji Ayub* (1916) 40 Bom. 386.

(u) *Mandil v. Goculdas* (1920) 22 Bom. L. R. 1048.

(v) *Tincowry v. Fakir Chand* (1903) 30 Cal. 218;

Venkatachala v. Rangiah (1911) 36 Mad. 353; *Vyankatesh v. Ramchandra* (1914)
38 Bom. 637.

(v) *Chinna v. Venkatasami* (1919) 42 Mad. 625, 629.

(w) *Muhammad v. Cheda Lal* (1892) 14 All. 141.

(x) *Etakkott v. Etakkott* (1908) 31 Mad. 1.

O. 23, r. 3. favourable to one of the parties (y). But if the agreement or compromise is unlawful as where it is opposed to public policy, the Court should under this rule refuse to pass a decree on the compromise even though both the parties consent thereto (z). If a decree is passed under this rule on a compromise which is not lawful, the Court should not enforce the decree in execution proceedings. Thus a sale of an office attached to a temple is against public policy. Hence if in a suit against the holder of such an office a compromise is arrived at whereby the holder of the office consents to the office being sold in satisfaction of the debt due to the plaintiff, and a decree is passed on the compromise, the Court should notwithstanding the consent decree refuse to sell the office in execution (a). It is clear that if the matter had rested in contract only, the Court could not have enforced the sale in a suit brought for that purpose. The mere fact that the contract is embodied in a decree does not alter the incidents of the contract. By private agreement, converted into a decree, parties cannot empower themselves to do that which they could not have done by private agreement alone (b). The principle is that where a decree is based on an agreement of compromise, the Court must be taken to adopt the agreement *with all its incidents* (c). "The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a judge" (d). One of the incidents of the contract in the above case was that the Court could not have enforced the sale of the office, had a suit been brought upon the contract. That incident still remained, though the agreement was recorded and a decree passed in accordance therewith. See notes to s. 11, "Consent decree and estoppel," p. 62 above. The following are further illustrations :—

(a) *B* holds certain lands under a lease from *A*. The rent falls into arrears, and *A* sues *B* for arrears of rent and for possession. It is subsequently agreed between the parties that *B* should continue to hold the lands as *A*'s tenant, but upon fresh terms arranged between the parties, and that if default should be made in payment of rent on the due dates, the lease should be forfeited [note that this last is a forfeiture clause]. A decree is passed in terms of the agreement under this rule. *B* commits default in payment of rent. *A* thereupon applies for possession of the land *in execution of the decree*. *P* offers to pay the arrears, and applies that he may be relieved against forfeiture. It is clear that if the matter had rested in contract only, the Court could have granted the relief: the right to relief would have been an incident of the contract. The mere fact, therefore, that the agreement has been recorded and a decree passed in accordance therewith, does not preclude the Court from granting relief against forfeiture (e).

(b) The facts are the same as in the above illustration, except that instead of proceeding *in execution*, a fresh suit is instituted by *A* against *B* for possession on default of payment of rent. The same principle applies as in the above case (f). It would seem that the proper procedure in cases where the forfeiture clause is in the form stated in ill. (a) is to enforce the forfeiture not by an application to execute the consent decree, but by a regular suit (g). The clause does no more than declare the right of forfeiture, and thus far the decree is declaratory, and it is an elementary principle that a declaratory decree can only be enforced by a suit.

(y) *Motiram v. Yessu* (1898) 22 Bom. 238.

(z) *Sundarambal v. Yogavanagurukkal* (1915) 38 Mad. 850.

(a) *Lakshmananami v. Rangamma* (1909) 26 Mad. 81.

(b) *Great N. W. Central Ry. Co. v. Charlebois* (1899) A. C. 114.

(c) *Nagappa v. Vankat Rao* (1901) 24 Mad. 265, 270.

(d) *Wentworth v. Bullen* (1829) 9 B. & C. 84.

Devesley v. Gilmore (1895) L. R. I. C. 570. See also *Conolan v. Leyland* (1884) 27 C. D. 632, 638.

(e) *Nagappa v. Vankat Rao* (1901) 24 Mad. 265. See Transfer of Property Act, 1882, s. 114.

(f) *Krishanabai v. Hari Govind* (1907) 31 Bom. 15, overruling *Shirekuli v. Mahabliya* (1886) 10 Bom. 435.

(g) 31 Bom. 15, 22 *supra*.

It has been recently held by a Full Bench of the Bombay High Court that a compromise in a suit which comes under the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not bad in law because it is made without compliance with the provisions of sec. 15B of that Act (h).

Compromise of probate proceedings.—Unless a will is proved in some form, no grant of probate can be made merely on the consent of parties. Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not “lawful” within the meaning of this rule, and no probate can be granted merely because the caveator consents to the grant. Such an agreement is against public policy, for its object is to exclude inquiry into the genuineness of the will which it is the duty of the Probate Court to make (i). Hence it is open to the caveator, before probate is granted, to withdraw from the compromise and to require that the will be proved (j). For the same reason if an executor withdraws his petition for probate, such withdrawal being pursuant to a compromise, he is not precluded by the provisions of r. 1 above from presenting another petition for probate, though the first petition was withdrawn without the permission of the Court (k).

Where the decree comprises matters that do not relate to the suit.—The decree to be passed under this rule must be confined to matters *that relate to the suit*. This does not mean that the decree to be passed in accordance with a compromise must be restricted to the *reliefs* claimed in the plaint. “All terms which form the *consideration* for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit, and can be embodied in the decree.” Thus where *A* sued *B* on a promissory note, and a compromise was arrived at between the parties whereby *B* agreed to pay the amount of the note by instalments, and the amount was also made a charge on certain immoveable property of *B*, it was held that there was nothing in the present rule to preclude the Court from making the amount a charge on *B*'s property, even though the relief claimed was for a *money-decree* only. The *charge*, though not claimed as a relief, *related to the suit* (l). It formed the *consideration* for the time allowed for payment of the sum decreed by instalments, and thus constituted an integral and necessary part of the adjustment of the claim in the suit (m). But where *A* sued *B* to restrain *B* from building a projected house in such a way as to interfere with *A*'s enjoyment of light and air, and a compromise was arrived at between the parties whereby *B* undertook not to build his house higher than what it originally was, and also agreed, as regards a passage between the two houses, not to let water into the passage, it was held that the arrangement as to the passage did not relate to the suit, and that the decree should be confined to the undertaking as to the house (n). But if either party objects to the splitting of the agreement, the Court has no power to record only a part of it, unless the part sought to be recorded is quite distinct from the other, and the performance of the one is not dependent on the performance of the other (o). But the parties can get over the difficulty by amending the pleadings with the leave of the Court so as to comprise in the pleadings and the decree matters

(h) *Shivayyagappa v. Govindappa* (1913) 37 Bom. 614.

(i) *Monmohini v. Banga* (1904) 81 Cal. 357.

(j) *Janakbait v. Gajanan* (1916) 1 Pat. L. J. 377.

(k) *Jugeshwar v. Jagadhari* (1917) 2 Pat. L. J. 535. See Probate and Administration Act, 1881, s. 55.

(l) *Kurusetappa v. Sirusappa* (1907) 30 Mad. 478; *Natesa Chetti v. Vengu* (1909) 33 Mad. 102; *Bhuvanagiri v. Maradugula* (1907) 17 Mad. L. J. 200; *Subapathy v.*

Vanmahalinga (1914) 38 Mad. 959; *Ayyagiri v. Koobur* (1914) 27 Mad. L. J. 173; *Ratnaswami v. Ratnammai* (1914) 27 Mad. L. J. 388; *Charu v. Sambhu* (1918) 3 Pat. L. J. 255, 288.

(m) *Gobinda Chandra v. Dwarka Nath* (1908) 35 Cal. 837; *Purna v. Nil Madhub* (1901) 5 C. W. N. 485.

(n) *Ruttonsey v. Pooribai* (1883) 7 Bom. 304.

(o) *Ruttonsey v. Pooribai* (1883) 7 Bom. 304, 309. See also *Purna v. Nil Madhub* (1901) 5 C. W. N. 485.

- O. 23, r. 3. that did not relate to the original suit but are set forth in the compromise (p). In a Patna case where the plaintiff claimed Rs. 7,000 with interest at 9½ per cent. per annum, and a consent-decree was passed whereby the defendant agreed to pay Rs. 2,500 together with interest at 9 per cent. per annum if the amount was paid on a particular day, but at 24 per cent. per annum if it was paid after that date, the Court refused execution of the decree with interest at 24 per cent. on the ground that that part of the compromise was outside the scope of the suit, and allowed execution with interest at 9 per cent. only (q).

Execution of consent decree.—This rule requires that where the Court is invited to pass a decree in terms of an agreement or compromise, the agreement or compromise should be *lawful*; and, further, that the decree should not comprise those terms of the agreement or compromise that *do not relate to the suit*. Suppose now that a decree is passed on an agreement that is not lawful, or that it embraces matters that do not relate to the suit. It is clear that such a decree is not a nullity (r). But the question that requires consideration is, whether the Court is bound to execute the decree literally according to its terms? We proceed to state the effect of the decisions on the subject.

First, where a consent decree is based on an agreement or compromise that is not lawful. As to this, it has been held that "so far as the decree embodies unlawful terms of a compromise, it is inoperative, and will not be enforced" (s). This subject has already been considered in the notes above under the head "Court cannot refuse to record a compromise except where it is unlawful," p. 685 above.

Next, where a consent decree embraces matters that do not relate to the suit.—Where a consent decree includes terms of a compromise that do not relate to the suit, there is a conflict of opinion as to how far it can be executed. According to the Allahabad and Madras decisions, such terms can be enforced in execution of the decree (t). It is not open to the party against whom the decree is sought to be executed to object to the decree on the ground that it contains matters foreign to the suit. Such an objection, it has been said by the Madras High Court, must be taken by way of appeal from the decree [and now by way of appeal under O. 43, r. 1, cl. (m), from the order recording the compromise], and it cannot be taken in execution of the decree (u). On the other hand, the High Court of Calcutta has expressed the opinion that such terms cannot be enforced in execution of the decree, but they may be enforced as a contract by original suit (v). Such a suit, however, according to the Allahabad High Court, would be barred under s. 47, the question in the view taken by that Court being one relating to execution (w). In a recent case (ww) where a decree comprised matters outside the scope of the suit the Judicial Committee observed: "A perfectly proper and effectual method of carrying out the terms of [the present rule] would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This in fact is what the decree did in

(p) *Mohibullah v. Imami* (1887) 9 All. 229.
 (q) *Gauri Dutt v. Dohan* (1917) 2 Pat. L. J. 678.
 (r) *Purna Chandra v. Nil Madhub* (1901) 5 Cal. W. N. 485.
 (s) *Lakshmanaswami v. Rangamma* (1903) 26 Mad. 81.
 (t) *Mohibullah v. Imami* (1887) 9 All. 229; *Manager of Sri Meenakshi Devasthanam v. Abdul Karim* (1907) 30 Mad. 421; *Sabapathi v. Panmahalinga* (1914) 38 Mad. 959. See also *Gauri Dutt v. Dohan* (1917) Pat.

L. J. 678.
 (u) *Manager of Sri Meenakshi Devasthanam v. Abdul Karim* (1907) 30 Mad. 421; *Ramaswami v. Ratnammal* (1914) 27 Mad. L. J. 888.
 (v) *Jasimuddin v. Bhudan* (1907) 34 Cal. 456, 468; *Purna Chandra v. Nil Madhub* (1901) 5 Cal. W. N. 485.
 (w) *Mohibullah v. Imami* (1887) 9 All. 229.
 (ww) *Hemant Kumari v. Midnapur Zamindari Co.* (1919) 46 I. A. 240, 245.

the present case. *It may be that as a decree it was incapable of being executed outside the limits of the district, but that does not prevent it being received in evidence of its contents.*" **O.23, r. 3.**

Appeal.—An order under this rule recording or refusing to record a compromise is appealable under O. 43, r. 1, cl. (m). The Court may, under this rule, either record a compromise or it may refuse to do so. If an order is made recording the compromise the Court must pass a decree in accordance with the agreement. If an order is made refusing to record the compromise, the suit will be proceeded with. But in either case, as stated above, an appeal will lie from the order. Where an order is made recording the agreement, the appeal may be preferred on any of the following grounds:—

1. That there was no compromise at all, or no such compromise as the Court ordered to be recorded (x).
2. That the compromise is *not lawful* (y).
3. That the compromise recorded by the Court comprises *matters extraneous to the suit* (z).

A compromise entered into by a pleader without the authority of his client is no compromise at all (a), and as such it comes under group (1) above. The mere fact that a decree has been passed in accordance with the compromise does not preclude an appeal from the order recording the compromise (b).

See notes to s. 96, under the head "Sub-section (3): consent decrees not appealable," p. 248 above, and notes above under the head "Scope of the rule."

"Registration."—In order to understand what follows it is necessary to bear in mind that a document creating or declaring a right in immoveable property of the value of Rs. 100 or upwards requires registration (Registration Act, 1908, s. 17 (1) (b)) but that a decree, though it may create or declare a right in immoveable property of that value, does not require registration [*ib.*, s. 17 (2) (vi)]. It is also necessary to bear in mind that the present rule contemplates an agreement of a compromise commonly called *sulahnamah* or *razinamah* and that it provides for the recording of a compromise and of passing a decree in accordance with the compromise *so far as it relates to the suit*. It often happens that an agreement of compromise comprises not only the property in suit, but other property, and this gives rise to the following questions:—

1. A sues B for the recovery of certain immoveable properties. The parties enter into a compromise by which it is provided that B should have a moiety of the properties in suit and a moiety also of other properties which are not the subject of the suit. The latter properties are of the value of Rs. 5,000. In such a case a perfectly proper and effectual method of carrying out the terms of this rule would be for the decree to recite the whole of the agreement of compromise and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the suit, the decree taken as a whole would include the agreement (c). Suppose now that the procedure indicated above is followed, that is to say, a decree is

(x) *Goculdas v. James Scott* (1892) 16 Bom. 202, 212; *Talamand v. Faiz Din* (1918) Punj. Rec. no. 88, p. 277 (where no consent was given at all by some of the parties to the suit).
 (y) *Goc das v. James Scott* (1892) 16 Bom. 202, 212; *Shridharan v. Purnamathan* (1900) 23 Mad. 101.
 (z) *Venkatasappa v. Thimma* (1895) 18 Mad. 410; *Pragdas v. Giridhardas* (1902) 26 Bom.

76, 79; *Manager of Sri Meenakshi Devasthanam v. Abdul Kasim* (1907) 30 Mad. 421, 423; *Mahomed Rashid v. Rahmat Ullah* (1914) Punj. Rec. no. 96, p. 355.
 (a) *Thenal v. Sakkammal* (1917) 41 Mad. 283.
 (b) *Mahomed Rashid v. Rahmat-Ullah* (1914) Punj. Rec. no. 96, p. 355.
 (c) *Hemania Kumari v. Midnapur Zamindari Co.* (1919) 46 I. A. 240, 246.

O. 23,
rr. 3, 4.

passed including the whole agreement comprising the properties in suit as well as properties outside the suit, and that the operative part of the decree is confined to the properties in suit. Suppose, further, that neither the agreement of compromise nor the decree is registered. Suppose also that after the passing of the decree *A* refuses to deliver possession to *B* of a moiety of the properties outside the suit and that *B* institutes a suit against *A* for a declaration that he is entitled to a moiety of the properties outside the suit and for possession thereof and he relies upon the decree in support of his claim. Is the decree admissible in evidence, regard being had to the fact that it is not registered? It has been held by the Judicial Committee that it is, for as stated above it does not require registration, though it may be that it is incapable of being executed as respects properties outside the suit. As observed by the Judicial Committee, "there is a difference between receiving the decree *in evidence* and *executing* its terms as against properties outside the suit (*d*)."

Suppose now that the procedure indicated above is not followed and that the decree does not incorporate that portion of the compromise which relates to the properties outside the suit. In such a case the decree will not help *B*, and he must fall back upon the agreement of compromise. But the agreement not being registered, it cannot be admitted in evidence [Registration Act, 1908, s. 49], and *B*'s suit must fail (*e*).

It may here be observed that where a document requires registration, but is not registered, the defect may be cured by the conduct of the parties in continuously acting upon it (*f*).

4. [S. 375A.] Nothing in this Order shall apply to any proceedings in execution of a decree or order.

Proceedings in execution of decrees not affected.

Proceedings in execution.—This rule provides that the provisions of rr. 1 and 3 shall not apply to execution proceedings. An application for execution of a decree is a proceeding in execution; the Court, therefore, has no power to allow the applicant to withdraw the application under r. 1, sub-r. (2) above with permission to make a fresh application (*g*). But a compromise of a suit after the passing of a preliminary decree and during the pendency of an enquiry before the Commissioner is not a compromise of a proceeding in execution. Such a compromise may therefore be recorded under r. 3 above (*h*).

ORDER XXIV.

Payment into Court.

O. 24, r. 1.

1. [S. 376.] The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

Deposit by defendant of amount in satisfaction of claim.

(d) *Hemanta Kumari v. Midnapur Zamindari Co.* (1919) 46 I. A. 240; *Binderi Naik v. Ganga Saran Sahu* (1897) 20 All. 171, 25 I. A. 9. See *Raghubans v. Mahabir* (1905) 20 All. 78; *Charan Sher v. Srinath* 10 I. C. 551 (per Jenkins, C.J.); *Dissanay v. Mahadeo* (1916) 1 Pat. L. J. 208; *Kuru Mian v. Tejo Mian* (1917) 3 Pat. L. J. 43; *Charu v. Shambhu* (1918) 3 Pat. L. J. 255; *Hari Chand v. Maghi Mal* (1917) Punj. Rec. no. 78, p. 306; *Natesa v. Vengu* (1909)

33 Mad. 102. But see *Gurdeo Singh v. Chandrikah Singh* (1907) 36 Cal. 195, 223.
(e) *Pranai Anni v. Lakshmi Anni* (1899) 22 Mad. 508, 26 I. A. 101. See also *Chellamauna v. Rama Rao* (1911) 86 Mad. 46; *Patha v. Esup* (1906) 29 Mad. 365; *Kashi v. Sumer* (1910) 32 All. 206.
(f) *Mahomed Musa v. Aghore Kumar* (1914) 42 I. A. 1.
(g) *Malu v. Bent* (1914) 36 All. 172.
(h) *Pragdas v. Girhardas* (1902) 26 Bom. 76, 82.

Payment into Court with denial of liability There is no provision in this rule enabling a defendant to pay money into Court *with a defence denying liability* as there is in the corresponding English rule: see R. S. C., O. 22, rr. 1 and 6.

**O. 24,
rr. 1, 2.**

Mere willingness to pay.—A mere allegation of willingness to pay made in the written statement is not equivalent to payment into Court, and it does not stop interest from running (*j*).

Suit to recover debt or damages.—This order applies only to suits for “debt or damages” and not to suits of any other kind. Where a suit is instituted against a defendant to recover a debt or damages from him, he may pay into Court such amount *as he considers* a satisfaction in full of the plaintiff’s claim. By such Payment into Court, the defendant may derive two advantages, one in respect of interest, for which see r. 3, and the other in respect of costs, for which see r. 4 and illustrations thereto.

A suit for an injunction to restrain a defendant from building so as to interfere with the plaintiff’s light and air, but *including no claim for damages*, is not a suit for “debt or damages” within the meaning of this rule. In dealing with such a suit, the Court has, no doubt, a discretion under the Specific Relief Act 1 of 1877 to award damages in lieu of an injunction. This circumstance, however, does not make the suit one for “damages” within the meaning of this rule (*k*). It is, however, a well established practice to pay into Court money in injunction cases, and though there is no express provision for such a case in the Code in ordinary cases where no declaration of right to easements is sought, the principle underlying r. 4 ought to regulate the discretion of the Court (*l*).

Suit for accounts.—This rule does not apply to suits for an account (*m*).

Suit to recover debt or damages together with other relief.—This rule applies to suits to recover debt or damages, though there may be other reliefs claimed in the suit, *e.g.*, injunction (*n*).

At any stage of the suit.—This means before decree as indicated by the words “in full of the *claim*” and the subsequent rules. See notes to r. 3 below, “Execution proceedings.”

2. [S. 377.] Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

Notice of deposit.

Compare R. S. C., O. 22, rr. 4 and 5.

Form.—For form of notice, see App. H., form no. 3.

“Unless the Court otherwise directs.”—These words show that the Court has the discretion to refuse to allow monies to be paid out, but that discretion is to be exercised reasonably. Where the money sued for and paid into Court is due on a promissory note, it would be unreasonable in the absence of special circumstances not to allow the plaintiff to take the money out. The fact that the payment into Court is accompanied by a denial of liability on the ground of minority is not such a

(*j*) *Haji Abdul Rahman v. Haji Noor Mahomed* (1891) 16, Bom. 141, 150.

(*k*) *Luxumon v. Moroba* (1897) 21 Bom. 502.

(*l*) 21 Bom. 502, *supra*.

(*m*) *Nichols v. Evans* (1883) 22 Q. D. 611.

(*n*) See *Moon v. Dickinson* (1890) 63 L. T. 371.

O. 24, rr. 2-4. circumstance (o). Where there are conflicting claims, as where the amount deposited in Court is claimed by different parties, no party can withdraw the amount without an order of the Court (p).

3. [S. 378.] No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

Interest on deposit not allowed to plaintiff after notice.

Tender.—A plea of tender before action must, to stop interest, be accompanied by a payment into Court after action, otherwise the tender is ineffectual (q).

Execution proceedings.—The principle of this rule applies to proceedings in execution; therefore, if money is paid into Court by a judgment-debtor, no interest should be allowed to the decree-holder on the amount so paid, although such amount may not in fact be the whole amount due under the decree (r).

4. [S. 379.] (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

Procedure where plaintiff accepts deposit as satisfaction in part.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed, and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full.

Illustrations.

(a) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(o) *Dwarkanath v. Ghish Chunder* (1899) 26 Cal. 766.

(p) *Haji Abdul Rahman v. Haji Noor Mahomed* (1891) 16 Bom. 141.

(q) *Haji Abdul Rahman v. Haji Noor Mahomed* (1891) 16 Bom. 141.

(r) *Ambul v. Mahammad* (1917) 40 All. 125.

(b) *B* sues *A* under the circumstances mentioned in illustration (a). On the plaint being filed, *A* disputes the claim. Afterwards *A* pays the money into Court. *B* accepts it in full satisfaction of his claim. The Court should also give *B* his costs of suit, *A*'s conduct having shown that the litigation was necessary. O. 24, r. 4.

(c) *A* owes *B* Rs. 100, and is willing to pay him that sum without suit. *B* claims Rs. 150 and sues *A* for that amount. On the plaint being filed *A* pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. *B* accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay *A*'s costs.

Compare R. S. C., O. 22, r. 6.

Apportionment of costs.—Where the suit is not one “to recover debt or damages” within the meaning of r. 1, the Court has a discretion to apportion the costs (s). See notes to r. 1, “Suit to recover debt or damages,” p. 691 above.

ORDER XXV.

Security for Costs.

1. [Ss. 380, 382.] (1) Where, at any stage of a suit, O. 25, O. 25, r. 1.

When security for costs
may be required from
plaintiff.

r. 1, it appears to the Court that a sole plaintiff, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiff does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

Residence out of British
India.

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

O. 25, r. 1. Object of the rule.—The object of the rule is to provide for the protection of defendants in certain cases where, in the event of success, they may have difficulty in realizing their costs from the plaintiff (i).

Application of the rule.—Security for the costs of a defendant *may* be required from a plaintiff in the following two cases :—

- I. (a) Where the plaintiff resides out of British India, or where there are two or more plaintiffs, *all* the plaintiffs reside out of British India; and
 (b) where none of the plaintiffs has sufficient immoveable property within British India other than the property in suit.
- II. (a) Where the plaintiff is a woman ;
 (b) where her suit is for the payment of money; and
 (c) she does not possess sufficient immoveable property within British India.

Discretion of Court in requiring security for costs from non-resident plaintiffs.—The word “may” implies discretion. In the exercise of this discretion the Court will not order security for costs from a plaintiff residing out of British India in cases in which he cannot be rendered liable for the defendant's costs, *e.g.*, an administration suit by the plaintiff as a creditor or a legatee in which the plaintiff's claim is *admitted*, or a suit on a mortgage or a promissory note *where there is no defence*. In such cases no security for costs will be ordered *even though* the plaintiff resides out of British India, and has not sufficient immoveable property within British India, not even though the plaintiff be a woman (u).

Resides.—The mere presence in British territory at the time of suit is not “residence” (v). See notes to s. 16, “Actually and voluntarily resides,” p. 80 above.

British India.—The Cantonment of Wadhwan in Kathiawar is not within British India (w); nor is the Cantonment of Secunderabad (x); nor is Rajkot Civil Station (y). See notes to s. 1, “British India,” p. 2 above.

Does not possess sufficient immoveable property.—A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immoveable property cannot be said to *possess immoveable property* within the meaning of this rule (z).

Poverty of plaintiff.—Mere poverty is no ground for requiring the plaintiff to give security for costs of the suit (a); it is otherwise when he is not the real litigant, but is suing on behalf of another who is not a party to the suit (b). In a recent Bombay case, a suit was brought by a Parsi father and his minor daughter as plaintiffs for damages for the defendant's breach of his promise to marry the daughter. The father was an undischarged insolvent, and it was alleged that the suit was really the father's suit and that he was seeking to make money out of his daughter's engagement. The Court upon these grounds ordered the father to furnish security for the costs of the defendant (c).

(i) *Premchand*, in the goods of (1894) 21 Cal. 832, at p. 836.

(u) *Premchand*, in the goods of (1894) 21 Cal. 832, 836.

(v) *Shuffli v. Laldin* (1879) 8 Bom. 227.

(w) *Emperor v. Ohimanlal* (1912) 14 Bom. L. R. 876, dissenting from *Tricum v. B. B. & C. I. Ry.* (1885) 9 Bom. 244.

(x) *Hossein Ali v. Abid Ali* (1894) 21 Cal. 177.

(y) *Queen Empress v. Abdul* (1886) 10 Bom. 186

(z) *Premchand*, in the goods of (1894) 21 Cal. 832.

(a) *Maneckji v. Goolbais* (1879) 3 Bom. 241; *Khajah Assenoolajoo v. Solomon* (1887) 14 Cal. 533.

(b) *Ram Coommar Coondoo v. Chunder Canto Mookerjee* (1887) 2 Cal. 233, 4. I. A. 23; *Khajah Assenoolajoo v. Solomon* (1887) 14 Cal. 533.

(c) *Bomonyji v. Nusservanji* (1903) 27 Bom. 100.

Where leave granted to plaintiff to sue as a pauper.—The Court has no power under this rule to require security for costs from a person to whom leave has been granted under O. 33, r. 8, to sue *as a pauper*, for to do so would be to render nugatory the order under O. 33, r. 8 (d). If an order is made requiring a plaintiff to furnish security for the costs of the defendant, and leave is subsequently granted to the plaintiff to continue the suit as a pauper, the order ceases to operate as regards antecedent costs, provided the leave was granted before the time limited for giving security has expired (e).

Where the plaintiff is a woman.—The necessity for the provisions of sub-r. (3) arises from the provisions of s. 56, by which it is enacted that no woman can be arrested or detained in the civil prison in execution of a decree for the payment of money (f). But the Court has a discretion in the matter, and in the exercise of its discretion, it will not as a general rule require security for costs from a woman plaintiff, if the result of such an order will be practically to defeat the suit where it has been instituted *bona fide* and has become almost ripe for hearing (g).

Where the plaintiff is a minor.—The power as to requiring security for costs is a discretionary one, and except in exceptional cases, neither a minor plaintiff nor his or her next friend should be required to give security for costs (h), not even if both the minor and his next friend are residing out of British India and do not own immoveable property in British India (i).

Suit for the payment of money.—Suits which are not exclusively for the payment of money, but which will result in a decree for the payment of money on the relief sought, are suits for the payment of money within the meaning of this rule (j). Thus a suit to recover possession of specific moveable property (e.g., ornaments), or in the alternative the money value of such property, is a suit for the payment of money within the meaning of this rule (k).

Cross-claim and security for costs.—There is no hard and fast rule of practice which prevents the Court from making an order for security for costs against a person residing out of British India who, upon being sued in British India, sets up a cross-claim, either by counter-claim or by cross-suit. It is for the Court to consider, in the exercise of its discretion, whether, having regard to the circumstances of the particular case, the cross-claim must be treated as made, substantially, by way of defence to the suit against the claimant, or whether it must be regarded as being substantially in the nature of an independent claim made in respect of matters foreign to that suit, and therefore one with regard to which security for costs ought to be ordered to be given (l).

Appeal.—An order under this rule made by a High Court requiring a plaintiff to give security for the costs of a suit is a judgment within the meaning of clause 15 of the Letters Patent, and is therefore appealable (m).

Other cases in which security for costs may be required under the Code.—See O. 22, r. 8 [plaintiff's insolvency]; O. 37, r. 4 [summary suit on negotiable instruments]; O. 41, r. 5 [security on stay of execution]; O. 41, r. 6 [security where

(d) *Mussamat Hafizan v. Abdul Karim* (1908) 12 C. W. N. 168. See also *Nusserooddeen Biswas v. Ujjul Biswas* (1871) 17 W. R. 68 [no security for costs from a pauper-appellant].

(e) *Bai Lazmi v. Harjivan* (1911) 36 Bom. 415.

(f) *Prechand*, in the goods of (1894) 21 Cal. 832, 836.

(g) *Namubai v. Daji Govind* (1910) 35 Bom. 421; *Sonabai v. Tribhovandas* (1908) 32 Bom. 602, 606.

(h) *Bai Porebai v. Devji* (1899) 23 Bom. 100; *Mans Bai v. Ladd Govind* (1908) 18 Mad. L. J. 155.

(i) *Bhaishanker v. Mulji* (1910) 35 Bom. 339.

(j) *Soonabai v. Tribhovandas* (1908) 32 Bom. 602.

(k) *Degumbari v. Aushootosh* (1890) 17 Cal. 610. See also *Bai Porebai v. Devji* (1899) 23 Bom. 100; *Bomonji v. Nusserwanji* (1903) 27 Bom. 100.

(l) *New Fenix Compagnie v. General Accident Assurance Corporation* [1911] 2 K. B. 619.

(m) *Seshagiri v. Nawrah Askur* (1903) 26 Mad. 502; *Sonabai v. Tribhovandas* (1908) 32 Bom. 602.

O. 25, execution is granted of a decree appealed from]; **O. 41, r. 10** [security from appellant]
rr. 1, 2. and **O. 45, r. 7** [security on grant of certificate of leave to appeal to the Privy Council].

2. [S. 381.] (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

Effect of failure to furnish security.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

Res judicata.—A plaintiff whose suit has been dismissed under this rule for failure to furnish security is not precluded from pleading the subject-matter of such suit in answer to any other suit instituted against him (n), or from instituting a fresh suit on the same cause of action (o). A sues B for the cancellation of a promissory note alleging that the note was obtained by fraud. The suit is dismissed under this rule for failure to furnish security. This does not preclude A from instituting a fresh suit for the cancellation of the note, nor does it preclude him, if a suit is brought against him by B to recover the amount of the note, from pleading fraud in answer to such suit.

Limitation.—An application by a plaintiff for an order to set aside a dismissal for failure to furnish security for costs must be made within 30 days from the date of dismissal [Limitation Act, 1908, sch. I., art. 163].

Appeal.—An appeal lies from an order under this rule rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit [O. 43, r. 1, cl. (n)].

ORDER XXVI.

Commissions.

Commissions to examine witnesses.

O. 26, r. 1.

1. [S. 383.]

Cases in which Court may issue commission to examine witness.

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction

(n) *Rungraw v. Sidhi Mahomed* (1882) 6 Bom. 452. | (o) *Hariram v. Lalbat* (1902) 26 Bom. 687

who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it. **O. 26, rr. 1-3.**

Power of Court to issue commissions.—See s. 75 above.

Cases in which commissions may be issued.—A commission can only be issued in the cases specified in this rule and rules 4 and 5 below, and in no other case. Therefore, a commission should not be issued for the examination of the head of a *mutt*, though it may be alleged by him that it is derogatory to a person in his position to appear personally in Court as a witness. But where the other side applies to the Court to summon the head of a *mutt* as a witness for him, the Court may, if it thinks that the application is vexatious, refuse the application and allow the head of the *mutt* to be examined on commission (*p*).

Persons exempted from attending the Court.—Amongst those so exempted are women who, according to the custom and manners of the country, ought not to be compelled to appear in public (see s. 132). Such women ought to be examined on commission, even though they may have appeared in public before (*q*) and though an allegation of immorality is made against them (*r*). A woman may have entirely abandoned the protection of the *purda*, and yet she may be exempted under s. 132 from giving evidence in Court, if the Court is satisfied having regard to the class and community to which she belongs that she should not be compelled to appear in the witness-box (*s*). A religious preceptor is not one of the persons exempted from attending the Court (*t*).

May issue.—See notes to r. 4 below under the head “May issue”.

Arbitration.—It is competent to the Court to issue a commission for the examination of witnesses, though the matters in difference in the suit have been referred to arbitration under Schedule II of this Code (*u*).

Appeal.—See notes to rule 4 below, “Appeal.”

2. [S. 384.] An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

Order for commission.

3. [S. 385.] A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute.

Where witness resides within Court's jurisdiction.

(p) *Veerabadram v. Nataraja* (1905) 28 Mad. 28.
(q) *Mohesh Chunder v. Manick Lall* (1899) 26 Cal. 650; *Chamatkar v. Mohesh Chunder* (1892) 26 Cal. 651; *Balakeshwari v. Jnanananda* (1918) 45 Cal. 697.
(r) *Binodini v. Kala Chand* (1901) 5 Cal. W. N.

ccxxxii.

(s) *Solomon v. Jyotsna* (1918) 45 Cal. 492.
(t) *Panachand v. Manoharlal* (1917) 42 Bom. 136, 141-142.
(u) *Rabiabai v. Rahimabai* (1905) 7 Bom. L. R. 560.

O. 26, r. 4.

Persons for whose examination commission may issue.

4. [S. 386.] (1) Any Court may in any suit issue a commission for the examination of—

- (a) any person resident beyond the local limits of its jurisdiction ;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and
- (c) any civil or military officer of the Government, who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

Form.—For form of commission to examine absent witness, see App. H, form no. 7.

May issue.—The Court has a discretion to grant or refuse a commission (v). But the discretion must be exercised judicially (w). If the Court fails to exercise the discretion judicially, such failure of itself is not a ground for interfering with the decree in appeal: the appellate Court should not interfere, unless it is shown that, if the lower Court had exercised the discretion judicially, the decision would have been different from what it was (x). As to the right of appeal, see note below under the head "Appeal."

Commission for the examination of witnesses.—A commission will be granted almost as a matter of course for the examination of a material witness (y).

Plaintiff asking for a commission to examine himself.—Suppose a plaintiff, residing in Delhi, institutes a suit in Bombay, and then applies to the Bombay Court for the issue of a commission for his examination in Delhi. In such a case the Court will refuse the application unless a very strong case is made out, because the Bombay Tribunal is chosen by the plaintiff himself (z).

Defendant asking for a commission to examine himself.—The case, however, is different, where the application is made by a defendant, and especially a defendant lawfully resident out of the jurisdiction, according to the ordinary course of his life and business. The Court will not regard the case of a defendant with the same strictness as the case of a plaintiff (a). See preceding paragraph.

(v) *Burney v. Eyre* (1864) 1 Hyde, 68; *Coch v. Allcock* (1888) 21 Q. B. D. 179.

(w) *Huree Dass v. Meer Moazzum* (1871) 15 W.R. 447; *Mowji v. Nemchand* (1899) 23 Bom. 626.

(x) *Akikunnissa v. Rup Lal* (1898) 25 Cal. 807, 25 I. A. 117.

(y) *Huree Dass v. Meer Moazzum* (1871) 15 W.R. 447.

(z) *Ross v. Woodford* [1894] 1 Ch. 88, 42; *New v. Burns* [1894] 64 L.J.Q.B. 104; *Keeley v. Wakley* [1893] 9 Times Rep. 571.

(a) *Id.*

O. 26,
rr. 4-7

Appeal.—It was held at one time by the High Court of Madras that an appeal lies under cl. 15 of the Letters Patent from an order directing the issue of a commission (b) as well as from an order refusing a commission (c). But those decisions have since been disapproved by a Full Bench of the same High Court (d). In Bombay, it has been held that no appeal lies from an order *directing* the issue of a commission, the reason given being that such an order is not a “judgment” within the meaning of the said clause (e).

5. [S. 387.] Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

Commission or request
to examine witness not
within British India.

“Or a letter of request.”—These words are new. See s. 77 above. For form of letter of request, see App. H, form no. 8.

Evidence of a foreign witness.—Evidence of a foreign witness taken in foreign territory (e.g., Chandernagore) under a commission issued under this rule, and executed in accordance with the provisions of r. 17 below, is clearly admissible (f).

Revision.—An order made under this rule refusing the issue of a commission is not subject to revision under s. 115 (g).

6. [S. 388.] Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

Court to examine wit-
ness pursuant to com-
mission.

Examination on commission.—A party who has not joined in a commission is entitled to cross-examine the witness examined under the commission (h). Evidence taken on commission without full opportunity for complete cross-examination should not be admitted (i). But where the Court is satisfied that the cross-examination of any witness on commission is being unnecessarily prolonged, it will order such cross-examination to be concluded within a certain time (j).

7. [S. 389.] Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise

Return of commission
with depositions of wit-
nesses.

(b) *Veerabadram v. Nataraja* (1905) 28 Mad. 28.
(c) *Maruthamuthu v. Krishnamachariar* (1907) 30 Mad. 143.
(d) *Tuljaram v. Alagappa* (1910) 35 Mad. 1, 8, 20-21.
(e) *Miya Mahomed v. Zorabat* (1909) 11 Bom. L. R. 241.
(f) *Kadumbiny v. Kumudini* (1903) 7 Cal. W. N.

806.
(g) *Nizam of Hyderabad*, In re (1886) 9 Mad. 256.
(h) *Gregory v. Dooley Chand* (1868) 14 W. R. O. C. 17.
(i) *Boisagomoff v. Nahapiet Jule Co.* (1901) 5 Cal. W. N. cclxx.
(j) *Suraj Prosad v. Standard Life Insurance Co* (1903) 30 Cal. 625.

O. 26, directed, in which case the commission shall be returned in
rr. 7, 8. terms of such order; and the commission and the return
thereto and the evidence taken under it shall (subject to the
provisions of the next following rule) form part of the record
of the suit.

Evidence taken on commission shall form part of the record of the suit.—See notes to r. 8 below, "Reading depositions in evidence."

8. [S. 390.] Evidence taken under a commission shall
not be read as evidence in the suit with-
out the consent of the party against whom
the same is offered unless—

When depositions may
be read in evidence.

(a) the person who gave the evidence is beyond the
jurisdiction of the Court, or dead or unable
from sickness or infirmity to attend to be per-
sonally examined, or exempted from personal
appearance in Court, or is a civil or military
officer of the Government who cannot, in the
opinion of the Court, attend without detriment
to the public service, or

(b) the Court in its discretion dispenses with the proof
of any of the circumstances mentioned in clause
(a), and authorizes the evidence of any person
being read as evidence in the suit, notwith-
standing proof that the cause for taking such
evidence by commission has ceased at the time
of reading the same.

"Or is a civil or military officer..public service."—These words which
occur in cl. (a) are new.

Reading depositions in evidence.—According to the practice prevailing on
the Original Side of the High Court of Calcutta, evidence taken on commission is not
treated as evidence in the suit until the same has been tendered and read as evidence
in the suit by the party on whose behalf it has been taken. It therefore follows that
evidence taken under a commission at the instance of one party cannot be used by the
opposite party until it is tendered and read as evidence by the party on whose behalf
it has been taken (k). On the other hand, the practice in the Courts in the mofussil of
Calcutta is to treat the deposition of a witness examined on commission as evidence
in the case even though it has not been formally tendered, and this practice has been
said to be not only perfectly consistent, but also in strict accordance with the provisions
of rules 7 and 8 (l).

(k) *Kurum v. Satya* (1908) 30 Cal. 999; *Hemanta*
v. Banku Behari (1905) 9 C. W. N. 794.
(l) *Nistarini v. Nundu Lall* (1899) 26 Cal. 591;

Man Gobinda v. Shashindra Chandra
(1908) 35 Cal. 28; *Dhanu Ram v. Muri*
(1909) 36 Cal. 566.

Admissibility of documents.—Where a document is produced before a Commissioner, and no objection is taken to its admissibility, no such objection can be taken before the Court hearing the suit to which the commission is returned (*m*). But if the admissibility of the document is objected to before the Commissioner, the party who has objected to the admissibility of the document before the Commissioner on one ground is not precluded from objecting to its admissibility before the Court on any other ground (*n*).

O. 26.
rr. 8-10.

Commissions for local investigations.

9. [S. 392.] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Commissions to make local investigation.

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

Alteration in the rule.—The words “and the same cannot be conveniently conducted by the judge in person,” which occurred in the old section after the words “net profit,” have been omitted in this rule.

Commissions for local investigations.—This rule does not authorise a Court to delegate to a Commissioner the trial of any *material issue* which it is bound to try (*o*).

In a suit as to a right of way a commissioner was appointed under this rule to prepare a map of the locality in question. *Held* that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence (*p*).

Amount of profits.—The report of a commissioner appointed by a Court of Revenue to ascertain the amount of actual collection in a suit for profits under s. 164 of the Agra Tenancy Act is admissible in evidence having regard to this rule and rules 16, 17 and 18 (*q*).

Form.—For form of commission for local investigation, see App. H, form no. 9.

10. [393.] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

Procedure of Commissioner.

(*m*) *Struthers v. Wheeler* (1878) 6 C. L. R. 109.
(*n*) *Ralli v. Gau Kim* (1888) 9 Cal. 939.
(*o*) *Sangit v. Mookan* (1893) 16 Mad. 350
(*p*) *Shilawa v. Bhimappa* (1899) 24 Bom. 43.

(*q*) *Bakhtawar v. Sheo Prasad* (1917) 39 All. 694. The provisions of O. 26 are applicable to suits under the Agra Tenancy Act 2 of 1901.

O. 26,
rr. 10-12.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court, or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

Report and depositions to be evidence in suits.

Commissioner may be examined in person.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Alterations in the rule.—The words “or as to his report” in sub-rule (2) after the words “mentioned in his report,” are new. Sub-rule (3) is also new.

Further evidence after Commissioner's report.—This rule does not contemplate the tender of further evidence after the Commissioner's report, except the examination of the Commissioner himself, but it does not forbid it. It is consistent with either course, and the point must be decided on general principles according to the facts of each case (r).

Commissions to examine accounts.

11. [S. 394.] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

Commission to examine or adjust accounts.

Commission to examine account.—The commissioner to whom a suit is referred by a Judge on the original side of the High Court of Bombay is entitled to decide questions of law which may arise while taking accounts (s).

Form.—For form of commission to examine accounts, see App. H, form no. 9.

12. [S. 395.] (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Court to give Commissioner necessary instructions.

(r) *Grieh Chander v. Shoshik Shikharwar Ray* (1900) 27 Cal. 951, 966, 27 I. A. 117. | (s) *Lazimibai v. Hussainbhai* (1916) 41 Bom. 719.

- (2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.
- Proceedings and report to be evidence, Court may direct further inquiry.
- O. 26, rr. 12-14.

Commissions to make partitions.

13. [S. 396, 1st para.] Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.
- Commission to make partition of immoveable property.

Alteration in the rule.—The singular “person” has been substituted for the plural “persons.” Under the old section it was held that the use of the plural “persons” showed that the Court could not issue a commission to make partitions to a single Commissioner (t). The substitution of the singular “person” for the plural “persons” clearly shows that under the present rule the commission may be issued to a single Commissioner.

Form.—For form of commission to make a partition, see App. H, form no. 10.

14. [S. 396, 2nd and 3rd paras.] (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.
- Procedure of Commissioner.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court: and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

O. 26,
rr. 14-17.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied ; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

Alterations in the rule.—The words “shall confirm, vary or set aside the same” at the end of sub-rule (2), and the whole of sub-rule (3), have been substituted for the words “shall either quash the same and issue a new commission, or (where the Commissioners agree in their report) pass a decree in accordance therewith.” Under the wording of the old section it was held that the Court must either accept the report or reject the report, and that it had no power to *vary* it (*u*). The word “vary” has been added into sub-rule (2) to enable the Court to modify the report in a proper case.

Resistance to Commissioner.—Where a commission has been issued to make a partition, the circumstance that the plaintiff or his agent resists the Commissioner is not sufficient to justify the dismissal of the suit (*v*).

General provisions.

15. [S. 397.] Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Expenses of commission
to be paid into Court.

16. [S. 398.] Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

Powers of Commis-
sioners.

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him ;
- (b) call for and examine documents and other things relevant to the subject of inquiry ;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order.

17. [S. 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon witnesses, shall apply to persons required

Attendance and examina-
tion of witnesses before
Commissioner.

to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court. O. 26,
rr. 17, 18.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

Sub-rule (a).—This sub-rule is new. It enables the Court within the local limits of whose jurisdiction a witness resides to issue a summons for his examination on the application of the Commissioner. In the absence of any such provision in the old section, it was held that where a witness failed to appear before a Commissioner pursuant to a notice issued by him, the only course left open to the Commissioner was to return the commission to the Court from which it was issued, and the latter Court would then send the commission to the Court within the local limits of whose jurisdiction the witness to be examined resided (*w*).

18. [S. 400.] (1) Where a commission is issued under this Order, the Court shall direct that the Parties to appear before
Commissioner. parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear the Commissioner may proceed in their absence.

Form.—See App. H, form no. 7.

ORDER XXVII.

Suits by or against the Government or Public Officers in their official capacity.

1. [New.] In any suit by or against the Secretary of State for India in Council, the plain or O 27, r. 1.
Suits by or against
Government. written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.

O. 27,
rr. 1-6.

Suits by or against Government.—Suits by or against the Government must be instituted by or against the Secretary of State for India in Council; see s. 79 above.

Notice in suits against Secretary of State or public officer.—See s. 80 above.

2. [S. 417.] Persons being *ex-officio* or otherwise authorised to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government.

Persons authorized to act for Government.

3. [S. 418.] In suits by or against the Secretary of State for India in Council instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "The Secretary of State for India in Council."

Plaints in suits by or against Government.

4. [S. 419.] The Government pleader in any Court or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court.

Agent for Government to receive process.

5. [S. 420.] The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government, and may extend the time at its discretion.

Fixing of day for appearance on behalf of Government.

6. [S. 421.] The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council who may be able to answer any material

Attendance of person able to answer questions relating to suit against Government.

questions relating to the suit, direct the attendance of such a person. O. 27,
rr. 6-8

7. [S. 423.] (1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint,

Extension of time to enable public officer to make reference to Government.

he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

8. [Ss. 426, 427.] (1) Where the Government under-

Procedure in suits against public officer.

takes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2) Where no application under sub-rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest nor his property to attachment, otherwise than in execution of a decree.

ORDER XXVIII.

Suits by or against Military Men.

1. [S. 465.] (1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead. O. 28, r. 1.

O. 28,
rr. 1-3. (2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Order the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer or soldier belongs.

2. [S. 466.] Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

Person so authorized may act personally or appoint pleader.

3. [S. 467.] Processes served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

Service on person so authorized or on his pleader, to be good service.

ORDER XXIX.

Suits by or against Corporations.

O. 29, r. 1. 1. [S. 435.] In suits by or against a corporation any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Subscription and verification of pleading.

Companies authorized to sue and be sued in the name of an officer or trustee.—All reference has been omitted in this and the next following rule to companies authorised to sue and be sued in the name of an officer or of a trustee, as such companies must be very few, if, indeed, any exist.

Foreign corporation.—The procedure prescribed by this rule applies to foreign corporations as well. It is not necessary before a foreign corporation can claim the benefit of this rule that it must be registered under the Indian Companies' Act or under an Act of Parliament (x). Thus a plaint in a suit by the Singer Manufacturing Company, which is a company incorporated in the United States, may be verified by an agent holding a general power-of-attorney from the company as a "principal officer" of the company within the meaning of this rule (y).

Suit by an unregistered or unincorporated Society.—A suit by an unregistered or unincorporated society must be brought in the names of all the members of the society (z). Where there are numerous members, the suit may be instituted by one or more of them with the permission of the Court on behalf of all [O. 1, r. 8].

Suit by or against a registered company.—A suit by or against a registered company must be instituted in the name of the company. A suit against two companies described as "the India General S. N. and R. Co., Ltd., and the Rivers S. N. Co., Ltd., by their joint agent A. E. Rogers," is substantially a suit against Rogers and it is in contravention of the provisions of this rule. The words "by their joint agent A. E. Rogers" should be omitted (a).

Other principal officer of the corporation.—The manager at Lucknow of the local branch of the Delhi and London Bank was authorized by a power of attorney to manage the affairs of the Bank, and to substitute any person for himself. In pursuance of this power he gave a power of attorney to the accountant of the Bank to manage the affairs of the Bank, but such power omitted words giving authority to sue. *Held* that the accountant was, under the circumstances, the principal officer of the Bank, and that he could, as such, sign and verify the plaint in a suit filed by the Bank (b).

"Who is able to depose to the facts of the case."—Where a plaint or written statement is signed and verified by a director, secretary or other principal officer of a corporation, it must be stated in the plaint that he is a director, secretary or principal officer of the Company, and that he is able to depose to the facts of the case. If there is no such statement in the plaint or written statement, the plaint or written statement should not be admitted, unless the defect is made good by an affidavit containing such statement (c).

Dismissal of suit.—Where in the case of a suit by a corporation, the plaint is signed and verified by an officer other than a principal officer of the corporation, the suit should be *dismissed* (d). Similarly, the suit should be *dismissed*, if in the case of an unregistered or unincorporated society, the suit is brought in the names of some only of the members of the society (e). See notes above.

(x) *Singer Manufacturing Co. v. Baijnath* (1903) 30 Cal. 108.

(y) *Singer Manufacturing Co. v. Yar Muhammad* (1912) Punj. Rec. no. 8, p. 83.

(z) *Panchaiti v. Gauri Kuar* (1898) 20 All. 167.

(a) *India General S. N. & R. Co., Ltd. v. Lal Mohan* (1915) 43 Cal. 441.

(b) *Delhi and London Bank v. Oldham* (1894)

21 Cal. 60, 20 I. A. 139.

(c) *Sreenath v. East Indian Railway Coy.* (1895) 22 Cal. 268.

(d) *Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church* (1894) 16 All. 420.

(e) *Panchaiti v. Gauri Kuar* (1898) 20 All. 167.

O. 29,
rr. 2, 3.

2. [S. 436.] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

Service on corporation. .

- (a) on the secretary, or on any director, or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

Service by post.—The language of the old section has been enlarged so as to allow of service by post on corporations, and by this means the rule is brought into line with the provisions of s. 148 of the Indian Companies Act 7 of 1913.

3. [S. 436, last para.] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

Power to require
personal attendance of
officer of corporation.

ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

O 30, r. 1.

1. [New. R. S. C., O. 48A, r. I.] (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

Suing of partners in name
of firm.

- (2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or

the defendant, suffice if such pleading or other document is O. 30, r. 1. signed, verified or certified by any one of such persons.

Additions made into this rule by the Chief Court of the Punjab.—See Appendix V below.

Suit by or against firms.—The whole of this Order is new. It is a reproduction almost *verbatim* of the principal rules comprised in O. 48A of the English rules. The rules as to the *attachment* of partnership property and the execution of decrees against firms will be found in O. 21, rr. 49 and 50 above.

In applying English decisions under the corresponding rules in England, it must be remembered that there is a distinction between the English and the Indian law as to the liability of partners. According to the English law, the liability is joint; according to the Indian law, it is joint and several. See Indian Contract Act, 1872, ss. 42 to 45.

This Order deals with the mode of suing firms. Rule 1 provides that two or more persons claiming or being liable as partners may sue or be sued in the firm name. Rule 3 provides that where a suit is instituted by partners in the name of their firm, the plaintiffs shall, on demand in writing by the defendant, declare in writing the names and places of residence of the partners. If the plaintiffs fail to comply with the demand, the Court may stay further proceedings. If the demand is complied with, the suit will proceed as if all the partners had been named as plaintiffs in the plaint. As regards *signature and verification* where a suit is brought in a firm name, it is provided by r. 1, sub-r. (2), that it will suffice if the pleading or any other document required to be signed or verified is signed or verified by *any one* of the partners: it is not necessary that all the partners should sign or verify it. As regards *appearance* in a suit brought against a firm, it is to be noted that a firm cannot appear as a firm, and the partners should therefore appear individually in their own names, but all subsequent proceedings should continue in the name of the firm (r. 6). Where a suit is brought against a firm, no partner can put in a personal defence (f). He can only file a written statement *for and in the name of the firm*. The decree also must be in the name of the firm (g), though all the partners may not have appeared (h). As to execution of a decree passed against a firm, see O. 21, r. 50.

Rule 9 applies to suits *between co-partners*, and rule 10 to suits *against a person carrying on business in a name other than his own name*.

“Any two or more persons.”—The fact that one of the members of a partnership, which is sued in the firm name, is a minor does not prevent judgment being obtained against the firm and execution issuing thereon against the property of the partnership (i). But execution cannot issue against the separate property of the minor (j).

“At the time of the accruing of the cause of action”—These words show that a suit may be brought by or against a firm in the firm name though the firm may have been dissolved before the date of the suit, provided the cause of action arose before dissolution (k).

“Carrying on business in British India.”—This rule applies to all partnerships carrying on business in British India. Therefore a firm which carries on business in British India may be sued in the firm name under this rule, although it be a foreign

(f) *Ellis v. Wadson* [1899] 1 Q. B. 714.

(g) *Harris v. Beauchamp Brothers* [1893] 2 Q. B. 584, 585.

(h) *Lyneight, Ltd. v. Clark & Co.* [1891] 2 Q. B. 552.

(i) *Harris v. Beauchamp Brothers* [1893] 2 Q.

B. 534.

(j) See O. 21, r. 50, notes under the head “Minor Partner.”

(k) *Davis & Son v. Morris* (1883) 10 Q. B. D. 468.

O. 30,
rr. 1, 2.

firm the members of which are resident out of the jurisdiction (l). "The only question to be considered in order to see whether the case comes within the rule is whether the firm carries on business [in British India]" (m). If it does, the partners may be sued in the firm name. If it does not, the partners cannot be sued in the firm name (n). The expression "carry on business" has no special legal meaning. It must be interpreted in the ordinary business sense (o). A firm in England cannot be said to carry on business in Bombay, merely because it has employed an agent in Bombay to collect orders for the firm, *the agent having no authority to accept or reject the orders* (p); it does not make any difference that the name of the firm is affixed to the agent's office (q). See notes to s. 16, "Carries on business," p. 81.

Statement of names and addresses.—Rule 2 enables a *defendant* to obtain disclosure of the names of the partners in a *plaintiff firm* by a statement in writing by the plaintiffs or their pleader: Under r. 1 *any party* to the suit may apply to the Court for a statement of the names of the partners in the *plaintiff or defendant firm* to be furnished and verified in such manner as the Court may direct (r). "It is perhaps not altogether easy to reconcile the two rules, but r. 2 is applicable to the case only of plaintiffs, whereas r. 1 applies generally" (s). Where an affidavit has been filed under r. 1 or a declaration made under r. 2, the Court has no power to require the deponent or declarant to attend to be cross-examined on the affidavit or declaration, nor has the Court any power to direct the separate trial of an issue as to whether a person whose name has been disclosed in the affidavit or declaration was a partner in the firm at the time the cause of action accrued (t). But the statement of names disclosed in the affidavit or declaration will be treated as embodied in the plaint and will be a necessary part of the cause of action, and if the plaintiffs fail in establishing it, the suit will fail (u).

Suit by or against individual partners.—See Indian Contract Act 1872, ss. 43 and 45.

2. [New. R. S. C., O. 48 A, r. 2.] (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed, upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects

(l) *Worcester City & County Banking Co. v. Firbank Pauling & Co.* [1894] 1 Q. B. 784.

(m) *Ib.*, p. 788.

(n) *Von Hellfeld v. Rechnitzer* [1914] 1 Ch. 742.

(o) *Grant v. Anderson & Co.* [1892] 1 Q. B. 108,

107, per Lord Esher, M. R.

(p) *Grant v. Anderson & Co.* [1892] 1 Q. B. 108.

(q) *Baillie v. Goodwin & Co.* (1886) 33 C. D. 604.

(r) *Bridges & Co. v. Shamas Din & Co.* (1918) Punj. Rec. no. 78, p. 262.

(s) *Abrahams & Co. v. Dunlop Pneumatic Tyre Co.* [1905] 1 K. B. 48, 50.

(t) *Abrahams & Co. v. Dunlop Pneumatic Tyre Co.* [1905] 1 K. B. 46.

(u) *Ib.*, p. 51.

shall follow, as if they had been named as plaintiffs in the
 O. 30,
 rr. 2, 3.
 plaint :

Provided that all the proceedings shall nevertheless continue in the name of the firm.

Disclosure of partners' names.—See notes to r. 1 above, "Statement of names and addresses," p. 712. If the plaintiff firm has not made a full disclosure of their partners, the proper procedure is not to dismiss the suit, but to allow the firm to put in a further declaration making a full disclosure, and thus remedy the defect (v).

Proceedings to continue in name of firm.—See notes to r. 6 below, "Subsequent proceedings to continue in name of firm."

3. [*New. R. S. C., O. 48 A, r. 3.*] Where persons are sued
 as partners in the name of their firm the
 Service. summons shall be served either—

- (a) upon any one or more of the partners, or
- (b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India :

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

Service of summons.—This rule is to be read with r. 1 above and with O. 21, r. 50. It applies only to suits against partners *in the name of their firm*. It provides a special mode of service upon firms *carrying on business in British India*, whether the partners reside within or without British India (w). One mode of service authorized by the rule is service upon any one or more of the partners; the other is service at the principal place of business of the partnership, within British India, upon the manager of such business. If the summons is not served in either of these ways, the service is irregular (x). If it is served in either of these ways, the service is good service upon

(v) *Imperial Pressing Co. v. British Crown Assurance Corporation* (1918) 41 Cal. 581, 585.

(w) *Grant v. Anderson & Co.* [1892] 1 Q. B. 108.

(x) See *Worcester City and County Banking Co. v. Fairbank Pauling & Co.* (1894) 1 Q. B. 784, 788-790.

O. 30, r. 3. *the firm* whether all or any of the partners are within or without British India. The service being good service *upon the firm*, any decree that may be passed in the suit against the firm may be executed against the property *of the firm or partnership*.

If the service is effected in the first mode prescribed by the rule, that is, if the service is *upon a partner* it is good service *upon the firm as well as upon that partner personally*, but it is not service upon any other member of the firm so as to make such member "a person who has been *individually* served as a partner," etc., within O. 21, r. 50, sub-r. (1), cl. (c). If the service is effected in the second mode prescribed by the rule, that is, *upon a manager* at the place of partnership business, and the manager is not a partner, the service, no doubt, is good service upon the firm, but it is not service upon any member of the firm so as to make such member "a person who has been *individually* served as a partner," etc., within O. 21, r. 50, sub-r. (1), cl. (c) (y). This distinction is important for the purposes of execution, for, as we have seen in O. 21, r. 50, where a decree has been passed against a firm, execution can at once issue without leave against the property of the firm, and also against the separate property of any individual partner who was served with the writ. But execution cannot be issued without the leave of the Court against the separate property of any partner who was not served with the writ and did not appear (z).

Dissolution of partnership before institution of suit.—Where there has been dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable, unless he serves the writ of summons upon him. A sues the firm of B & Co. upon a promissory note passed to him by the firm. When the note was given, the firm consisted of three partners, X, Y and Z, but Z had retired from the firm before the institution of the suit, and A knew before he instituted the suit that Z had so retired. Z resides in British India, but he is not individually served as required by the proviso to this rule. Z does not appear. A obtains a decree against the firm. The decree cannot be executed against the personal property of Z. Nor can A apply under O. 21, r. 50, sub-r. (2), for leave to execute the decree against the personal property of Z. The reason is that the present rule overrides O. 21, r. 50, and the latter rule only applies where there has been no dissolution to the knowledge of the plaintiff (a). The above ruling would not apply to the case of a partner who had left the firm before the institution of the suit *without* the knowledge of the plaintiff.

Service on manager, subsequent service on partner.—Where a summons is served upon a manager, and subsequently upon a partner, it is the date of the latter service from which time is to be counted for the appearance of the defendant firm (b).

"Principal place at which the partnership business is carried on."—See notes to r. 1 above, "Carrying on business in British India," p. 711.

"As the Court may direct."—These words do not occur in the corresponding English rule. According to the English rule, the summons may be served upon a partner or upon the manager at the plaintiff's option. Under the present rule, it would seem, that the plaintiff has no such option, and that he should obtain the directions of the Court as to the mode of service. It is conceived, however, that omission to obtain such directions would not vitiate the service, but would constitute at the most an "irregularity" within the meaning of s. 99 above.

Notice to be given to the person served as to the capacity in which he is served.—See r. 5 below and notes thereto.

(1) *In re Ide* (1886) 17 Q. B. D. 755.

(2) *Batnab v. Bank of Bengal* (1914) 19 C. W. N. 1008, 1012.

(a) *Wigram v. Cox, Sons, Buckley & Co.* [1894] 1 Q. B. 792.

(b) *Alden v. Beckley* (1890) 25 Q. B. D. 543.

4. [New.] (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

O. 30,
rr. 4, 5.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

- (a) to apply to be made a party to the suit, or
- (b) to enforce any claim against the survivor or survivors.

Indian Contract Act, 1872, s. 45.—*A* passes a promissory note for Rs. 5,000 to a firm consisting of two partners *B* and *C*. If *B* dies, *C* alone cannot sue to recover the amount of the note. The suit must, under s. 45 of the Contract Act, be brought by *C* along with *B*'s legal representative. The effect of the present rule is that where the suit is brought in the firm name, it is not necessary to join *B*'s legal representative as a party plaintiff. But the legal representative may apply to be made a party plaintiff. The mere fact that he does not apply will not affect his right to claim the benefit of any decree that may be passed against *C*.

5. [New. R. S. C., O. 48A, r. 4.] Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

Notice in what capacity served.

Notice in what capacity served.—Where a suit is brought against a firm in the firm name, the summons will be issued against the firm. Such summons may be served either upon any one or more of the partners or upon the person in control of the business [r. 3]. The present rule provides that the person served should be informed by notice in writing given at the time of service, whether he is served as a partner, or as a person in management of the business, or in both characters. In default of notice, the person served will be deemed—not merely presumed—to be served as a partner. If he contends that he is not a partner, the proper course for him to adopt is to appear under protest under r. 8 below denying that he is a partner. If he does not do so, he will be deemed to have been served personally as a partner within the meaning of O. 21, r. 50, sub-r. 1, cl. (c), and execution may be granted against him personally (c).

O. 30,
rr. 5, 6.

Service on manager.—If service is effected on the person in control of the business and no notice is served as provided by this rule, the service is not effective, and cannot be made so [Annual Practice, notes to O. 48A, r. 4].

Appearance under protest.—Where a summons is served upon a person as a partner, but such person appears under protest denying that he is a partner, the plaintiff may disregard the appearance altogether, and proceed as if the summons had not been served; that is, he may have service subsequently effected upon a partner or partners or upon any person having the control of the business as provided by r. 3 above. The mere fact that the person served as a partner denies that he is a partner and appears under protest does not preclude the plaintiff from *otherwise* serving the summons on the firm (r. 8 below).

Where a summons is served upon a person both as a partner and manager, and such person appears with denial of partnership, but does not deny that he is the person in management of the business, the plaintiff is entitled to a decree against the firm, for the service is then one under r. 3, cl. (b), and such service is good service upon the firm.

Forms of notice.—"Take notice that the summons served herewith is served on you—

(i) as a partner in the defendant firm of *AB & Co.*

(ii) or as the person having the control or management of the partnership business of *AB & Co.*

(iii) or as a partner in the defendant firm of *AB & Co.*, and also as the person having the control or management of the partnership business of *AB & Co.*

6. [New. R. S. C., O. 48A, r. 5.] Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Appearance of partners.

Appearance of partners.—Though all proceedings in a suit instituted against a firm in the firm name are to be conducted *in the firm name*, the partners should, so far as appearance is concerned, appear individually *in their own names*. The reason of the rule is that a firm cannot appear as a firm. Where a suit is brought against a firm in the firm name, the appearance of one partner is the appearance of the firm (d).

The only persons entitled to appear in a suit against a firm are—

(i) persons who allege they are partners of the firm sued, or were partners at the time the cause of action arose; and

(ii) persons who are served as partners, but deny that they are partners of the firm sued or were partners of the firm at the time the cause of action accrued. Such persons may appear under protest. See rr. 7 and 8 below.

A person served as a manager of the partnership business need not appear unless he is a member of the firm sued (r. 7 below). A managing partner of a business firm has an implied authority, in the ordinary course of business, to appoint solicitors, to defend a suit brought against the firm in the firm name, and to instruct him to enter an appearance for the other partners as well. No suit will therefore lie against the

solicitors at the instance of the other partners for entering an appearance in their name without their express authority (e).

The expression "individually" is not synonymous with "in person"; hence no partner can be forced under this rule to appear in person (f).

"All subsequent proceedings shall continue in the name of the firm."

—Where persons are sued as partners in the firm name, every subsequent proceeding must be headed with the firm name as defendants. The written statement must be headed in the firm name, and the decree also must be against the firm in the firm name. The Court cannot in such a suit pass any *personal* decree against a partner, unless he is sued *personally* along with the firm (g).

Defence.—Where a suit is brought against a firm in the firm name, the claim being against the partnership, the partners ought, if they can agree, to put in one written statement. But if they cannot agree on one defence, each partner is entitled to put in a separate written statement. In any case the written statement should be a written statement of the firm, but where the partners cannot agree on one defence and a partner puts in a separate defence, the proper form would be "written statement of the defendant firm of AB & Co., by XY, one of the partners appearing in the suit." It may be asked, what is the plaintiff to do if he finds a series of inconsistent defences put in by the different partners? The answer is that "to entitle him to judgment against the partnership, he must, to use a homely phrase, beat all the defences—that is to say, he must show and satisfy the judge at the trial that not one of the defences prevents a judgment being entered against the partnership" (h). What would happen if some of the partners did not appear at all? In case, say, one partner alone chooses to appear, he would be entitled and would be bound to put in a written statement for the firm. He might if he choose add "by" so and so, "one of the partners served and appearing"; but his defence would be the defence of the firm, and the suit would be tried upon that defence, and in that case judgment could be obtained against the firm. Of course, if the partner chose to put in an improper defence and so rendered the partnership liable in a case where it ought not to be made liable, he might thereby as between himself and his co-partners be committing a breach of duty for which he would be liable to them, but so far as the plaintiff is concerned, the plaintiff would be able to obtain judgment against the firm. A partner is not entitled, in a suit against a firm in the firm name, to put in a personal defence: he can only put in a defence for and in the name of the firm (i). But where a partner is sued *personally* along with the firm, he may put in a *personal* defence besides a defence for the firm (j).

Decree.—Where a suit is brought against a firm in the firm name, the decree must be against the firm in the firm name (k). From this it follows that if one of the partners fails to appear, no decree can be passed against him separately for want of appearance (l); and if any one partner does appear, no decree can be passed against the firm for want of appearance (m), the appearance of one partner being the appearance of the firm (n).

In England the practice appears to be where one of the partners is an infant, to enter judgment against the defendant firm "other than" the infant partner (o). But the express provisions of O. 21, r. 50, render this reservation unnecessary in India. See the proviso to sub-rule (1) of r. 50 of O. 21.

(e) *Tomlinson v. Broadsmith* [1898] 1 Q. B. 386.

(f) *Bridges & Co. v. Shamas Din and Co.* (1918) Punj. Rec. no. 78, p. 262.

(g) *Taylor v. Collier* (1882) 30 W. R. (Eng.) 701.

(h) *er Romer, L. J., Ellis v. Wadson* [1899] P. 1 Q. B. 714, 717.

(i) *Ellis v. Wadson* [1899] 1 Q. B. 714.

(j) *Taylor v. Collier* (1882) 30 W. R. (Eng.) 701.

(k) *Jackson v. Litchfield* (1882) 8 Q. B. D. 474.

(l) *Jackson v. Litchfield* (1882) 8 Q. B. D. 474, 478.

(m) *Adam v. Townsend* (1885) 14 Q. B. D. 103.

(n) *Lysaght, Ltd. v. Clark & Co.* [1891] 1 Q. B. 552, 556.

(o) *Lovell v. Beauchamp* [1894] A. C. 607, varying *ex parte G. W. Beauchamp* [1894] 1 Q. B. 1.

O. 30,
rr. 7-9.

7. [*New. R. S. C., O. 48 A, r. 6.*] Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

No appearance except by partners.

See notes to r. 6 above, "Appearance of Partners," p. 716.

8. [*New. R. S. C., O. 48 A, r. 7.*] Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

Appearance under protest.

Appearance under protest.—Where a person served with a summons as a partner denies that he is a partner, he may enter appearance under protest under this rule. Where an appearance is entered under protest, its effect is to nullify the service altogether as regards the defendant firm. In such a case the plaintiff may disregard the appearance under protest altogether, and have the summons served upon one who is admittedly a partner or one who has the control or management of the defendant firm as provided by r. 3 above, and having obtained a decree against the firm, he may apply for leave to execute it against such person under O. 21, r. 50. But the plaintiff is not bound to adopt this course. He may take out a chamber summons and contend that the party who appeared under protest is a partner or was a partner at the time the cause of action accrued, and apply on that basis to strike out of such appearance the denial of partnership. See *Annual Practice*, notes to O. 48A, rr. 4 and 7.

9. [*New. R. S. C., O. 48A, r. 10.*] This order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and enquiries may be directed to be taken and made and directions given as may be just.

Suit between co-partners.

Scope of the rule.—This rule provides that suits between a firm and one of its members, or between two firms with a common member, may be instituted in the firm name provided, the firms carry on business in British India (r. 1). But no execution can be issued in such a suit except by leave of the Court.

10. [New. R. S. C., O. 48A, r. 11.] Any person carrying O. 30, r. 10.

Suit against person
carrying on business
in name other than his
own.

on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit

all rules under this Order shall apply.

Scope of the rule.—A person trading by himself as a firm or in an assumed or trading name may be sued in his trade name, but he cannot sue in that name (p). The rule does not enable a plaintiff to sue the proprietor of a newspaper in the name of the newspaper (q).

Non-resident foreigner.—As to the corresponding English rule, it has been held that it does not apply where the person carrying on business in a name other than his own is a foreign subject resident out of the jurisdiction, though he may carry on business through an agent within the jurisdiction. The decision proceeded upon the broad ground that an English Court has no jurisdiction over foreigners residing abroad merely because they carry on business within the jurisdiction, and that the words "any person," though large enough to include a foreigner, refer only to an English subject (r). The question as to whether the Courts of this country have jurisdiction over foreigners residing abroad merely because they carry on business here through an agent, arose in the recent Privy Council case of *Annamalai v. Muruga* (s), but the point was not decided by their Lordships. In both Courts in India it was assumed that the Court had jurisdiction, but their Lordships said, "This assumption appears to their Lordships to require more attention than it had deserved."

Application of foregoing rules.—By the latter part of this rule all the foregoing rules of this Order relating to proceedings against firms are to apply to a person trading in a name other than his own so far as the nature of the case will permit. By virtue of r. 1, this rule does not apply unless the business is carried on in British India. By virtue of rr. 1 and 2, the person sued in his tradename may be required to disclose his real name and private address. By virtue of r. 3, the summons may be served upon the person sued or upon any person having the control or management of the business; but in the latter case execution cannot be issued against the personal property of the persons sued except by leave of the Court [O. 21, r. 50]. As regards appearance, the person sued must appear in his own name (r. 6).

ORDER XXXI.

Suits by or against Trustees, Executors and Administrators.

1. [S. 437.] In all suits concerning property vested O. 31, r. 1. in a trustee, executor or administrator where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor,

Representation of beneficiaries in suits concerning property vested in trustees, etc.

(p) *Mason v. Mogridge* (1892) 8 Times Rep. 805.

(q) *De Bernales v. New York Herald* [1893] 2 Q. B. 97 (n).

(r) *St. Gobain Chauny and Cirey Co. v. Hoyer-man's Agency* [1893] 2 Q. B. 96.

(s) (1903) 26 Mad. 544, 30 I. A. 220.

O. 31,
[rr. 1, 2.

or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

Scope of the rule.—This rule applies only where the contention is between the beneficiaries and a third person. It does not apply where the contention is between beneficiaries and trustees or between the beneficiaries *inter se*. In suits between beneficiaries and a third person the trustees sufficiently represent the beneficiaries (*t*), though the beneficiaries are an unascertained and unascertainable class (*u*) or persons (*v*). As to declaratory decrees it is provided by s. 43 of the Specific Relief Act, 1877, that a declaration made under s. 42 of that Act is binding, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees. Compare R. S. C. 16, r. 8.

When beneficiaries may be added as parties.—Beneficiaries should always be made parties when the executors are wholly uninterested in the case as where they have fully administered the estate (*w*), or where they have an interest adverse to that of the beneficiaries (*x*). Where a suit was brought by an executor, and the names of the beneficiaries who took possession of the estate pending the suit were substituted as plaintiffs, it was held that it did not amount to a substitution of new plaintiffs within the meaning of s. 22 of the Limitation Act (*y*).

A purchases certain property at an execution sale in the name of B. If the sale is sought to be set aside by the judgment-debtor, A is not a necessary party to the proceeding, regard being had to the provisions of this rule (*z*).

2. [S. 438.] Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them :

Joinder of trustees, executors and administrators.

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties.

Trustees.—The word "trustees" has been newly added in this rule.

Several trustees, executors or administrators.—This rule applies only to suits against, and not to suits by, trustees, executors or administrators. It provides that all executors who have proved the will should be made parties to the suit. The Court may, however, entertain an application as for a receiver even though all proving executors are not made parties to the suit (*a*). An executor who has neither proved nor intermeddled with the estate cannot be sued as representing the estate (*b*). See Indian Succession Act, 1865, s. 271, and Probate and Administration Act, 1881, s. 92.

"Outside British India."—These words have been substituted for the words "beyond the local limits of the jurisdiction of the Court" (*c*).

(t) See as to beneficiaries under a will *Ardesir v. Hrabai* (1884) 8 Bom. 474.

(u) *Fussell v. Dowding* (1884) 27 Ch. D. 237; *Re Sheldon* (1888) 39 Ch. D. 50.

(v) *Cardigan v. Curzon Howe* [1901] 2 Ch. 485.

(w) *Clegg v. Rowland* (1866) L. R. 3 Eq. 368, 373.

(x) *Beresford v. Ramasubba* (1890) 13 Mad. 197.

(y) *Jahnabai v. Brojo* (1903) 7 C. W. N. 817.

(z) *Baroda v. Ohunder* (1902) 29 Cal. 682.

(a) *Hafizabai v. Kar Abdul* (1898) 19 Bom. 83, 85.

(b) *Mohamidu v. Pitohie* (1894) A. C. 437.

(c) See *Kumar Saradindu v. Dharendra* (1905) 2 Cal. L. J. 484.

Administration decree.—A decree for general administration cannot be passed without a general administrator (d). O. 31, rr. 2, 3.

3. [S. 439.] Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her.

Husband of married executrix not to join.

ORDER XXXII.

Suits by or against Minors and Persons of Unsound Mind.

1. [S. 440, 1st para.] Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. O. 32, r. 1.

Minor to sue by next friend.

Minor.—Every person domiciled in British India who has not completed the age of 18 years is a minor. In the case, however, of a minor of whose person or property a guardian has been appointed by a Court of Justice, or whose property is under the superintendence of a Court of Wards, the age of majority is deemed to have been attained on the minor completing his age of 21 years: see Indian Majority Act IX of 1875, s. 3.

Object of having next friend or guardian ad litem.—As a minor is deemed incapable of prosecuting or defending a suit himself, it is necessary that his interests in the suit should be watched by an adult person. Such person is, in the case of a minor plaintiff, called his next friend, and in the case of a minor defendant, his guardian *ad litem* or guardian for the suit. But neither the next friend nor the guardian *ad litem* is a party to the suit (e). The next friend of a minor plaintiff is just as much entitled to change his attorney as any other plaintiff who is *sui juris* (f). As to liability of next friend for costs, see notes below.

Title of suit.—Where a suit is brought on behalf of a minor, the title of the suit should run thus: “A.B. a minor, by his next friend C. D. v. X. Y.” Where a suit is brought against a minor, the title of the suit should be: “F. G. v. A.B., a minor by his guardian *ad litem* C.D.” Where the title of a suit in a case was “A. B. for self and his minor daughter C. D.” instead of “A.B., and C.D., a minor by her next friend A.B.,” and the objection was raised for the first time in appeal, it was held that the error did not affect the merits of the case, and that it was not therefore fatal to the suit (g) [s. 99]. See notes to r. 3 below, under the head “Where a minor defendant is substantially represented by a guardian *ad litem*.”

Objection to authority of next friend.—Where a minor plaintiff has a cause of action, no objection to the *authority to sue* of the next friend through whom the suit is brought will be entertained in appeal (h).

(d) See *Re Toleman* [1897] 1 Ch. 866.

(e) *Rup Chand v. Dasodha* (1908) 30 All. 55, 56.

(f) *Dinendra v. Wilson* (1901) 28 Cal. 284.

(g) *Alim v. Jhalo* (1886) 12 Cal. 48.

(h) *Hardi v. Ruder Perkash* (1884) 10 Cal. 626, 11 I. A. 26.

O. 32, r. 1. When minor may sue without next friend.—A minor may sue in a Presidency Small Cause Court without a next friend, when the amount claimed does not exceed Rs. 500, and is due to him for wages or for work done as a servant: Presidency Small Cause Court Act 15 of 1882, s. 32.

Liability of next friend for costs.—Where a suit brought by a minor by his next friend is dismissed, and the Court finds that the suit was not for the benefit of the minor, the Court may direct the next friend *personally* to pay the costs (i). But if the Court finds that there were reasonable grounds for instituting the suit, and the next friend has acted *bona fide*, the Court will not mulct the next friend in costs, and will direct the costs to come out of the property of the minor (j).

Suit on behalf of an alleged minor who is not in fact a minor.—A suit is instituted on behalf of a person alleged to be a minor, through his next friend. It is found that the plaintiff was not in fact a minor at the date of the institution of the suit. In such a case the suit should, according to Allahabad decisions, be dismissed (k); according to Calcutta (l) and Madras (m) decisions, the suit should not be dismissed, the proper course being to return the plaint for amendment. The latter seems to be the better opinion.

Decree against a major treating him as a minor.—A decree passed against a person treating him as a minor while in reality he was a major at the date thereof is not a nullity; consequently, whatever rights he may have to apply to set aside the decree, a sale in execution of the decree cannot be set aside on the ground that the Court had no jurisdiction to pass the decree (n). See notes below under the head "estoppel."

Estoppel.—A minor who, representing himself to be a major, collects rents and gives receipts therefor, is estopped from recovering again the rents once paid to him by instituting a suit through a next friend (o). Similarly, a minor who, representing himself to be of full age, sells certain property and executes a deed of sale, is estopped from suing to set aside the sale on the ground that he was a minor at the date of sale (p). But if the purchaser knew that the vendor was a minor, the purchaser could not be said to have been misled by the false representation as to the vendor's age and the suit to set aside the sale would not then be barred (q). A Court of Equity will deprive a fraudulent minor of the benefit of the plea of infancy, but he who invokes the aid of the Court must establish not only that a fraud was practised on him by the minor, but that he was deceived into action by the fraud (r). It is clear that if the purchaser *knew* that the vendor was a minor, he could not be said to have been deceived into action by the minor's misrepresentation as to his age.

If a person alleged to be a minor, but who is not in fact a minor, is sued as a minor by his guardian *ad litem*, and a decree is passed against him in the suit, he will be estopped from impeaching the validity of the decree as well as the sale on the decree if he was aware of the suit and allowed it to proceed against him (s).

Attorney's costs.—An attorney is entitled to recover from the infant's estate the costs of a proper suit or defence of a suit in which the estate was involved. He is also entitled to have a charge declared on the estate for the amount of his costs (t).

(i) *Geerebulla v. Chunder Kant* (1835) 11 Cal. 213.

(j) *Devkabal v. Jefferson* (1886) 10 Bom. 248.

(k) *Sheorania v. Bharat Singh* (1898) 20 All. 90.

(l) *Taqut Jan v. Obaitulla* (1894) 21 Cal. 866.

(m) *Shanmuga v. Narayana* (1917) 40 Mad. 743.

(n) *Seehagiri v. Hanumantha* (1915) 39 Mad. 1081.

(o) *Ram Ratun v. Sheo Nan lan* (1902) 29 Cal. 126.

(p) *Ganesh v. Bapu* (1897) 21 Bom. 198.

(q) *Mohori v. Dharmodas* (1908) 80 Cal. 539, 80 I. A. 114.

(r) *Brahmo Dutt v. Dharmodas* (1899) 26 Cal. 381.

(s) *Ramachari v. Duraisami* (1898) 21 Mad. 167.

(t) *Watkins v. Dhunmoo Baboo* (1881) 7 Cal. 140; *Sham Charan v. Chowdhry Debya*

Singh (1894) 21 Cal. 872; *Kumar Krishna*

v. Hari Narain (1915) 43 Cal. 676; see

also *Branson v. Appasami* (1894) 17 Mad. 257.

2. [S. 442.] (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Where suit is instituted without next friend, plaint to be taken off the file.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

Taking the plaint off the file.—This rule contemplates the case where a suit is instituted by a person who is alleged by the defendant to be a minor, without a next friend. In such a case the defendant may apply under this rule to have the plaint taken off the file. To bring his case within the rule, the defendant must show that the plaintiff is a minor and that the suit was instituted without a next friend. Now the fact of minority—

- (i) may either be apparent on the face of the plaint, or
- (ii) it may be ascertained upon objection by the defendant and enquiry by the Court.

In case (1), the practice is to take the plaint off the file (u).

In case (ii), i.e., where the fact of minority is established after evidence has been taken on the point, it may be found—

- (a) that the plaintiff instituted the suit with the knowledge of the fact of minority and with the intention of deceiving the Court and evading the payment of costs in the event of failure; or
- (b) that the plaintiff had no such knowledge or intention.

In case (a), the practice, according to the Bombay decisions, is to make an order under this rule directing the plaint to be taken off the file (v). According to the Calcutta decisions, the Court should pass a decree dismissing the suit. The Calcutta High Court holds that the procedure prescribed by this rule, namely, taking the plaint off the file, applies only to those cases where the fact of minority is apparent on the face of the plaint, that is to say, in case (i), and that it does not apply where the fact of minority is established on enquiry held by the Court upon that point (w). The difference between the practice of the two Courts is important in this way, that while an appeal lies from a decree dismissing a suit, no appeal lies from an order directing a plaint to be taken off the file.

In case (b), the practice is to stay proceedings and to allow sufficient time to enable the minor plaintiff to be represented by a next friend (x).

Costs.—When a suit is instituted by a minor without a next friend, the pleader or any other person presenting the plaint is liable for costs and the Court should not render the property of the minor liable for costs (y).

(u) *Beni Ram Bhutt v. Ram Lal* (1886) 13 Cal. 189; *Rattonbai v. Chabildas* (1889) 13 Bom. 7.

(v) *Rattonbai v. Chabildas* (1889) 13 Bom. 7.
(w) *Beni Ram Bhutt v. Ram Lal* (1886) 13 Cal. 189.

(x) *Beni Ram Bhutt v. Ram Lal* (1886) 13 Cal. 189; *Rattonbai v. Chabildas* (1889) 13 Bom. 7.

(y) *Amichand v. Collector of Sholapur* (1889) 13 Bom. 234.

O. 32,
rr. 2, 3.

Decree for a minor in a suit instituted by him without a next friend.—Where a suit is instituted by a minor without a next friend, and the defendant does not object to it, he will be deemed to have waived his objection. The defendant cannot, in such a case, after a decree has been passed against him, object to the execution of the decree on the ground that the suit was instituted by the minor without a next friend. The absence of a next friend does not make the suit a nullity. The institution of a suit by a minor without a next friend is merely an irregularity which can be waived by the conduct of the defendant (z).

3. [S. 446, 1st para., S. 456.] (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

Guardian for the suit to be appointed by Court for minor defendant.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

Sub-rule (4) is new.

Guardian ad litem.—Where a guardian *ad litem* has once been appointed, his appointment endures for the whole of the litigation, including proceedings in execution and appeal (a).

A guardian *ad litem* is not a party to a suit or appeal. Therefore a suit or an appeal is not time-barred, merely because the order appointing a guardian *ad litem* is not made until after the expiration of the period of limitation prescribed for the suit or appeal (b).

“Proper” person to be appointed guardian ad litem.—It is the duty of the Judge himself to decide who is the proper person to be appointed as guardian *ad litem* (c).

(z) *Kamalakshi v. Ramasami* (1896) 19 Mad. 127.

(a) *Juala v. Pirbhu* (1892) 14 All. 35; *Zenkata v. Alakarajamba* (1899) 22 Mad. 187; *Muzaffar Ali Khan v. Parbatti* (1907) 29

All. 640.

(b) *Khem Karan v. Har Dayal* (1882) 4 All. 37; *Rup Chand v. Dasodha* (1908) 30 All. 55.

(c) *Ramechandra Das v. Jotiprasad* (1907) 29 All. 675, 678.

O. 32, r. 3.

Plea of minority.—*A* sues *B*. *B* alleges that he is a minor. In such a case the Court should frame a preliminary issue on the question of minority, and appoint a guardian for the purpose of the enquiry on the question of minority. If the defendant is found to be a minor, a guardian *ad litem* should be appointed for him; but if he is found to be a major, the guardian appointed for the inquiry should cease to act and the defendant may conduct his own case (*d*).

Where a minor defendant is not represented at all by a guardian ad litem.—The provisions of this rule as to the appointment of a guardian *ad litem* for a minor defendant are imperative. Hence if a minor is sued without a guardian *ad litem*, and a decree is passed against him, the decree is a nullity, and it cannot be enforced against him (*e*).

A minor against whom a decree has been passed without the appointment of a proper guardian *ad litem* has several remedies open to him. He may, if the facts of the case justify, in that very suit, (1) appeal from the decree, or (2) apply for a re-hearing under O. 9, r. 13, or (3) apply for a review of judgment, or (4) apply for an order under O. 32, r. 5 (2), according as the circumstances of the case may permit (*f*). He has also another remedy open to him, namely, a suit on the lines indicated in the undermentioned case (*g*).

Where a decree in a suit against a minor is set aside on the ground that he was not represented by a proper guardian *ad litem*, the Court in which the suit was filed has inherent power to restore the suit and to proceed with the appointment of a fit and proper person as guardian *ad litem* for the minor defendant (*h*).

Where a minor defendant is substantially represented by a guardian ad litem.—There are cases in which there have been no formal application and no formal order for the appointment of a guardian *ad litem* for a minor defendant, but in which the proceedings show that the minor was substantially represented by a guardian *ad litem*. In such cases it has been held that the want of a formal application and order for the appointment of a guardian *ad litem* is but an irregularity, and that the decree will bind the minor unless it is shewn that the defect in procedure has prejudiced the minor (*i*). In *Walian v. Banke Behari* (*j*), a suit was brought against a minor, but no order was applied for and none was made for the appointment of a guardian *ad litem*. In the plaint, however, which was admitted by the Court, the mother of the minor was described as his guardian. Further, the mother appeared throughout the proceedings in the suit as the minor's guardian. A decree was passed against the minor, and in the decree and the execution proceedings the mother was described as the minor's guardian. In a suit brought by the minor on attaining majority to set aside the decree passed against him on the ground that no guardian *ad litem* had been appointed as required by the present rule, it was held by their Lordships of the Privy Council, overruling the decision of the Calcutta High Court, that the Court in which the former suit was instituted had, by its action, given sanction to the appearance of the mother as a guardian *ad litem*, and that the absence of a formal order of appointment was not fatal to the suit,

(d) *Kasi Doss v. Kassim Sait* (1893) 16 Mad. 344.

(e) *Dakeshur v. Rewat* (1897) 24 Cal. 25; *Bhura Mal v. Har Kishan Das* (1902) 24 All. 383; *Hanuman v. Muhammad* (1900) 28 All. 187; *Daji v. Dhirajram* (1888) 12 Bom. 18; *Rashid-un-Nisa v. Muhammad* (1909) 36 I. A. 168.

(f) *Bhagwan v. Param Sukh Das* (1917) 39 All. 8, 10-11.

(g) *Sham Lal v. Ghasita* (1901) 23 All. 459.

(h) *Bhagwan v. Param Sukh Das* (1917) 39 All. 8.

(i) *Walian v. Banke Behari* (1903) 30 Cal. 1021, 30 I. A. 182; *Hanuman v. Muhammad* (1906) 28 All. 137; *Kedar v. Protap* (1893) 20 Cal. 11; *Hari v. Bhubaneswari* (1889) 16 Cal. 40, 15 I. A. 195; *Suresh Chunder v. Jugut Chander* (1887) 14 Cal. 204; *Sayad Amir v. Shekh Masleudin* (1916) 40 Bom. 541; *Keshaveaarindra v. Rani Debendra* (1918) 4 Pat. L. J. 213; *Narain Das v. Ralli Brothers* (1915) Punj. Rec. no. 61, p. 270.

(j) (1903) 30 Cal. 1021, 30 I. A. 182.

Q. 32,
rr. 3, 4.

unless it was shown that the defect in procedure prejudiced the minor. Their Lordships observed that there was nothing in the proceedings of that suit to suggest that the interests of the minor were not duly protected by the mother or that the defect in procedure had prejudiced the minor, and they accordingly held that the decree was binding upon the minor. But where it appears that the minor's interests were not duly protected, and that the defect in procedure has prejudiced the minor, the decree will not bind the minor, and it will be set aside as a nullity (*k*). It is clear from what has been stated above that the mere absence of an affidavit such as is required by sub-r. (3) is not sufficient to render the proceedings illegal and void as against a minor (*l*).

Service of summons.—There is no special provision in the Code for service on minors. Hence where the defendant is a minor, he should be served with the summons in the way provided for service upon adults (*m*). It is, indeed, doubtful whether service on a guardian *ad litem* is sufficient service for the purposes of the Code (*n*). But all notices of applications and other processes in a suit should be served upon the guardian *ad litem* [See rule 5 below]. As to service in suits brought against wards of Courts of Wards, see Bengal Court of Wards Act, 1879, s. 54, and Bombay Court of Wards Act, 1905, s. 34.

Fraud of next friend or guardian ad litem.—A decree passed against a minor properly represented is binding upon him as much as a decree passed against an adult, but it is open to the minor to impeach the decree by a suit in cases where the next friend or guardian for the suit has been guilty of fraud or collusion in allowing the decree to be passed against him (*o*).

4. [Ss. 445, 457; ss. 440, 443; s. 456, and R. S. C., O. 65, r. 13.]

Who may act as next friend or be appointed guardian for the suit.

(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared, by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons

(k) *Hanuman v. Muhammad* (1906) 28 All. 137; *Partab Singh v. Bhadut Singh* (1918) 35 All. 487, 494, 40 I. A. 182, 188; *Bhagwan v. Param* (1915) 37 All. 179. Contrast *Maruthamalai v. Palani* (1912) 37 Mad. 535.
(l) *Munnu Lal v. Ghulam Abbas* (1910) 32 All. 287, 37 I. A. 77.
(m) *Jasindra v. Srinath* (1899) 26 Cal. 267, 271; *Abdul v. Egar* (1907) 35 Cal. 182, 184. See *In the goods of Amelia Lal* (1900) 27 Cal. 350, and *Rebelov. Rebelov* (1897) 2 C.

W. N. 100 [both cases of service of citation]. See also Trevelyan on Minors, 4th ed. p. 269.
(n) *Suresh Chunder v. Jugut Chunder* (1886) 14 Cal. 204, 215; *Govind Ram v. Muhammad Ali* (1912) Punj. Rec. no. 353 p. 115.
(o) *Cureandas v. Lakkavahu* (1894) 19 Bom. 571; *Lalla v. Ramnandan* (1895) 22 Cal. 8; *Raghubar v. Bhikya* (1885) 12 Cal. 69; *Bent Prasad v. Lajja Ram* (1916) 38 All. 452.

to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be. O. 32, r. 4.

(3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

References to Code of 1882.—Sub-r. (1) corresponds to ss. 445 and 457 of the Code of 1882, sub-r. (2) to ss. 440 and 443, 2nd paragraph, and sub-r. (4) to s. 456, 2nd paragraph, and R. S. C., O. 65, r. 13. Sub-r. (3) is new. It is in accordance with a Bombay ruling in the undermentioned case (p).

Married woman as guardian ad litem.—Under the Code of 1882, though a married woman could be appointed next friend of a minor plaintiff, she could not be appointed guardian *ad litem* of a minor defendant. Under this Code she may be appointed guardian *ad litem* as well.

Guardian appointed by competent authority.—A guardian of his minor son appointed by a Hindu father under his will is not a guardian appointed by "competent authority" within the meaning of this rule (q).

Sub-r. (2) provides that where a minor has a guardian appointed by competent authority, no person other than such guardian should be appointed his guardian *ad litem*. Where, however, the Court, in ignorance of the fact that the minor has a guardian appointed by competent authority, appoints another person guardian for the suit, such appointment is not an illegality, but a mere irregularity, and it does not of itself vitiate either the decree passed in the suit or a sale consequent upon such decree (r).

Sub-rule (2): "Another person be permitted to act."—The permission need not be express (s).

Sub-rule (3): consent of guardian ad litem.—Where a father of a joint Hindu family was appointed guardian *ad litem* of his minor sons in a suit against them on a mortgage of joint family property executed by the father, and it appeared that the father had not intimated his consent to act as guardian *ad litem*, and the father not appearing to defend the suit an ex parte decree was passed, it was held in a suit by the sons to recover their share of the property on the ground that they were not properly

(p) *Jadow v. Ohagan* (1881) 5 Bom. 306.

(q) *Buhalal v. Morarji* (1907) 31 Bom. 413.

(r) *Bammar Singh v. Pirbhu Singh* (1907) 29 All.

290.

(s) *Sridhar Rao v. Ram Lal* (1909) 31 All. 7.

O. 32,
rr. 4-6.

represented in the previous suit and that the debt contracted by the father was immoral, that the minors were not properly represented and that the sons were entitled to maintain the suit (t).

Officer of Court as guardian ad litem.—An officer of Court who has been appointed guardian *ad litem* should not be paid for his trouble (u). If he has no funds to conduct adequately the defence of the minor, the Court has the power to relieve him of his position as guardian (v).

5. [Ss. 441, 444.] (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

Representation of minor
by next friend or guardian
for the suit.

(2) Every order made in a suit, or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

6. [S. 461.] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

Receipt by next friend
or guardian for the suit of
property under decree for
minor.

- (a) by way of compromise before decree or order, or
- (b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

Joint Mitakshara family.—The provisions as to leave of Court and security bonds do not apply where a suit is brought by two members of a joint Hindu family governed by the Mitakshara law, one of whom is the manager of the family, who

(t) *Bejnath v. Dharam* (1918) 38 All. 315.
(u) *Kerakoos v. Serle* (1844) 3 M. I. A. 329.

(v) *Goptial v. Agarwajit* (1904) 28 Bom. 626.

O. 32,
rr. 6, 7.

is also appointed next friend of the other member. The reason is that the manager alone may sue as such to recover moneys due to the family, and the other member is not a necessary party to the suit. *A* and *B*, two Hindu brothers, constitute a joint Hindu family governed by the Mitakshara law. *A* is the manager of the family. *B* is a minor. A suit is brought by *A* and *B* for rent against a tenant. *A* is appointed next friend of *B*. *A* may receive the money payable under the decree without the leave of the Court (*w*). But see *Ganesh Row v. Tuljaram Row* (*x*), cited on p. 732 below under the head "Where the minor is a member of a joint Hindu family."

Security for protection of minor's property.—A bond passed by a surety under sub-r. (2) cannot be enforced by summary process under s. 145 (*y*).

7. [S. 462.] (1) No next friend or guardian for the suit shall, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

Agreement or com-
promise by next friend
or guardian for the suit.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

Alterations in the rule.—The words "expressly" recorded in the proceedings" in sub-r. (1), and the words "so recorded" in sub-r. (2), are new. They give effect to the practice established under the old section. See notes below, "Compromise decree when binding on a minor"

Scope of the rule.—This rule contemplates the following steps to be taken in order before a compromise decree is passed in a suit to which a minor is a party, namely, (1) an application by the next friend or guardian *ad litem* for leave to compromise the suit, (2) the granting of leave by the Court if the Court thinks the case is a fit one for leave, and (3) the consent of the next friend or guardian *ad litem* to the proposed compromise after the Court has granted the leave (*z*). If the leave is granted, and the next friend or guardian *ad litem* assents to the compromise, the parties may apply to the Court under O. 23, r. 3, for a consent decree in terms of the compromise, and if the compromise is lawful, it is the duty of the Court under that rule to pass the decree applied for. If the next friend of a minor plaintiff agrees to compromise a suit on behalf of the minor subject to the leave of the Court, and then withdraws from the compromise before the leave of the Court is applied for, the Court will not enforce the compromise at the instance of the defendant, even though the terms of the compromise might appear beneficial to the minor. The reason is that such compromise is not binding unless it is sanctioned by the Court (*a*).

Compromise decree when binding on a minor.—The provision contained in this rule making it necessary to obtain the leave of the Court is of great

(*w*) *Harihar Pershad v. Mathura Lal* (1908) 35 Cal. 561.

(*x*) (1913) 86 Mad. 295, 40 I. A. 132.

(*y*) *Kurugodappa v. Soogamma* (1918) 41 Mad.

40.

(*z*) *Aman Singh v. Narain* (1898) 20 All. 98.

(*a*) *Ranga v. Rajagopala* (1899) 22 Mad. 379.

O. 32, r. 7. importance to protect the interest of minors (b). To render a decree passed in pursuance of a compromise binding on a minor, the following conditions must be complied with :—

- (a) The next friend or guardian *ad litem* must apply to the Court for leave to enter into the proposed compromise (c), stating specifically that the compromise is sought to be made on behalf of the minor (d), and also setting forth the terms of the proposed compromise (e).
- (b) On such an application being made to the Court, the Court must exercise a judicial discretion as to the propriety, in the interests of the minor, of the proposed compromise (f). And if the Court sees reason to grant leave, it should record an order showing that an application has been made to it, that the terms of the proposed agreement or compromise have been considered by it, and that having regard to the interests of the minor, it has granted leave to make the agreement or compromise (g). "It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained" (h). A compromise will be deemed to be beneficial to the interests of a minor, if it secures to the minor some demonstrable advantage, or averts some obvious mischief (i).
- (c) The leave must be *express*, not implied. It must, in the language of this rule, be *expressly recorded* in the proceedings. From the mere fact that the Court has passed a decree in accordance with a compromise it cannot be inferred that any of the steps preliminary and necessary to the making of the decree have been taken by the Court. The Court by passing a decree in pursuance of a compromise does not *ipso facto* sanction the compromise (j). The provisions of this rule are complied with if the leave of the Court is expressly recorded; it is not necessary that the order granting leave should state that the Court had considered the terms of the compromise and regarded them to be beneficial to the minor (k).

But the non-observance of the above conditions does not render the compromise decree *void*. The decree is only *voidable*, and that too at the option of the minor. No other party to the suit can call the decree in question: the minor alone is entitled to call it in question, and this he may do, either on attaining majority or before then through a next friend (l).

Procedure to set aside compromise decree.—A compromise decree may be set aside either in a regular suit or upon an application for review to the Court that passed the decree (m). But it cannot be called in question by way of objection to any proceeding taken in execution of it (n).

- (b) *Subramanian v. Raja Rajewara* (1915) 30 Mad. 115, 127 [P. C.]
- (c) *Kalavati v. Chedilal* (1895) 17 All. 531.
- (d) *Manohar Lal v. Jadunath Singh* (1906) 28 All. 585, 33 I. A. 128.
- (e) *Virupakshappa v. Shidappa* (1902) 26 Bom. 109.
- (f) *Kalavati v. Chedilal* (1895) 17 All. 531.
- (g) *Manohar Lal v. Jadunath Singh* (1906) 28 All. 585, 33 I. A. 128; *Kalavati v. Chedilal* (1895) 17 All. 531; *Govindasami v. Alagirisami* (1906) 29 Mad. 104; *Bhiwa v. Devchand* (1911) 35 Bom. 322; *Sethuram v. Vasantha* (1910) 84 Mad. 314; *Badri Prasad v. Gopal* (1919) 41 All. 559.
- (h) 28 All. 585, 589, 33 I. A. 128, 131, *supra*.
- (i) *Dharmaji v. Gurrav* (1873) 10 B. H. C. 311.
- (j) *Manohar Lal v. Jadunath Singh* (1906) 28

- All. 585, 33 I. A. 128; *Partab Singh v. Bhabuti Singh* (1913) 35 All. 487, 40 I. A. 182; *Virupakshappa v. Shidappa* (1902) 26 Bom. 109; *Kalavati v. Chedilal* (1895) 17 All. 531; *Arunachalam v. Meyyappa* (1898) 21 Mad. 91; *Sharat Chunder v. Kartik Chunder* (1883) 9 Cal. 810.
- (k) *Janki v. Naunihal* (1917) Punj. Rec. no. 36, p. 146.
- (l) *Virupakshappa v. Shidappa* (1902) 26 Bom. 109.
- (m) *Mirali v. Rahmoobhoy* (1891) 15 Bom. 594; *Surendra v. Hemangini* (1907) 34 Cal. 83.
- (n) *Arunachalam v. Murugappa* (1880) 12 Mad. 503; *Virupakshappa v. Shidappa* (1899) 23 Bom. 626.

It was doubtful whether under the Code of 1882 a compromise decree can be set aside by an *appeal* from the decree. Where an appeal was preferred from a compromise decree on the ground that the lower Court did not consider the question as to whether the compromise was a proper one in the interests of the minor, the High Court of Allahabad entertained the appeal (*o*); in a similar case, the High Court of Calcutta refused to entertain the appeal (*p*). Under the present Code no appeal lies from a consent-decree [s. 96, sub-s. (3)].

Compromise under misapprehension of a material fact.—Where a compromise is entered into under a misapprehension of a material fact, it will be set aside even though it may have been sanctioned by the Court under this rule (*q*). See Indian Contract Act, 1872, s. 20.

Compromise of execution proceedings.—The provisions of this rule apply to a compromise entered into even *after* a decree has been passed. Hence an adjustment of a decree to which a minor is a party requires the sanction of the Court under this rule (*r*). See O. 21, r. 2.

Agreement to be bound by oath under Indian Oaths Act, 1873, s. 9, not within this rule.—An agreement by the next friend of a minor that an issue in the suit should be determined by the oath of the defendant, does not come within the purview of this rule, and the sanction of the Court is not necessary. In such a case the minor is bound by the agreement, provided there is no fraud or gross negligence on the part of the next friend (*s*).

Abandonment of issue does not amount to a compromise.—A next friend or guardian *ad litem* may abandon an issue in the course of the trial of the suit, and the sanction of the Court is not requisite for that purpose, for the abandonment of an issue does not amount to a "compromise" within the meaning of this rule. The abandonment is binding on the minor provided there is no fraud or gross negligence on the part of the next friend or guardian *ad litem* (*t*).

Agreement to refer to arbitration.—It has been held by the High Court of Madras (*u*) and the Chief Court of the Punjab (*v*), that an agreement by a next friend or guardian *ad litem* to refer any matter in controversy in a suit to arbitration is an "agreement" within the meaning of this rule, and that the sanction of the Court is therefore necessary. According to the Allahabad High Court such an agreement is not within this rule, and the sanction of the Court is not necessary (*w*). See Schedule II, r. 1.

The decisions cited above relate to cases where the agreement to refer was made during the pendency of a suit. We now proceed to consider cases where there is no suit pending but an agreement to refer is made to which a minor is a party by his guardian. Before dealing with these cases it may be premised that to attract the application of this rule it is necessary—

- (1) that there should be a pending suit as indicated by the words "no next friend or guardian for the suit", and
- (2) that there should be an agreement to refer.

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| <p>(<i>p</i>) <i>Kalavati v. Chedilal</i> (1895) 17 All. 531.
 (<i>q</i>) <i>Rakhai v. Advya</i> (1908) 30 Cal. 613.
 (<i>r</i>) <i>Bibee Solomon v. Abdool Azeez</i> (1881) 6 Cal. 687.
 (<i>s</i>) <i>Virupakshappa v. Shidappa</i> (1902) 26 Bom. 109; <i>Arunachalam v. Ramanandhan</i> (1906) 29 Mad. 309.
 (<i>t</i>) <i>Chengal v. Venkata</i> (1889) 12 Mad. 493; <i>Shoo Nath v. Sukh Lal</i> (1900) 27 Cal. 229.
 (<i>u</i>) <i>Venkata v. Bhashyakariu</i> (1899) 22 Mad. 538. See also <i>Suamirao v. Collector of Dharwar</i> (1899) 17 Bom. 299 and <i>Luch-</i></p> | <p><i>meswar v. Darbhanga Municipality</i> (1891) 18 Cal. 99, 17 I. A. 90 [as to waiver].
 (<i>v</i>) <i>Lakshmana v. Chinnathambi</i> (1901) 24 Mad. 326; <i>Vijaya v. Venkatasubba</i> (1914) 39 Mad. 858.
 (<i>w</i>) <i>Ganesha v. Mulchand</i> (1912) Punj. Rec. no. 95, p. 330 [F. B.]; <i>Muhammad Ibrahim v. Allah Baksh</i> (1919) Punj. Rec. no. 145, p. 371, 1 Lah. L. J. 138.
 (<i>x</i>) <i>Hardeo v. Gauri Shankar</i> (1908) 28 All. 35; <i>Lutawan v. Lachya</i> (1913) 36 All. 69 [F. B.].</p> |
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O. 32, r. 7.

If either of these conditions is wanting, the present rule does not apply and no leave of the Court is necessary. *A* and *B* carry on business in partnership. *A* dies leaving a minor son and a widow. Disputes arise between the parties as to accounts, and an agreement is made between the minor through his mother and *B* to refer the disputes to arbitration. The arbitrators make their award, and the minor, by his mother, applies to file the award under para. 20 of Sch. II. The application is registered as a suit between the minor applicant as plaintiff and *B* as defendant [see the 2nd clause of para. 20]. Notice is then given as required by the 3rd clause of para. 20 to *B*, and no objection to the award having been made by *B*, the award is filed and a decree passed in terms of the award as provided by para. 21 of Sch. II. Does the agreement to refer require the sanction of the Court under this rule? No, because it was not made during the pendency of a suit and the first of the two conditions mentioned above is wanting (*x*). Does the decree on the award require the sanction of the Court? No, because the application to file the award being made by the minor as plaintiff, it cannot be said that there was an agreement on behalf of the minor not to object to the award and to allow a decree to be passed on the award; in this case the second of the two conditions mentioned above is wanting (*y*). Suppose now that the application to file the award was made by *B*, in which case the application would be registered as a suit between *B* as plaintiff and the minor as defendant, would the decree on the award require the sanction of the Court? Yes, if the minor's guardian agreed not to object to the award and to allow a decree to be passed on the award; in this case both the conditions mentioned above are present, namely, that there is an agreement on behalf of the minor, and the agreement is made in the course of a suit started by the application to file the award (*z*).

Withdrawal of suit by next friend.—If the next friend of a minor plaintiff withdraws from the suit, and such withdrawal is in pursuance of an agreement or compromise entered into with the defendant, the withdrawal must be with the sanction of the Court under this rule; if the sanction of the Court is not obtained, the order of withdrawal may be set aside at the instance of the minor (*a*). But if the withdrawal is not in pursuance of an agreement or compromise entered into with the defendant, the sanction of the Court is not necessary, and the withdrawal is binding on the minor plaintiff, provided there is no fraud or gross negligence on the part of the next friend (*b*).

Where the minor is a member of a joint Hindu family.—In a suit brought by some of the members of a joint Hindu family one of whom was a minor, a compromise decree was passed after the compromise had been sanctioned by the Court. The minor had no separate interest; the adult members of the family had taken part in the compromise and assented to it, and the Court pronounced that it was for the benefit of the minor. In a suit brought on behalf of the minor to set aside the compromise decree on the ground that the proper materials which were essential to make the compromise and decree binding upon him were not placed before the Court previous to obtaining its sanction, it was held that the decree was under the circumstances binding on the minor (*c*).

When the father of a minor, a member of a joint Hindu family, of which the father is the managing member, is appointed his guardian *ad litem*, his powers as managing

(*x*) *Vithaldas v. Dattaram* (1901) 26 Bom. 298.

(*y*) *Hanmantram v. Shivnarayan* (1918) 43 Bom. 258 [F. B.]

(*z*) *Mahadev v. Balkrishna* (1898) Printed Judgments [Bombay] 609.

(*a*) *Karmali v. Rahimkhoy* (1889) 18 Bom. 187; *Doraswami v. Thungasami* (1904) 27 Mad.

377.

(*b*) *Ram Sarup v. Shah Lafat* (1902) 29 Cal. 785; *Rajada v. Ghulla* (1919) Punj. Rec. no. 59, p. 148.

(*c*) *Rameswar Pershad v. Ram Bahadur Singh* (1907) 34 Cal. 70.

O. 32,
rr. 7-9.

member, so far as they relate to the minor's interest, are controlled by the provisions of the present rule, and he cannot, without the leave of the Court, enter into any agreement or compromise on behalf of the minor with reference to the suit. Such an agreement is not binding on the minor even if it was a *bona fide* settlement of a disputed claim (d).

Where a minor is under the charge of a Court of Wards.—The sanction of the Civil Court required by this rule is not necessary, having regard to the provisions of ss. 18 and 21 of the Court of Wards Act (Beng. Act 9 of 1879), for a compromise entered into under the authority and by the direction of the Court of Wards on behalf of a minor under its charge (e).

Joint bond by a minor and an adult.—In compromise of a suit two defendants, of whom one is a minor, enter into a bond by which they jointly agree to pay a certain sum of money to the plaintiff at a future date. The leave of the Court is not obtained on behalf of the minor as required by this rule. The bond is not enforceable against the minor, but it is enforceable to the full amount against the adult promisor (f).

8. [S. 447.] (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

Retirement of next friend.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed and also that he has no interest adverse to that of the minor.

Retirement of next friend.—A suit is brought by A and B, both minors, by their mother as their next friend. The mother is also appointed guardian of the person and property of the minors under the Guardians and Wards Act, 1890. Subsequently, on the application of the mother, A who has then attained majority, is appointed guardian of the person and property of B in her place. This is not tantamount to A being appointed next friend of B for the suit. The mother, therefore, cannot retire without first procuring a fit person to be put in her place and giving security for the costs already incurred (g).

9. [S. 446.] (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within

Removal of next friend.

(d) *Ganesh Row v. Tuljaram, Row* (1913) 30 Mad. 295, 40 I. A. 132.

(e) *Nakimo v. Pemba* (1917) 44 Cal. 829.

(f) *Jamna Bai v. Vasant Rao* (1916) 43 I.A.

99, 39 Mad. 409.

(g) *Banarsi Prasad v. Ram Narayan* (1908) 30 All. 105.

O. 32, rr. 9, 10. British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

Alterations in the rule.—The words “and make such other order as to costs as it thinks fit” in sub-r. (1) are new. The words, “and shall thereupon appoint, etc.” at the end of sub-r. (2) are also new.

Where the next friend does not do his duty.—Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend, or that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it (h).

Adverse interest.—In a suit brought against a minor by his next friend, a decree is passed against the minor. The interest of the minor requires an appeal, but certain events happen after the passing of the decree which render it to the interest of the next friend that the decree against the minor should stand, and hence no appeal is preferred by the next friend from the decree. In such a case leave will be granted to the minor on his attaining majority to appeal from the decree, though the period of limitation for the appeal may have expired (i).

10. [Ss. 448, 449.] (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Stay of proceedings on removal, etc., of next friend.

(2) Where the pleader of such minor omits within a reasonable time to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

(h) *Doragumti v. Thungasami* (1904) 27 Mad. | (i) *Cursandas v. Ladkavahoo* (1896) 20 Bom. 104. 377.

11. [Ss. 458, 459.] (1) Where the guardian for the suit desires to retire or does not do his duty, ^{O. 32, rr. 11, 12.} or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

The words "may permit such guardian to retire" in sub-r. (1) are new.

12. [Ss. 450, 453.] (1) A minor plaintiff or a minor not a party to a suit on whose behalf, an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus:—

"A. B., late a minor, by C. D., his next friend, but now having attained majority."

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made *ex parte*: but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

When title to be corrected.—The provisions of this rule which require the title of a suit to be corrected apply to a *pending* suit, and not to a suit in which a final decree has been passed and in which it only remains to proceed in execution (j).

O. 32.
rr. 13-15.

13. [S. 454.] (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Where minor co-plaintiff
attaining majority desires
to repudiate suit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

Sub-r. (4) is new.

14. [S. 455.] (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper.

Unreasonable or Impro-
per suit.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the cost of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

15. [S. 463.] The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

Application of rules to
persons of unsound mind.

Persons of unsound mind.—The present rule makes the provisions of rules 1 to 14 applicable to persons of unsound mind. The result is that where a person of unsound mind is a plaintiff, a suit on his behalf must be brought by a next friend, and where he is a defendant, the suit must be defended by a guardian *ad litem*. Where a manager has been appointed of the property of a lunatic under the Lunacy

Act, no person other than such manager should act as the next friend of the lunatic in a suit in respect of the lunatic's property (k). See r. 4, sub-r. (2) above. O. 32,
rr. 15, 16.

Persons adjudged to be of unsound mind.—A person may be adjudged to be of unsound mind under the Lunacy Act 4 of 1912.

Persons of unsound mind not adjudged to be so.—The old section did not contain any provision as to persons of unsound mind not adjudged to be so. But it was held that the same procedure applied where a party to a suit was of unsound mind though not adjudged to be so. For the title of suits, see App. A, Pleadings, Title of Suits.

16. [S. 464.] Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

For an additional rule made by the Madras High Court.—See Appendix VII below.

ORDER XXXIII.

Suits by Paupers.

1. [S. 401.] Subject to the following provisions, any suit may be instituted by a pauper. O. 33, r. 1.

Suits may be instituted in forma pauperis.

Explanation.—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

Scope and object of the Order.—A plaintiff suing in a civil Court must pay the Court fee prescribed by law for the plaint and subsequent proceeding in the suit. These fees are prescribed by the Court Fees Act VII of 1870. But a person may be too poor to pay the Court fee, and the object of this Order is to enable such person to bring and prosecute suits without payment of Court fees (l). There are, however, certain fees from which even a pauper is not exempted, namely, fees for service of process, and such fees must be paid by him (r. 8). If the pauper succeeds in the suit, the Government have a first charge on the subject-matter of the suit for the amount of the Court

(k) See *Bai Divali v. Hiralal* (1899) 23 Bom. 403. | (l) *Jotindro v. Dwarka* (1893) 20 Cal. 111, 115.

O. 33, r. 1. fee which would have been paid by him if he had not been permitted to sue as a pauper (r. 10). If the pauper fails in the suit, the Court should order him to pay the Court fees due by him (r. 11).

"Subject-matter of the suit."—In determining whether a person claiming to sue as a pauper is worth Rs. 100, neither the value of his necessary wearing apparel nor the value of the property claimed by him in the suit should be taken into consideration. The ground for excluding the "subject-matter of the suit" under this rule is that such property is presumably out of the pauper's reach and cannot be made use of by him to carry on his litigation (m).

A applies for leave to sue as a pauper for the recovery of certain ornaments worth Rs. 2,000 from B. Pending the investigation into pauperism, B deposits in Court a portion of the ornaments claimed by A of the value of Rs. 100 as ornaments belonging to A. The ornaments deposited in Court, being entirely at A's disposal, are no longer part of the "subject-matter of the suit." From the moment of the deposit A becomes "entitled to property worth Rs. 100," and hence he is not entitled to sue as a pauper for the rest of the ornaments (n). In a recent case, however, Macleod, J., expressed the opinion that A could not be said in such a case to be entitled to property worth Rs. 100, for otherwise every application for leave to sue as a pauper may be defeated by the respondent paying into Court Rs. 100 out of the amount claimed (o).

A who has mortgaged his property to B sues B for redemption. A's equity of redemption is no part of the subject-matter of the suit. Its value, therefore, should be taken into consideration in determining whether A is a pauper (p).

"Other than his necessary wearing apparel and the subject-matter of the suit."—These words do not qualify that part of the Explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs. 100 (q).

Prosecution of suit as pauper.—A plaintiff may be allowed to *continue* as a pauper a suit instituted by him in the ordinary way (r).

Pauper minor.—Where the plaintiff is a minor*, the suit is instituted in the minor's name by an adult person who is called his next friend. If the minor is a pauper, the suit may be brought on his behalf *in forma pauperis* by his next friend (s). In England when a minor applies to sue as a pauper, it must be proved that the minor *as well as the next friend* are paupers. But this rule of English practice does not apply in India, and it is enough if it is proved that the minor is a pauper; it is not necessary to prove that the next friend also is a pauper (t).

Pauper defendant.—It has been held by the High Court of Calcutta that although the Civil Procedure Code provides only for suits to be brought by a pauper plaintiff, the Court has inherent power to allow a *defendant* to defend *in forma pauperis* (u).

Legal representative of pauper.—The legal representative of a deceased person may be allowed to *institute* a suit *in forma pauperis*, if the deceased himself had been allowed to sue as a pauper if the proceedings had been instituted in his lifetime, provided

(m) *Muhammad v. Ajudhia* (1888) 10 All. 467.
 (n) *Dwarkanath v. Madhavray* (1886) 10 Bom. 207.
 (o) *Fatmabai v. Dossabhoj* (1909) 34 Bom. 658.
 (p) *Rupji Deo v. Ram Rukha* (1910) 33 All. 238.
 (q) *Ershabai v. Manohar* (1906) 30 Bom. 593.
 (r) *Reefi v. Sakaram* (1884) 8 Bom. 616; *Thompson*

v. Calcutta Tramway Co. (1893) 20 Cal. 319.
 (s) *Golaupmones v. Prosonomoye* (1873) 11 B. L. 373.
 (t) *Venkatanarasaiyya v. Achemma* (1881) 3 Mad. B.
 (u) *Doorga Churn v. Nittokally* (1880) 5 Cal. 319.

the legal representative is also himself a pauper (*v*). Similarly, on the death of a pauper plaintiff, his legal representative may be allowed to *continue* the suit *in forma pauperis*, provided the legal representative is also himself a pauper (*w*). O. 33,
rr. 4-3.

In England an executor or administrator is not allowed to sue or defend as a pauper (*x*), unless he is also a beneficiary (*y*).

Official liquidator.—The word “person” in this rule includes a company [see General Clauses Act 10 of 1897, s. 3 (39)]. An official liquidator therefore of a company is competent to apply for leave to sue *in forma pauperis* on behalf of the company, if the company is a pauper within the meaning of this rule. The fact that the liquidator in his personal capacity is not a pauper does not affect the question (*z*).

Married woman.—The mere fact that the applicant’s husband has property is not sufficient reason for disallowing her application for leave to sue *in forma pauperis* (*a*).

Pauper appeals.—As to pauper appeals, see Order 44 below.

2. [S. 403.] Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

Contents of applica-
tion.

Procedure.—Rules 2 to 8 prescribe the procedure to be followed when a suit is proposed to be instituted *in forma pauperis*.

Death of applicant.—Where an application for leave to sue *in forma pauperis* has been made, but the applicant dies pending the hearing of the application, the application cannot be continued by the legal representative of the deceased applicant. The reason is that the right to apply for leave to sue as a pauper is a *personal* right, and it does not survive to the representative of the deceased applicant. But the legal representative may present a *fresh application* for leave to sue *in forma pauperis*, if he himself is a pauper (*b*).

3. [S. 404.] Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Presentation of applica-
tion.

(v) *Bill in re* (1884) 7 Mad. 390.

(w) *Manaji v. Khandoo* (1911) 36 Bom. 279, contra *Bhagbut v. Balaram* (1865) 3 W. B. M.S. 20; *Dasubhat in re* (1894) 18 Bom. 237.

(x) *Paradice v. Sheppard* (1745) 1 Dick 136; *Oldfield v. Cobbett* (1845) 1 Phill. 613.

(y) *Williams on Executors*, 10th Ed., p. 1541; *Daniel's Ch. Fr.*, pp. 87, 88.

(z) *Perumal v. Thirumalarayapuram Nidhi, Ltd.* (1917) 41 Mad. 624.

(a) *Sharfuneesa v. Nazri* (1917) 3 Pat. L. J. 178.

(b) *Lalit Mohan v. Satish Chandra* 1906) 33 Cal. 1163

**rr. 33,
rr. 3-5.**

Purda-nashin woman.—A purda-nashin woman exempted from appearing in Court under s. 132 above may present the application for leave to sue as a pauper by a duly authorized agent (c).

Pauper appeals.—The provisions of this rule apply also to applications for leave to appeal as a pauper. See O. 44, r. 1.

4. [S. 406.] (1) Where the application is in proper form and duly presented, the Court may, Examination of applicant. if it thinks fit, examine the applicant, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken. If presented by agent, Court may order applicant to be examined by commission.

Examination.—This Order contemplates examination of two kinds, namely, (1) the examination of the applicant which may as indicated in this rule be regarding (a) the merits of the claim and (b) pauperism, and (2) the examination of persons other than the applicant which should be confined to pauperism only as indicated by the provisions of rr. 6 and 7 below. Persons other than the applicant cannot be examined on the merits of the applicant's claim (d).

5. [Ss. 405, 407.] The Court shall Rejection of application. reject an application for permission to sue as a pauper—

- (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

Alteration in the rule.—The expression "cause of action" in cl. (d) has been substituted for the words "right to sue in such Court." See notes below under the head "Clause (d): cause of action."

Clause (c): fraudulent disposal of property.—Thus if a person has property worth Rs. 1,000, and he disposes of the same in August 1915 to enable himself to sue as a pauper, and applies for leave to sue as a pauper in September 1915, the application should be rejected under this rule.

Clause (d): cause of action.—The corresponding clause of the old section ran thus: "That his allegations do not show a right to sue in such Court." It was contended, on the strength of the words "sue in such Court," that that clause referred to the question of *jurisdiction* and not to the question whether or not a good cause of action was disclosed in the application. But this contention was not upheld, and it was held that the terms of that clause did not limit the Court's power to merely ascertaining whether the right to sue arose within the *jurisdiction*, but had a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court and calling for an answer, and not barred by the law of limitation or any other law (e). It was accordingly held that the application to sue as a pauper must be rejected, if the right to sue was barred by the law of limitation (f) or as *res judicata* (g), or if it did not disclose a good cause of action as where the application was for leave to sue on a contract which was void as being immoral and opposed to public policy (h). The expression "cause of action" has been substituted for the words "right to sue in such Court" to give effect to the above decisions. Though the Court, as stated above, can go into the question of limitation to see if the applicant has a subsisting cause of action, it should not go into that question if it requires an elaborate examination of conflicting authorities on the point. "The cases do not decide that an elaborate enquiry into doubtful and complicated questions of law should be raised at the stage contemplated by Order XXXIII, rule 5" (i).

It is open to the Court to consider not only the statements made in the plaint but also the statements made in his examination by the applicant under r. 4, in determining whether his allegations do not show a cause of action as laid down in cl. (d) of this rule (j). Where the application discloses a cause of action, the Court, it is said, should not inquire into the merits of the case (k). But where the application does not show a *prima facie* case on the merits, the Court may examine the applicant regarding the merits of the claim under r. 4 above (l). In the case last cited the High Court of Allahabad went to the length of saying that the Court had the power to examine the applicant regarding the merits of his claim, though the application disclosed a *prima facie* case on the merits, adding that if it were not so, the granting of the application would depend, not on whether the applicant had any merits to go upon, but on the skill of the person who drafted the application, and the examination as to the merits under r. 4 would be superfluous (m).

Clause (e): transfer of interest in subject-matter of proposed suit.—The interest transferred may be either vested or contingent. Thus an

- (e) *Chattarpal v. Raja Ram* (1885) 7 All. 661;
Kamrakh Nath v. Sundar Nath (1898)
 20 All. 299; *Vijendra v. Sudhindra* (1898)
 19 Mad. 197; *Amirtham v. Alwar* (1904)
 27 Mad. 87; *Dulari v. Vallabdas* (1889)
 13 Bom. 126.
 (f) *Chattarpal v. Raja Ram* (1885) 7 All. 661;
Haur Kaur v. Munt Lal (1919) Punj.
 Rec. no. 134, p. 848.
 (g) *Vijendra v. Sudhindra* (1898) 19 Mad. 127.
 (h) *Dulari v. Vallabdas* (1889) 13 Bom. 126.
 (i) *Govindasami v. The Municipal Council*

- (1917) 41 Mad. 620.
 (j) *Chattarpal v. Raja Ram* (1885) 7 All. 661;
Kamrakh Nath v. Sundar Nath (1898)
 20 All. 299; *Dulari v. Vallabdas* (1889)
 13 Bom. 126; *Navab Bahadur v. Harish
 Chandra* (1910) 13 Cal. L. J. 593, *Jogendra
 v. Durga* (1918) 46 Cal. 651.
 (k) *Debo Das v. Ram Charn* (1898) 2 C. W. N.
 474; *Gopal v. Bigoo* (1908) 8 C. W. N. 70.
 (l) *Kamrakh Nath v. Sundar Nath* (1898) 20
 All. 299.
 (m) *Ibid.*, p. 301.

Q. 33,
5-7.

agreement authorising a pleader to recover his fees out of the revenues of a village forming the subject-matter of the proposed suit, *in the event of the applicant failing to pay the fees to the pleader*, is an agreement under which the pleader obtains a contingent interest in the subject-matter of the suit. If such an agreement is proved, the application for leave to sue *in forma pauperis* must be rejected (n).

Revision.—An order rejecting an application under this rule is not appealable (o), but it is open to revision in a proper case (p).

6. [S. 408.] Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Notice of day for receiving evidence of applicant's pauperism.

Evidence.—See notes to r. 4 above under the head "Examination."

Notice.—As to form of notice, see App. H, form no. 12.

7. [S. 409.] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

Procedure at hearing.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

Scope of inquiry under this rule.—See notes to r. 4 above, "Examination".

Argument on the question whether the application is subject to the prohibitions contained in r. 5.—Sub-r. (2) enables the parties to argue the question referred to therein; but it does not preclude the Court, if no argument is offered by the parties, from considering that question of *its own motion* (q).

Review.—An order under this rule refusing leave to sue as a pauper is subject to review (r). The application for review is not liable to any Court-fee (s).

(n) *Manohar v. Lakshman* (1885) 9 Bom. 371.

(o) *Secretary of State v. Jillo* (1899) 21 All. 133.

(p) *Muhammad v. Ajudhia* (1888) 10 All. 467;

Debo Das v. Ram Charn (1898) 2 Cal. W.N.

474; *Gopal v. Bigoo* (1903) 8 Cal. W.N. 70

(q) *Amirtham v. Alwar* (1904) 27 Mad. 87.

(r) *Adarji v. Manekji* (1880) 4 Bom. 414.

(s) *Umda v. Naima* (1898) 20 All. 410.

Propriety of order allowing applicant to sue in forma pauperis.—Where **O 33, r. 7** after due consideration of an application for leave to sue as a pauper, the Court of first instance has allowed the suit to be instituted *in forma pauperis*, and has passed a decree in favour of the plaintiff, it is not open to the defendant, in appeal from the decree, to question the propriety of the order permitting the plaintiff to sue as a pauper. S. 105 does not apply to such an order (t).

Limitation where application granted.—Where an application for leave to sue as a pauper is *granted*, the date on which the application is *filed* will be deemed to be the date on which the pauper-suit is instituted for all purposes of limitation, and *not* the date on which the application is *numbered and registered as a suit* [Limitation Act, 1908, s. 4].

Limitation where application refused.—Where an application for leave to sue as a pauper is *refused*, and the applicant subsequently institutes a suit in respect of the same subject-matter in the ordinary way (r. 15), the suit will be deemed for the purposes of limitation, to have been instituted on the date on which the plaint is presented, and *not* the date on which the *rejected application* was filed. The reason is that upon an order of refusal under this rule, the proceedings instituted under r. 2 come to an end (u).

Limitation where application is converted into a plaint on payment of Court-fees.—A person who has applied for leave to sue as a pauper may, at any time, before an order is made under this rule convert his application into a plaint, by paying into Court the necessary Court-fees. In such a case, if the application was made *bona fide*, the suit would be deemed to have been instituted for the purposes of limitation on the day on which the application was filed and not the day on which the Court-fees were paid. But if it is found that the application was made in bad faith, the suit would be deemed to have been instituted on the day on which the Court-fees were paid and not on the day on which the application was filed (v).

Illustrations.

1. A applies for leave to sue as a pauper. On the day fixed for the hearing of the application, A, alleging that he has succeeded in negotiating a loan for the payment of the Court-fees, pays the necessary Court-fees into Court. The application is thereupon numbered and registered as a plaint. The application for leave to sue as a pauper having been made in good faith, the suit will be deemed to have been instituted on the day on which the *application* was filed, and not on the day on which the Court-fees were paid.

2. On the last day of the period of limitation prescribed for the institution of a suit, A applies for leave to sue as a pauper. The application is heard a fortnight later. It transpires at the hearing of the application that *A was possessed of sufficient means to enable him to pay the Court-fees*. Before an order is made under this rule rejecting the application, A pays the necessary Court-fees into Court, and the application is thereupon converted into a plaint. The application not having been made in good faith the suit will be deemed to have been instituted on the day on which the Court-fees were paid, and not on the day on which the application was filed. The Court-fees having been paid *after* the expiration of the period of limitation, the suit is time barred.

(t) *Mumtaz v. Rasulan* (1901) 28 All. 364.
(u) *Naraini v. Makan Lal* (1895) 17 All. 526;
Keshav v. Krishnarao (1896) 20 Bom.
508; *Aubhaya v. B. Sreenivari* (1897) 24
Cal. 889.

(v) *Stuart Skinner v. Orde* (1880) 2 All. 241;
Naraini v. Mahan Lal (1895) 17 All. 526
Janakdhar v. Janki (1901) 28 Cal. 427;
Contra Abbasi v. Nanhi (1896) 18 All.
206.

O. 33,
rr. 8-10.

8. [S. 410.] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Procedure if application
admitted.

Limitation: where application granted; See notes to r. 7 above.

9. [S. 414.] The Court may, on the application of the defendant or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

Dispaupering.

- (a) if he is guilty of vexatious or improper conduct in the course of the suit ;
- (b) if it appears that his means are such that he ought not to continue to sue as a pauper ; or
- (c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

10. [S. 411.] Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper ; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

Costs where pauper succeeds.

See rr. 12 and 13.

Amount of Court-fees shall be a first charge.—The charge is to be enforced by an application for the attachment and sale of the subject-matter of the suit. A separate suit for the sale of the subject-matter to realize the Court-fees is now barred: see r. 13 below and s. 47 (w). The application for execution by the Government must be made within three years from the date of the decree in the pauper suit (x).

Recovery of Court-fees by Government from party ordered to pay the same.—If the plaintiff is directed to pay the Court-fees, the Government may realize the same by an application for execution against the person or property

(u) *Ram Das v. Secretary of State* (1896) 18 All. 419; *Babui v. Secretary of State* (1919) 4 Pat L. J. 166.

(x) *Appaya v. Collector of Vizagapatam* (1882) 4 Mad. 155.

of the plaintiff, and if the defendant is directed to pay the Court-fees, the Government may realize the same by an application for execution against the person or property of the defendant. O. 33, r. 10.

Mode of realization of Court-fees by Government.—The plaintiff in a suit *in forma pauperis* obtains a decree against the defendant for possession of certain property. It is declared by the decree that the amount of Court-fees shall be a first charge on the property, and that the same shall also be recoverable by the Government from the defendant. In such a case if the defendant fails to pay the Court-fees, the Government may at its option realize the Court-fees either by attachment and sale of the property which was the subject-matter of the suit, or it may realize the same by an application for execution against the person or property of the defendant (y). The former right is not lost merely because the property for the recovery of which the pauper suit was brought has passed from the hands of the judgment-debtor into the hands of the pauper decree-holder (z). The Government, however, have *no lien upon the decree* for the amount of the Court-fees (a); hence if the amount of Court fees is not paid, the Government are not entitled to sell the decree obtained by the plaintiff for the purpose of recovering such amount (b).

Effect of first charge.—Since the amount of Court-fees recoverable by Government is a *first charge* on the subject-matter of the suit (c), it follows that a sale held in execution of such charge must prevail against a subsequent sale (d). For the same reason, the defendant against whom the decree is passed cannot set-off against the subject-matter of the suit any sum that may be due to him under a cross-decree held by him against the plaintiff. A obtains a decree against B for Rs. 1,500 in a suit brought *in forma pauperis*. A is directed by the decree to pay the Court-fees, but he fails to pay the same. Thereupon the Government apply to attach and sell the judgment-debt of Rs. 1,500 due to A from B. B claims to set-off Rs. 1,475 due to him under a decree held by him against A. B is not entitled to the set-off claimed by him, for the Government has a *first charge* on Rs. 1,500, that being the *subject-matter* of the suit (e).

Crown's prerogative of precedence in respect of Court-fees.—If the plaintiff succeeds in the suit, and the amount payable under the decree by the defendant is paid *into Court*, the Government is entitled to payment of the Court-fees out of the fund in the Court on a mere application for payment without *attaching* the fund in the first instance. The reason is that the Crown is entitled to precedence in respect of a Crown debt over all other creditors of the pauper decree-holder. A obtains a decree against B for specific performance and costs in a suit brought *in forma pauperis*. It is directed by the decree that B should pay the Court-fees to Government, and the Court-fees are also declared to be a first charge on the property directed to be conveyed by B to A. B fails to pay A's costs. A thereupon applies for attachment and sale of certain property belonging to B for payment of his costs. The property is sold, and the sale proceeds amounting to Rs. 1,000 are paid into Court. Thereafter A's solicitor, C, applies to the Court for payment to him out of the Rs. 1,000 of the costs incurred by him on behalf of A. At the same time a claim is made by the Government Solicitor for payment of the Court-fees out of the Rs. 1,000 in priority to C's claim. The Government are

(y) *Ram Das v. Secretary of State* (1896) 18 All. 419.

(z) *Babul v. Secretary of State* (1919) 4 Pat. L. J. 166.

(a) *Pran Krito v. Collector of Moorshedabad* (1871) 15 W. B. 205.

(b) *Jotindro Nath v. Dwarka Nath* (1893) 20 Cal. 111.

(c) See *Ganpat v. Collector of Kanara* (1875) 1 Bom. 7.

(d) *Puthia v. Veloth* (1902) 25 Mad. 733.

(e) *Janki v. Collector of Allahabad* (1887) 9 All. 64.

O. 33, entitled to precedence in respect of the Court-fees, and C is entitled only to the balance
 rr. 10, 11. left after payment of the Court-fees (f).

It is to be observed that in the Calcutta case cited above, C was a creditor of A inasmuch as he was entitled to be paid his costs by A. But he was merely an *ordinary* creditor as distinguished from a *secured* creditor. It is also to be observed that Court fees form a Crown debt, and the Crown was to that extent a creditor of A. It has to be borne in mind that it is only when claims of the Crown and claims of *ordinary* creditors or "common persons" (to use an old expression) concur or come into competition that the Crown is preferred. The Crown has no more right than a "common person" to seize X's property and apply it in or towards discharge of a debt due from Y. It was so observed by Lord Macnaghten in a case in which the Privy Council held that where a money decree is obtained by a pauper in a suit by him against Y, and Y is directed by the decree to pay the Court-fees, the Government are not entitled to realize the Court fees by a sale of Y's property previously mortgaged by him to X, so as to defeat the right of X (g). All that could be sold by the Government in such a case is the equity of redemption of Y in the property (h).

Appeal.—Questions arising between the Government and any party to the suit under this rule would be questions relating to the "*execution, discharge and satisfaction*" of a decree within the meaning of s. 47. And it is provided by r. 13 below that they should be deemed to be questions arising "*between the parties to the suit,*" within the meaning of s. 47. It therefore follows that an order deciding any such question is appealable as a decree [see s. 2, cl. (2), and s. 96] (i). Under the Code of 1882 it was held by the High Courts of Bombay and Madras that the Government not being a *party* to the suit, such questions could not be said to be questions arising *between the parties to the suit* with the meaning of s. 244 [now s. 47], and hence orders determining such questions were not appealable as decrees (j). On the other hand, it was held by the High Court of Allahabad that such orders were appealable (k). Rule 13 (which is new) sets this conflict at rest by providing that though the Government is *not* a party to the suit, the Government *shall be deemed* to be a party to the suit for the purposes of s. 47.

Costs where pauper partly succeeds and partly fails.—Rule 10 deals with the case of a pauper plaintiff who succeeds in the suit. Rule 11 deals with the case of a pauper plaintiff who fails in the suit. There is no separate provision for the case in which a pauper plaintiff has partly succeeded and partly failed. Presumably the Court is intended to deal with such a case by combining the provisions of the two rules. In such a case, therefore, the court-fees payable on the plaint should be apportioned between the plaintiff and the defendant. It is illegal to lay upon the defendant in such a case a larger proportion of the court-fee leviable from the plaintiff than would have been payable by the plaintiff if the claim had been limited originally to that portion which was successful (l).

11. [S. 412.] Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—

Procedure where pauper fails.

- (f) *Gayanoda v. Butto Kristo* (1906) 33 Cal. 1040; *Ganpat v. Collector of Kanara* (1875) 1 Bom. 7; *Secretary of State v. Bombay Landing and Shipping Co.* (1868) 5 B. H. C. O. C. 25.
 (g) *Ragho Prasad v. Mewa Lal* (1911) 34 All. 223, 39 I. A. 62.
 (h) *Dost Muhammad v. Mani Ram* (1907), 29 All. 537.
 (i) *Secretary of State v. Narayan* (1904) 29 Bom. 102.

- (j) *Collector of Ratnagiri v. Janardan* (1882) 6 Bom. 590; *Collector of Kanara v. Ram-bhat* (1894) 18 Bom. 454; *Collector of Trichinopoly v. Sivaramakrishna* (1900) 23 Mad. 73.
 (k) *Secretary of State v. Bhagvanti* (1891) 13 All. 326.
 (l) *Chandraka v. Secretary of State* (1890) 14 Mad. 163; *Ganga v. Gaura* (1916) 38 All. 469.

- (a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fees or postal charges (if any) chargeable for such service, or
- (b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

See rules 12 and 13.

Alterations in the rule:

1. The word "withdrawn" has been newly added. See notes below under the head "Withdrawn."
2. Besides the liability to pay the Court-fees, the plaintiff was, under the old section, subject to a further penalty of fine or imprisonment if the Court found that the suit was frivolous or vexatious. This provision has been omitted in the present rule.

Scope of the rule.—An order under this rule directing the pauper plaintiff to pay the Court-fees can only be made in the following four cases:—

- (1) where the plaintiff *fails* in the suit ;
- (2) where the plaintiff is *dispaupered* under r. 9 ;
- (3) where the suit is *withdrawn* ; or
- (4) where the suit is *dismissed under the circumstances specified* in cl. (a) or cl. (b).

It follows from what has been stated above that where an application for leave to sue *in forma pauperis* is returned under O. 7, r. 10, for want of jurisdiction to be presented to the proper Court, no order can be made under this rule directing the applicant to pay the Court-fees. It cannot be said in such a case that the plaintiff has *failed* in the suit (m). The decision may also be put on the ground that the present rule does not apply until the application is granted, and is numbered and registered under r. 8 above. But a dismissal of the suit at the request of the plaintiff and the defendant, the suit being settled out of Court, amounts to a *failure* within the meaning of this rule (n).

"Withdrawn."—This word has been newly added. Under the old section there was a conflict of decisions as to whether the Court could order the plaintiff to pay the Court-fees if the suit was withdrawn (o). The insertion of the word "withdrawn" makes it clear that the Court has the power under this rule to order the plaintiff to pay

(m) *Collector of Ratnagiri v. Janardan* (1882) 6 Bom. 590.
 (n) *Secretary of State v. Narayan* (1911) 35 Bom. 448.
 (o) *Collector of Vizagapatam v. Abdul Karim* (1898) 21 Mad. 114. *Secretary of State v.*

Narayan (1905) 29 Bom. 102; *Secretary of State v. Bhagirathibai* (1907) 31 Bom. 10. [Court-fees ordered]; *Collector of Kanara v. Krishnappa* (1891) 15 Bom. 77; *Chandaba v. Kuver* (1894) 18 Bom. 464 [Court-fees not ordered].

O. 33, the Court-fees if the suit is withdrawn, whether the withdrawal is without the leave
rr. 11-15. of the Court or with leave to bring a fresh suit under O. 23, r. 1.

Costs—This rule does not preclude the Court from awarding a successful defendant his costs in a pauper suit. The Court has full power under s. 35 to give and apportion costs in any manner it thinks fit. Nothing in this rule limits or otherwise affects the power conferred upon the Court by s. 35 to give and apportion costs (*p*).

Omission to make an order for payment of Court-fees.—The Government has the right at any time to apply to the Court to make an order for the payment of the Court-fees (r. 12). If the order is refused, the Government may, by virtue of the provisions of r. 13 (which is new), prefer an *appeal* from the order of refusal. Under the Code of 1882 it was held that the Government, not being a party to the suit, had no right of appeal, and it could therefore proceed only by an application for revision (*q*).

12. [New.] The Government shall have the right at any time to apply to the Court to make an order for the payment of Court-fees under rule 10 or rule 11.

Government may apply for payment of Court-fees.

This rule is new. It enables the Government, in cases of error and omission with regard to Court-fees, to have the error or omission rectified by a mere application to the Court. See r. 13 below.

13. [New.] All matters arising between the Government and any party to the suit under rule 10, rule 11, or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

Government to be deemed a party.

This rule is new. See notes to r. 10 under the head "Appeal," and notes to r. 11 under the head "Omission to make an order for payment of Court-fees."

14. [New.] Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

Copy of decree to be sent to Collector.

15. [S. 413.] An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

(*p*) *Jetha v. Gulraj* (1884) 8 Bom. 577.
 (*q*) *Collector of Ratnagiri v. Janardan* (1882) 6 Bom. 590; *Collector of Kanara v. Krish-*

nappa (1891) 15 Bom. 77; *Chandaba v. Kuver* (1894) 18 Bom. 464.

Shall be a bar to any subsequent application.—The bar to a subsequent application being a bar to the *jurisdiction* of the Court, the Court is competent and bound to take notice of it at any stage of the suit (r). **O. 33, rr. 15, 16.**

Dismissal for default.—The dismissal of a pauper application in default of appearance or for default in prosecution is no bar to a subsequent pauper application in respect of the same cause of action (s).

16. [S. 415.] The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit.

Costs.

ORDER XXXIV.

Suits relating to Mortgages of Immoveable Property.

1. [New. Act 4 of 1882, S. 85.] Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. **O. 34. r. 1.**

Parties to suits for foreclosure, sale and redemption.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Suits relating to mortgages.—This order is new. It is a re-enactment with some alterations of sections 85-90, 92-94, 96, 97, and 100 of the Transfer of Property Act 4 of 1882 relating to suits on mortgages. The Transfer of Property Act did not contain any provision for the passing of a final decree in cases where payment was made in accordance with the terms of the preliminary decree. This omission has now been remedied, and provision has been made in rules 3 (1), 5 (1) and 8 (1), for the passing of final decrees in such cases. The object of removing the provisions as to mortgage suits from the Transfer of Property Act to the Code is to avoid the confusion that arose in regard to execution in mortgage suits owing to such suits having been dealt with in the Transfer of Property Act (t). The general effect of this order is that the provisions of the Code as to execution of decrees apply to execution of mortgage decrees (u). See notes to r. 5 below, "Final decree for sale : Limitation."

Transfer of Property Act 4 of 1882, s. 85.—This rule is a reproduction with certain alterations of s. 85 of the Transfer of Property Act, which ran as follows :

"Subject to the provisions of the Code of Civil Procedure, s. 437 [now O. 31, r. 1] all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage : provided that the plaintiff has notice of such interest."

(r) *Ranchod v. Bezanji* (1896) 20 Bom. 86.
(s) *Bhoj Singh v. Maha Koonwar* (1868) 3 Agra. 118. 1; *Umasundari, in the matter of* (1870) 5 B. L. R. App. 29.
(t) See for an instance, *Krishnaji v. Mahadev*

(1901) 25 Bom. 104, and the cases there cited.
(u) See *Amluk Chand v. Sarat Chunder* (1911) 38 Cal. 913, 921-922.

O. 34, r. 1. Comparing the present rule with s. 85 of the Transfer of Property Act, it will be seen that the words "in the mortgage-security or in the right of redemption" have been substituted for "in the property comprised in the mortgage." An Explanation has been added and the proviso relating to notice is omitted. The explanation was rendered necessary as it was generally thought that s. 85 made it imperative on a puisne mortgagee to make a prior mortgagee a party to his action for foreclosure. The substitution of the words "in the mortgage-security or in the right of redemption" have made it clear that an adverse claimant who is a stranger to the security or the equity of redemption need not be joined: see notes below, "Persons having an interest either in the mortgage-security or in the right of redemption" (v).

Scope and object of the rule.—The object of this rule in requiring all persons having an interest either in the mortgage-security or in the right of redemption to be joined as parties is to avoid multiplicity of suits (*w*). The rule applies only to suits relating to a mortgage, that is to say, to suits for foreclosure, sale and redemption, as indicated by the marginal note to the rule. The rule therefore does not apply to suits by a mortgagee for a *personal decree* against the mortgagor (as to which see r. 6 below).

[The reader is advised at this stage to read the notes to s. 16 under the head "Clause (c), on p. 77 above."]

"Persons having an interest either in the mortgage-security or in the right of redemption."—The corresponding words in the Transfer of Property Act, s. 85, were "persons having an interest in the *property comprised in a mortgage*." These words gave rise to a conflict of views. According to one view, which coincides with the English law and the law as enunciated in the present rule, those persons only could be joined as parties to a suit relating to a mortgage who were either interested in the mortgage-security or in the right of redemption. A person who sets up a title paramount to that of the mortgagor and mortgagee should not be joined as a party to such suit, for he is neither interested in the mortgage-security nor in the right of redemption (*x*). Thus if *A* lets his property on a lease to *B*, and *B* mortgages the leasehold to *C*, *A*, holding the property by title paramount, should not be joined as a party defendant to a suit by *C* to enforce the mortgage (*y*). Similarly, if *A* and *B* are co-owners of certain property, and *B* mortgages his undivided share to *C*, *A* should not be joined as a party to a suit for sale by *C*, as *A* has no interest in the right of redemption (*z*). According to the other view which prevailed in Allahabad, all persons must be joined as parties if they had an interest in the *property*, though they might have no interest either in the mortgage-security or in the equity of redemption. The word "property," according to the Allahabad High Court, meant the actual immoveable property mortgaged, and not merely an interest in such property, such as an interest in the mortgage-security or in the right of redemption (*a*). The view held by the Allahabad High Court is no longer tenable. The present rule gives effect to the former view which, as stated above, is in accordance with the English law.

But though it was held by the Allahabad High Court that all persons interested in the *mortgaged property* must be joined as parties to a suit on mortgage, that Court

(v) Ghose on Mortgage, 4th ed., p. 927.
 (w) *Lala Suraj Prasad v. Golab Chand* (1901) 28 Cal. 517, 529, 530; *Shahasaheb v. Sadaashiv* (1919) 43 Bom. 575, 578.
 (z) *Nilakant Banerji v. Suresh Chandra* (1886) 12 Cal. 414, 421, 422, 12 I. A. 171; *Jaggeswar Dutt v. Bhuvan Mohan* (1906) 33 Cal. 425; *Radha Funwar v. Raoti Singh* (1916) 43 I. A. 187, 188, 38 All. 488, 491.

(y) *Jaggeswar Dutt v. Bhuvan Mohan* (1906) 33 Cal. 425. See also *Krishna Ayyar v. Muthukumaraswamiya* (1906) 29 Mad. 217, 224.
 (z) *Mon Mohini Ghose v. Parvati Nath Ghose* (1906) 32 Cal. 746; *Jogo Mohan Deb v. Daudoon* (1908) 12 C. W. N. 94.
 (a) *Maia Din v. Kasim Husain* (1891) 13 All. 432 [Mahmood, J., dissenting.]

agreed with the other High Courts in holding that a person who claimed adversely to the mortgagor and the mortgagee is not a necessary party to such suit. Thus if *A* mortgages certain property to *B* and *B* sues *A* for sale of the mortgaged property, and *C* claims the property as his own and denies *A*'s right to mortgage it, *C* is not a necessary party to the suit, and the question of *C*'s paramount title cannot be litigated in such a suit (*b*). And this is certainly the law under the present rule.

See notes below under the head "Parties to suits for redemption, foreclosure or sale."

Explanation : prior mortgagees.—The Explanation to the rule is new. It is intended to supersede certain decisions under s. 85 of the Transfer of Property Act to the effect that a prior mortgagee is a necessary party to a suit for sale or foreclosure by a puisne or subsequent mortgagee (*c*). The Explanation declares that a prior mortgagee is not a necessary party to such a suit. Thus if *A* mortgages his property to *B*, and subsequently to *C*, *C* may sue for sale without making *B* a party to the suit. In such a case if a decree for sale is passed, the property would be sold subject to *B*'s mortgage (*d*). But this rule does not preclude *C* from joining *B* as a party; in fact, *B* would be a proper party if *C* offered to redeem *B*'s mortgage (*e*).

It follows from the first branch of the Explanation to the rule that where the same person holds two mortgages of different dates upon the same property, he may sue on the mortgage of the later date subject to his rights under the first mortgage (*f*).

The second branch of the Explanation declares that a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. *A* mortgages his property first to *B*, and then to *C*. *B* is not a necessary party to a suit by *A* against *C* for redemption of the mortgage to *C*.

Parties to suits for redemption, foreclosure or sale.—All persons interested in the equity of redemption (*g*), and therefore in the proper taking of the accounts (*h*), either (1) primarily, as the mortgagor, or (2) derivatively, by operation of law, as the Official Assignee or Receiver of the assets of the mortgagor in insolvency (*i*), or by voluntary alienation, as the transferee of the equity of redemption (*j*), should be made parties to a suit relating to a mortgage (*k*). In other words, persons mentioned in s. 91 of the Transfer of Property Act as persons entitled to redeem the mortgaged property should be joined as parties (*l*). If not joined as plaintiffs, they should be joined as defendants (*m*). But a person not having any interest in the mortgage at the time of the suit need not be added as a party (*n*).

If a mortgagee, suing on his mortgage either for sale or foreclosure, thinks fit to exempt from his suit some portion of the mortgaged property and to sell or to foreclose the

(b) *Khatrali v. Banni Begum* (1908) 30 All. 240; *Joti Prasad v. Aziz Khan* (1909) 31 All. 11; *Gobardhan v. Munna Lal* (1918) 40 All. 584.

(c) *Mata Din v. Kasim Husain* (1891) 13 All. 482; *Sorabji v. Rattanji* (1898) 22 Bom. 701; *Keshav Ram v. Ranchhod* (1906) 30 Bom. 156; *Kanti Ram v. Kutubuddin* (1895) 22 Cal. 38. In *Srinivasa v. Yamunabai* (1906) 29 Mad. 84, 86, the point was considered to be a doubtful one.

(d) *Kanti Ram v. Kutubuddin* (1895) 22 Cal. 38.
(e) *Raj Coomary v. Prem Madhub* (1897) 1 C. W. N. 458.

(f) *Subramania v. Balasubramania* (1915) 38 Mad. 927; *Dhondo v. Bhikaji* (1915) 39 Bom. 138, 145.

(g) See Seton on Decrees, 6th ed., vol. III, p. 193; *Daniel's Chancery Practice*, 7th ed., vol. II, p. 2.

184-186.

(h) *Hughes v. Delhi and London Bank* (1888) 15 Cal. 35.

(i) *Punithavelu v. Bhashyam* (1902) 25 Mad. 406, 422.

(j) *Hira Lal v. Kishan Lal* (1897) 19 All. 543; *Sivathi v. Ramasubbayyar* (1898) 21 Mad. 84; *Brojonath v. Khetat Chunder* (1871) 14 M. I. A. 144.

(k) *Ragho Vinayak v. Sheikh Daud* (1889) 13 Bom. 51, 53.

(l) *Ghulam Husain v. Dina Nath* (1901) 23 All. 467 [attaching decree-holder]; *Dudoba v. Damodar* (1892) 16 Bom. 486 [auction-purchaser].

(m) *Ragho Saiji v. Balkrishna* (1885) 9 Bom. 128.

(n) *Ragho v. Daud* (1888) 13 Bom. 51; *Trimbak v. Sakharam* (1891) 16 Bom. 599.

- O. 34, r. 1. mortgage in respect of the remainder, there is nothing in law to prevent his doing so. If he exempts a portion of the mortgaged property from his suit, he is not obliged to make parties to the suit the persons interested in the portion of the property so exempted (o). The same rule applies where a part of the property originally mortgaged has been absolutely released from the mortgage and has become excluded from the operation of the security (p).

Where there are two or more mortgagors, that is, two or more persons interested in the equity of redemption, any one of them may sue for redemption, but then the other mortgagors must be made party defendants (q). Where there are two or more encumbrances created on the same property, the mortgagor seeking to redeem the first mortgage must join the subsequent mortgagees as parties. Similarly, a second mortgagee seeking to redeem a prior mortgage must join the mortgagor as a party (r). But the prior mortgagee is not a necessary party to a suit by the mortgagor to redeem a subsequent mortgage: see Explanation to the rule.

All persons interested in the mortgage-security, either (1) *primarily*, as the mortgagee, or (2) *derivatively*, (i) by operation of law, as the Official Assignee or Receiver of the assets of the mortgagee in insolvency, or (ii) by voluntary alienation, as the transferee of the security or debt, should be made parties to a suit relating to the mortgage (s). If not joined as plaintiffs, they should be joined as defendants.

A mortgages his property to B. B sues A on the mortgage. During the pendency of the suit A executes a second mortgage of his property to C. C is not a necessary party to A's suit, the mortgage to him having been executed subsequently to the institution of the suit (t).

Trustees, executors and administrators.—The rule begins with the words "subject to the provisions of this Code." The reference is to O. 31, r. 1, which provides for suits concerning property vested in a trustee, executor or administrator. Having regard to the provisions of that rule, a suit for redemption (u), or foreclosure (v), or sale, may be brought by trustees without making the beneficiaries parties.

Benamidar.—A benamidar can maintain a suit on a mortgage. Thus if a mortgage is executed ostensibly in favour of A, but the real mortgagee is B, A may sue the mortgagor on the mortgage. It is not open to the mortgagor to contend that A being merely the benamidar, he cannot maintain the suit (w).

Sub-mortgagee.—A mortgagee may create such estates as he pleases. He may convey by way of sub-mortgage to whom and in as many parcels as he pleases (x). It has been held by a Full Bench of the Allahabad High Court that when a mortgagee has sub-mortgaged his interest in the property mortgaged to him, the sub-mortgagee is entitled to sell the interest in the property of his sub-mortgagor without impleading the mortgagor and foreclosing his equity of redemption, in other words, he is entitled to sell the sub-mortgagor's interest leaving the equity of redemption outstanding in the

(o) *Sheo Tahal v. Sheodan Rai* (1906) 28 All.

174; *Sheo Prasad v. Behari Lal* (1908) 25 All. 79. See also *Ganeshi v. Charan* (1913) 35 All. 247.

(p) *Nazir Husain v. Nihal Chand* (1905) All. W. N. 156; *Hari Kissen v. Velhat Hossein* (1903) 30 Cal. 755; *Ponnusami v. Srinivasa* (1908) 31 Mad. 338.

(q) *Biri Singh v. Naval Singh* (1902) 24 All. 226; *Myrjyl Raman v. Naraganan* (1903) 26 Mad. 461.

(r) *Thompson v. Baskerville* (1888) 8 Ch. Rep. 215

(s) See Seton on Decrees, 6th ed., Vol. III, 1932; Danell's Chancery Practice, 7th

ed., Vol. I. pp. 184-186.

(t) *Ishay Ali Khan v. Churni* (1899) 21 All. 149.

(u) *Mills v. Jennings* (1880) 13 C. D. 639, affd. 6 App. Cas. 698.

(v) *Morley v. Morley* (1858) 25 Beav. 253; but see as to a defendant trustee, *Francis v. Harrison* (1890) 43 C. D. 183.

(w) *Gur Narayan v. Sheo Lal Singh* (1910) 46 I. A. 1, 9, 46 Cal. 566, 574; *Bhola Pershad v. Ram Lal* (1897) 24 Cal. 34; *Ravi v. Mahadev* (1898) 22 Bom. 672; *Yad Ram v. Umrao Singh* (1899) 21 All. 380.

(x) *Taylor v. Russell* [1892] A. C. 235, per Lord Herschell.

mortgagor (y). In an earlier case (z) the Allahabad High Court took the view that a sub-mortgagee is entitled only to a decree for money against the sub-mortgagor, but this was doubted in later cases (a), and it is not good law. See notes to r. 2 below, "Sub-mortgagee."

O. 34, r. 1.

A person cannot be both plaintiff and defendant.—In a foreclosure action by a first mortgagee where the plaintiff also joined himself as a defendant as one of the puisne mortgagees, his name was struck out as a co-defendant (b).

Consequences of non-joinder.—Under the corresponding section 85 of the Transfer of Property Act [see the section set out on page 749 above,] it was held by the Allahabad High Court that the non-joinder of a person who ought to have been made a party to a suit on a mortgage was a *defect fatal to the suit* and that the suit should therefore be dismissed; but that the Court, if it sees fit to do so, may add him as a party under s. 32 of the Code of 1882 [O. 1, 10 (2)]. Those decisions proceeded on what the Court said was the imperative character of the word "must" in section 85 of that Act (c). In a recent case under the present rule the same Court held that the result of non-joinder of a subsequent mortgagee in a suit on a prior mortgage, though intentional, would not be the dismissal of the whole suit but only so much of it as relate to the party affected by the subsequent mortgage (d). The High Courts of Bombay (e) and Calcutta (f) took the same view as the Allahabad High Court.

The word "must" which occurred in s. 85 of the Transfer of Property Act having been dropped, and the section having been transferred into the Code, the question as to the effect of non-joinder is, it is submitted, governed by the provisions of the Code. O. 1, r. 9, provides that no suit shall be defeated by reason of non-joinder of parties. Under O. 1, r. 10 (2), the Court has the power to add parties at any stage of the suit. By s. 99 of the Code it is enacted that no decree shall be reversed or substantially varied in appeal on account of any misjoinder of parties [which includes non-joinder (g)], unless it affects the merits of the case or the jurisdiction of the Court. The result is that no suit on a mortgage should be dismissed by reason of non-joinder of parties unless the parties are *necessary* parties and the plaintiff refuses to add them as parties. If the parties are merely *proper* parties (as distinguished from necessary parties (h)), the Court may, though the plaintiff refuses to add them as parties, proceed under O. 1, r. 9, to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. This was in effect held by the High Court of Bombay in *Shahasaheb v. Sadashiv* (i), a case under the present rule. In that case a suit was brought by a mortgagee against the widow and daughters of the deceased mortgagor for sale of the mortgaged properties. The deceased was a Mahomedan, and besides the widow and daughters he left a brother as one of his heirs. It was contended on behalf of the defendants that the brother having an interest in the right of redemption he ought to have been joined as a defendant, and that the plaintiff having omitted to join him as a defendant the suit should be dismissed in its entirety. At the date when the objection as to non-joinder was taken by the defendants, the period of

(y) *Ram Shankar v. Ganesh Prasad* (1907) 29 All. 885 [F. B.].

(z) *Ganga Prasad v. Chunni Lal* (1896) 18 All. 113; *Ram Jalan Rai v. Ramhil Singh* (1906) 27 All. 511.

(a) *Ram Subhag v. Narasingh* (1905) 27 All. 472, 477-478; *Mukhu Yijla v. Venkatachallam* (1897) 20 Mad. 85.

(b) *Wavell v. Mitchell* (1889) 64 L. T. 540.

(c) *Mata Din v. Karim Husain* (1891) 13 All. 432, 465; *Bhawant Prasad v. Kallu* (1895) 17 All. 587, 555-556; *Gulam Kadir Khan v. Musakim Khan* (1896) 18 All. 109, 113; *Kundan Lal v. Fakir Chand* (1905)

27 All. 75 [parties added]; *Tikam Singh v. Thakore Kishore* (1898) 20 All. 188 [parties added].

(d) *Alam Singh v. Gokal Singh* (1913) 35 All. 484.

(e) *Sorabji v. Rattonji* (1898) 22 Bom. 701, 707.

(f) *Jamuna Pershad v. Ganga Pershad* (1892) 19 Cal. 401, 411.

(g) See notes to s. 99, "Misjoinder of parties or causes of action."

(h) As to the distinction between necessary parties and proper parties, see notes to O. 1, r. 10 (2), "Who ought to have been joined."

(i) (1910) 43 Bom. 575.

O. 34, r. 1. limitation as against the brother had expired. It was held overruling the contention that the brother was not a *necessary* party and that a decree could be passed against the widow and the daughters to the extent of their interest in the properties.

Where a person who ought to have been joined as a party under this rule is not joined as a party, and a decree is passed in the suit, the decree cannot affect his rights (*j*) [see notes below, "Mahomedan co-heirs"]. Let us take the case, which is a common one, of a second or subsequent mortgagee who ought to be, but who is not joined as a party to a suit by the prior mortgagee. The second mortgagee not being a party to the suit the proceedings in the suit, are not binding on him so as to affect his rights under the second mortgage (*k*). As second mortgagee he could have sued the mortgagor for a sale of the property subject to the first mortgage, or he could have redeemed the first mortgage and then sued the mortgagor for sale on both the mortgages. The point to be noted is that the second mortgagee does not lose either of these rights, merely because a decree has been passed in the prior mortgagee's suit, and the mortgaged property has been sold in execution of the decree. The sale has not the effect of displacing the second mortgagee and leaving him with nothing but a claim against the balance (if any) of the sale proceeds of the property after satisfying the first mortgagee (*l*). The omission to implead the second mortgagee does not in any way prejudice his rights (*m*). That his right to sue for sale (subject, of course, to the first mortgage) is not lost, has been held by a Full Bench of the Calcutta High Court (*n*). That his right to redeem the first mortgage and to have the property sold to satisfy his own claim is not lost has been held in the undermentioned (*o*) and numerous other cases cited elsewhere in the notes to this rule. The next question to consider is upon what terms he is entitled to redeem the first mortgage. In *Umesh Chunder v. Zahur Fatima* (*oo*), it was held by the Judicial Committee that a second mortgagee desiring to redeem is bound to pay the whole amount due under the first mortgage, and not merely the price realized at the sale held in execution of the first mortgagee's decree. When the decree in *Umesh Chunder's* case was made, the Transfer of Property Act had not been passed and the procedure prescribed by that Act for suits for sales under that Act did not exist; that case was decided on the law as it then stood (*p*). By s. 89, however, of the Transfer of Property Act, it is provided that where a suit is brought by a mortgagee for sale and an order absolute for sale is made, "the defendant's (mortgagor's) right to redeem and the security shall both be extinguished", in other words, an order absolute for sale under s. 89 substitutes the rights under the decree for those under the mortgage. The result is that where in a case governed by the Transfer of Property Act the first mortgagee obtains a decree for sale without making the second mortgagee a party to his suit, and the mortgaged property is sold in execution of the decree, and the second mortgagee afterwards sues for a sale decree under his mortgage, he (the second mortgagee) is entitled to a decree for sale on payment of the amount *due under the decree*, and he is not bound to pay the entire amount of the first mortgage. It was so held by the Judicial Committee in *Matru Mal*

(*j*) *Brojonath v. Khelat Chunder* (1871) 14 M. I. A. 144; *Ragho Salvi v. Balkrishna* (1885) 9 Bom. 128; *Hassanbhai v. Umaji* (1904) 28 Bom. 153; *Ram Narain v. Bandi Pershad* (1904) 31 Cal. 737; *Jugdeo Singh v. Habibulla* (1908) 12 C. W. N. 107; *Hira Lal v. Kishan Lal* (1897) 19 All. 543; *Brij Kishore v. Madho Singh* (1908) 23 All. 278; *Seethi v. Ramasubdayyar* (1898) 21 Mad. 64; *Punithavelu v. Bhashyam* (1902) 25 Mad. 406, 422; *Rangasamy v. Jellu Bodi* (1903) 26 Mad. 484; *Malikarjunadu v. Linga Murti* (1903) 26 Mad. 332; *Kallash v. Girija* (1912) 39 Cal. 925.
(*k*) *Umesh Chunder v. Zahur Fatima* (1891) 18 C. I. 164, 17 I. A. 201; *Het Ram v. Shadi*

Lal (1918) 45 I. A. 130, 183, 40 All. 407, 410; *Matru Mal v. Durga Kanwar* (1920) 47 I. A. 71.
(*l*) *Gobind Lal v. Ramjanam* (1894) 21 Cal. 70, 20 I. A. 165.
(*m*) *Ram Prasad v. Bhikari Das* (1904) 26 All. 464, 467.
(*n*) *Debenandra Narain v. Ramtaran* (1903) 30 Cal. 599. See also Explanation to the rule.
(*o*) *Malikarjunadu v. Linga Murti* (1903) 26 Mad. 332; *Mohan Manor v. Togu Uka* (1896) 10 Bom. 224; *Kudrat-ullah v. Kubra Begum* (1901) 28 All. 25.
(*oo*) (1891) 18 Cal. 164, 17 I. A. 201.
(*p*) (1920) 47 I. A. 71, 75, *supra*.

v. Durga Kunwar (pp), a case decided in 1919. In several cases governed by the Trans. O. 34, r. 1. fer of Property Act and decided prior to *Matru Mal's* case, the Indian Courts seem to have overlooked the provisions of s. 89 of the said Act, and they held as was done by the Judicial Committee in *Umesh Chunder's* case that the second mortgagee can only redeem upon payment of the entire amount due under the first mortgage (q). It was also held that he was not bound to pay for any improvements which the purchaser might have made in the meantime (r). It was further held that where the property was purchased by a third party, and the purchase-money paid by him did not fully satisfy the amount of the first mortgage, the amount payable by the second mortgagee should be apportioned between the purchaser and the first mortgagee; that is to say, the purchaser should be paid the amount of the purchase-money paid by him at the sale and the balance should be paid to the first mortgagee. Thus if the amount due under the first mortgage was Rs. 10,000, and the property was sold in execution of the first mortgagee's decree for Rs. 1,050, and the second mortgagee desired to redeem the purchaser, the amount payable by the second mortgagee, namely, Rs. 10,000, should be apportioned between the purchaser and the first mortgagee, the former receiving Rs. 1,050, and the balance going to the first mortgagee (s). The decision in *Matru Mal's* case (t) was based upon the words "the defendant's (mortgagor's) right to redeem and the security shall both be extinguished" which occurred at the end of s. 89 of the Transfer of Property Act (u). But these words have been omitted in the corresponding r. 5 of this Order. The result would seem to be that the second mortgagee who is not made a party to the first mortgagee's suit can only redeem under the present law on payment of the entire amount due under the first mortgage as held in *Umesh Chunder's* case (v).

Where a person has come into possession subsequently to the date of the first mortgage either as putnidār or as usufructuary mortgagee, he should be joined as a party to a suit by the first mortgagee, and thus given an opportunity of redeeming the mortgage. If he is not joined as a party, the purchaser under the mortgage-decree is not entitled to obtain possession without paying off his charge (w).

Mahomedan co-heirs.—A Mahomedan mortgages his property to A. He then dies leaving as his heirs a widow, two daughters and a brother. After his death, A sues the widow and the daughters for sale of the mortgaged property. The brother is not joined as a party to the suit. According to the Bombay High Court, the brother is not a necessary party to the suit (x). But there is a conflict of opinion whether the Court can in such a case pass a decree for the sale of the whole property. In *Virchand v. Kondu* (y), the Court held that it can. In a later Bombay case (z), however, Pratt, J., expressed the opinion that a decree can be passed for the sale only of the right, title and interest of the widow and the daughters. See Mulla's Principles of Mahomedan Law, 6th ed., art. 36, p. 20.

Joint Hindu family.—There is a conflict of decisions as to whether where a suit is brought on a mortgage by or against the manager of a joint Hindu family in his representative capacity, the other members of the family are necessary parties to the suit having regard to the provisions of the present rule. It has been

(pp) (1920) 47 I. A. 71; *Hst Ram v. Shadi Lal* (1918) 45 I. A. 180, 133, 40 All. 407, 410.
 (q) *Dip Narain v. Hira Singh* (1897) 19 All. 527, explained in *Sri Ram v. Kesri Mal* (1904) 26 All. 186; *Sivathi v. Ramasubbayyar* (1898) 21 Mad. 64; *Delhi and London Bank, Ltd. v. Bhikari Das* (1902) 24 All. 138; *Girish Chunder v. Kedar Nath* (1906) 38 Cal. 590.
 (r) *Rangayya v. Patthasarathi* (1897) 20 Mad. 120; *Venkataramana Iyer v. Gompertz* (1908) 81 Mad. 425.
 (s) *Wahid-un-nissa v. Gobardhan Das* (1903) 25

All. 388.
 (t) (1920) 47 I. A. 71.
 (u) See *Hst Ram v. Shadi Lal* (1918) 45 I. A. 180, 133, 40 All. 407, 410.
 (v) (1891) 18 Cal. 164, 17 I. A. 201.
 (w) *Jugal Kishore v. Kartic Chunder* (1894) 21 Cal. 116; *Rangasamy v. Jelli Bodi* (1903) 26 Mad. 484; *Jambu Chetty v. Palaniappa* (1903) 26 Mad. 526.
 (x) *Shahasaheb v. Sadashiv* (1919) 43 Bom. 575; *Virchand v. Kondu* (1915) 39 Bom. 729.
 (y) (1915) 39 Bom. 729.
 (z) (1919) 43 Bom. 575, 581, *supra*.

- O. 34, r. 1. held by the High Courts of Allahabad (a), Madras (b) and Patna (c), following a recent decision of the Privy Council (d), that where a suit is brought on a mortgage by or against the manager of a joint Hindu family in his representative capacity, the other members of the family are not necessary parties to the suit, and that the suit will not fail by reason of the non-joinder of those members. It does not make any difference that the manager is a father or that he is a collateral relation as an uncle or a brother.

According to the Bombay decisions, it would seem that the other coparceners are necessary parties to a suit brought on a mortgage by or against the manager (e). But if they are not joined as parties, and a decree is passed for the sale of the joint family property against the manager in his representative character, and the property is sold in execution of the decree, the sale, it has been held, passes the interest of the other co-parceners also in the property; the mere fact that they were not parties to the mortgage-suit is no ground for setting aside the sale, unless it be shown by them that the debt contracted by the manager was one for which they are not liable (f).

According to the Calcutta High Court, the other co-parceners are necessary parties to a suit on a mortgage of joint family property, and if a decree is passed in such a suit without their being joined as parties, the decree is not binding on them, and they are entitled to bring a suit for a declaration that they not being parties to the suit their interests are not bound by the decree in the suit (g).

In a recent case before the Privy Council governed by the Transfer of Property Act, 1882, where a foreclosure decree was passed against the manager of a joint Hindu family, and the other members brought a suit to set aside the decree on the ground that they being interested in the equity of redemption ought to have been joined as parties to the suit under s. 85 of the Transfer of Property Act, but that they were not so joined, their Lordships held that the decree was in the circumstances of the case binding upon them, though they were not parties to the suit. Their Lordships said: "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family, that the family as a whole is bound. It is quite clear from the facts of the case and the findings of the Courts upon them that this is a case where this principle ought to be applied: *'There is not the slightest ground for suggesting that the manager of the joint family did not act in every way in the interests of the family itself'*, and no question arises under s. 85 of the Transfer of Property Act [O. 34, r. 1], because the mortgagee had no notice of the plaintiff's interests" (h). Note that the words "provided that the plaintiff has notice of such interest", which occurred in s. 85 of the Transfer of Property Act, do not occur in the present rule.

Where parties are not governed by the Hindu law, and the only interest which a son has under the customary law is a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations, the son has no such interest in the property as is contemplated by the present rule and he is not therefore a necessary party to a suit on a mortgage against his father (i).

- (a) *Hori Lal v. Munman Kunwar* (1912) 34 All. 549; *Madan Lal v. Kishan Singh* (1912) 34 All. 572, overruling *Bhavani Prasad v. Kailu* (1896) 17 All. 537.
 (b) *Sheik Ibrahim v. Rama Iyer* (1911) 35 Mad. 685. See also *Palani v. Rangayya* (1899) 22 Mad. 207; *Ramasamayyan v. Virasami* (1898) 21 Mad. 222.
 (c) *Raghunandan v. Parmeshwar* (1917) 2 Pat. L. J. 306; *Girwar v. Mamt. Makbunessa* (1916) 1 Pat. L. J. 468.
 (d) *Kishan Prasad v. Har Narain Singh* (1911) 33 All. 272, 38 I. A. 45.
 (e) *Ramechandra v. Dharamjit* (1916) 40 Bom.

248.
 (f) *Ramkrishna v. Vinayak* (1910) 34 Bom. 354; *Chinnana v. Sada* (1910) 12 Bom. L. R. 811.
 (g) *Lala Suraj Prasad v. Golab Chand* (1901) 28 Cal. 517; *Biswanath Pershad v. Jagdip Narain* (1912) 40 Cal. 342; *Debi Prasad v. Dharamjit* (1914) 41 Cal. 727.
 (h) *Shoo Shankar v. Jaddo Kunwar* (1914) 36 All. 383, 41 I. A. 216, affirming 33 All. 71.
 (i) *Shiv Dev Singh v. Jat Ram* (1919) Punj. Rec. no. 125, p. 827.

2. [*New. Act 4 of 1882, s. 86.*] In a **O. 34, r. 2.**
 Preliminary decree in fore-
 closure-suit. suit for foreclosure, if the plaintiff suc-
 ceeds, the Court shall pass a decree—

- (a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or
- (b) declaring the amount so due at the date of such decree, and directing—
- (c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims and shall also, if necessary, put the defendant in possession of the property, but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

Transfer of Property Act, s. 86.—This rule corresponds to s. 86 of the Transfer of Property Act except in the following particulars :—

1. The words “to the plaintiff or” which occurred in s. 86 after the word “pays” in cl. (c) have been omitted, the object being that in every case the defendant should pay the money *into Court*.
2. In cl. (c) the words “if so required” have been added before the words “re-transfer the property,” as according to *mofussil* practice a re-transfer is not ordinarily required.

Form of preliminary decree for foreclosure.—See Appendix D, form No. 3.

Right to foreclosure or sale.—The mortgagee has, at any time after the mortgage money has become payable to him, a right to obtain from the Court a decree that the mortgagor should be absolutely debarred of his right to redeem the property, or a decree that the property be sold. A suit to obtain a decree that the mortgagor should be absolutely debarred of his right to redeem the mortgaged property, is called a suit for foreclosure. A suit to obtain a decree that the property be sold is called a suit for sale [Transfer of Property Act, s. 87]. Rules 2 and 3 relate to decrees in suits for foreclosure. Rules 4 and 5 relate to decrees in suits for sale.

O. 34. r. 2. A suit for foreclosure can only be brought where the mortgage is an English mortgage or a mortgage by conditional sale. A suit for sale can only be brought where the mortgage is an English mortgage or a simple mortgage. A mortgagee by conditional sale cannot institute a suit for sale. A simple mortgagee cannot institute a suit for foreclosure. A usufructuary mortgagee cannot institute a suit either for foreclosure or sale [Transfer of property Act, s. 67].

Right to redemption.—The mortgagor has, at any time after the mortgage money has become payable by him, a right on payment or tender of the mortgage money, to require the mortgagee to deliver up to him all documents in the mortgagee's possession relating to the mortgaged property, and to retransfer the property to him. This right is called a right to redeem, and a suit to enforce it is called a suit for redemption [Transfer of Property Act, s. 60]. Rules 7 and 8 provide for decrees in suit for redemption.

Account against mortgagor.—Whether the suit be one for foreclosure, sale or redemption, the preliminary decree in each case must direct an account to be taken of what is due to the mortgagee for principal, interest and costs. Where the same property is mortgaged to several persons in succession, and the subsequent mortgagees are joined as parties to the suit, they are entitled, if they appear and prove their mortgages, to ask for a decree for an account on each of their mortgages and a declaration of their right to participate in the surplus sale proceeds in order of priority. An account is then taken of what is due on each mortgage, the sums so found due to each mortgagee are included in one report, and the sale proceeds are subsequently divided between the plaintiff and the puisne mortgagees in accordance with their claims as found by the report (*j*). Where the mortgagee is in possession, an account is to be taken of the income derived by him from the property, and also an account of what is due to the mortgagee for principal and interest. In taking the account it lies upon the mortgagee to prove what is due to him in respect of principal and interest. It follows from this that if the mortgage-bond is not put in evidence, as where it is not stamped and the mortgagee refuses to pay the penalty, he can only be credited in the account with the sum which the mortgagor admits was the amount of the principal (*k*).

Principal.—The amount of principal and the rate of interest payable thereon are almost invariably stated in the instrument of mortgage. Such statement amounts to an admission on the part of the mortgagor that he has received the amount mentioned in the instrument. But an admission is not conclusive proof of the matter admitted (*l*), it is therefore open to the mortgagor to show that a smaller consideration or no consideration at all passed under the instrument of mortgage (*m*). But the burden of proof in that case lies on the mortgagor (*n*). But though an admission is not conclusive proof of the matter admitted, it may operate as an estoppel, so as to preclude the mortgagor from asserting that a smaller consideration or no consideration passed under the instrument of mortgage (*o*). This happens when the mortgagee transfers his interest in the mortgage to a third party who has no notice that the full amount acknowledged to have been received on the face of the mortgage-deed has not been received. In such a case the mortgagor cannot redeem on tender or payment of the amount actually received, and the transferee is not bound to re-convey the property except on payment to him of the amount stated in the mortgage-deed to have been received by the mortgagor (*p*).

Interest.—The question of interest to be awarded by a decree in suits for the enforcement of a mortgage has already been considered in the notes to s. 34 under the

(*j*) *Berhamdeo Pershad v. Tara Chand* (1906) 33 Cal. 92, 111.

(*k*) *Ganga Mulik v. Bayaft* (1882) 6 Bom. 669, 670.

(*l*) Evidence Act, 1872, s. 31.

(*m*) Evidence Act, 1872, s. 92, proviso (1).

(*n*) *Mahabir Prasad v. Bishan Dayal* (1905) 27 All. 7. *Ali Khan Bahadur v. Indar Par-*

shad (1896) 23 Cal. 950, 23 I. A. 92. See also *Brajeshwars v. Budhanuddi* (1881) 6 Cal. 268, 277, 278.

(*o*) Evidence Act, ss. 31, 115;

(*p*) *Bickerton v. Walker* (1886) 81 C. D. 161; *Baleman v. Hunt* [1904] 2 K. B. 580.

head "Interest in suits for enforcement of mortgage," on p. 101 above. There are, however, a few matters of detail which have not been dealt with in those notes, and it is to these that we now propose to address ourselves. According to this rule as well as rules 4 and 7 there has to be added to the principal sum interest on the mortgage up to the date fixed by the Court for payment. But what if the mortgagor contends that the mortgage-bond does not provide for the payment of any interest after the due date, in other words, that there is no provision for the payment of *post-diem* interest? Where there is an express provision for the payment of interest up to the date of payment—and this is the usual case—there is no difficulty. The Court should in that case award interest at the contract rate up to the date of payment unless the stipulation for the payment of interest is penal within the meaning of s. 74 of the Contract Act, in which case the Court may award interest at such rate as it thinks just (see notes to s. 34, p. 101 above). Where there is no express provision for the payment of interest up to the date of payment, the Court should determine the intention of the parties by an examination of the terms of the deed. If on such examination it comes to the conclusion that there was an intention to pay interest up to the date of payment and not only up to the due date, the position is the same as if the bond contained an express provision to pay interest up to the date of payment (g). One of the rules of construction adopted in this connection is that where a mortgage-bond contains a stipulation for the periodical payment of interest, and there is nothing in the bond to suggest that the liability should cease on the due date, the Court will presume that there was an intention to pay interest up to the date of payment (r). If the Court comes to the conclusion that there was no intention to pay interest after the due date, the mortgagee may recover interest by way of damages under Act 32 of 1839, and the rate allowed will *prima facie* be the same as that provided by the bond, although there is no rule of law making that rate necessarily the measure of damages (s). Is the interest that may be awarded as damages to be treated on the same footing as interest for the payment of which there is an express or implied stipulation, or is it to be treated on a different footing? If the former, and that is the view held by the High Courts of Calcutta and Madras, it is to be treated as part of the mortgage-money so as to be recoverable out of the mortgage property in the same way as the principal and the costs of the suit (t). If the latter and this is the view taken by the High Court of Allahabad, the interest awarded as damages is not recoverable out of the mortgaged [property, but that portion of the decree which awards such interest is to be treated as a decree for the payment of money, and executed as such (u).

It may perhaps be thought, as it was thought in some cases (v), that a claim for interest by way of damages being a claim for compensation for breach of contract, the claim will be barred unless it is made in a suit brought within six years of the due date

- (g) *Mathura Das v. Raja Narindar* (1897) 19 All. 39, 23 I. A. 138; *Bhinderji Naik v. Ganga Saran Sahu* (1898) 20 All. 171, 25 I. A. 9; *Sarala Das v. Jogendra* (1898) 25 Cal. 246; *Pedda Subbaraya v. Ganga* (1897) 20 Mad. 149; *Nityananda v. Sri Radha* (1897) 20 Mad. 371; *Ghantayya v. Papayya* (1900) 23 Mad. 534.
- (r) *Jivanna v. Appala* (1899) 22 Mad. 339; *Manager Vithoba Timap Sanbhog v. Vigneshwar* (1898) 22 Bom. 107, where it also appeared from the evidence that the mortgagor had paid interest for several years after the due date.
- (s) *Chajmal Das v. Brij Bhukan Lal* (1895) 17 All. 511, 22 I. A. 199; *Mathura Das v. Raja Narindar* (1897) 19 All. 39, 23 I. A.

- 138.
- (t) *Bikramjit v. Durga Dayal* (1894) 21 Cal. 274; *Moti v. Ramohari* (1897) 24 Cal. 699; *Rama Reddi v. Appaji Reddi* (1895) 18 Mad. 248. See also *Chajmal v. Brij Bhukan* (1895) 17 All. 511, 517, 22 I. A. 199, where interest awarded as damages was directed to be added to the principal in taking the accounts.
- (u) *Narindra Bahadur v. Khadim Husain* (1895) 17 All. 581; *Rikhi Ram v. Sheo Parshan* (1896) 18 All. 316.
- (v) *Gudri Koer v. Bhubaneswari* (1892) 19 Cal. 19; *Moti v. Ramohari* (1897) 24 Cal. 699; *Narindya v. Khadim* (1895) 17 All. 581; *Badi v. Sami* (1895) 18 Mad. 257; *Thayar Ammal v. Lakshmi* (1895) 18 Mad. 331.

O. 34, r. 2. for payment of the mortgage money, that being the period prescribed by art. 116 of the Limitation Act for a suit for damages for breach of a contract in writing registered. In the undermentioned case (*w*), however, the Judicial Committee observed that such a claim was a recurring one within the meaning of s. 23 of the Limitation Act. The result therefore is that as long as the principal is not barred, six years' interest can be recovered. Thus if the due date for payment of mortgage money under a registered deed of mortgage be 1st January 1900, and the mortgagee brings a suit for foreclosure or sale on 1st January 1908, he will be entitled, according to the observations of the Judicial Committee, to interest for a period of six years next preceding the date of the suit, and it is only the claim for interest for the years 1900 and 1901 that would be barred. According to the earlier cases cited above, the mortgagee would not be entitled to any interest at all, the date of the breach of contract being 1st January 1900, and the suit having been brought more than six years after that date. It must, however, be remembered that this rule of limitation applies only to interest by way of damages recoverable in cases where there is no intention to pay interest after the due date. In other cases, the mortgagee is entitled to have the interest from the date of his security up to the date fixed by the Court for payment added to the mortgage-debt, though it may be for a period exceeding six years (*x*).

Interest subsequent to the date fixed for payment.—There is no provision made in this rule for interest after the date fixed in the decree for payment as there is in rule 4 which relates to a decree for sale. The reason is to be sought in the difference between a foreclosure and sale. In the former case interest stops because the mortgagee gets the property in lieu of his debt, whereas a sale must be subject to some substantial delay, and in many cases is subject to long delays (*y*). See notes to s. 34, p. 101 above.

Damdupat—See notes to s. 34, "The rule of damdupat," p. 102 above.

Costs.—Whether the suit be one for foreclosure, sale or redemption, the mortgagee is entitled to all costs properly incurred (*z*) by him including costs subsequent to decree (*r*. 10). "This right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract" (*a*). Thus costs incurred by the mortgagee after a proper tender has been made have been disallowed (*b*). And where in a suit for redemption the mortgagee, though he had been fully paid, contended that a large amount was still due to him, it was held that he must pay the costs of the whole suit (*c*).

Account against mortgagee in possession.—Where it is provided by the terms of a usufructuary mortgage that the mortgagee should enjoy the profit in lieu of interest, or that the profits should be taken as an equivalent of the interest and of specific portions of the principal, no accounting is necessary on the part of the mortgagee, for no questions of account can arise in such a case (*d*). In other cases the mortgagee in possession is bound to render an account of the rents and profits of the mortgaged property (*e*). As to annual rents against a mortgagee in possession, see the undermentioned cases (*f*).

(*w*) *Mathura Das v. Raja Narindar* (1897) 19

All. 39, 47, 25 I. A. 138.

(*x*) *Daudbhai v. Daudbhai* (1890) 14 Bom. 113.

(*y*) *Maharaja of Bharatpur v. Kanno Dei* (1901) 23 All. 181, 183, 28 I. A. 35.

(*z*) *Dryden v. Frost* (1838) 8 L. J. Ch. 235.

(*a*) *Bank of New South Wales v. Connor* (1889) 14 App. Case 273, 278.

(*b*) *Dhondo v. Balkrishna* (1884) 8 Bom. 190.

(*c*) *Ashworth v. Lord* (1887) 36 C. D. 545. See

also *Charles v. Jones* (1887) 35 C. D. 545.

(*d*) Transfer of Property Act, ss. 62, 76 and 77.

(*e*) Transfer of Property Act, s. 76 (*q*).

(*f*) *Jaijit Rai v. Gobind* (1884) 6 All. 308; *Ashworth v. Lord* (1887) 36 C. D. 545, 550. See also *Fisher on Mortgage*, pp. 872-874, and *Tagore Lectures*, 1876-76, p. 254.

Sub-mortgagee.—A sub-mortgagee may sue for foreclosure or sale to the same extent as the mortgagee himself (g). Where the sub-mortgagee is a party to the suit, the preliminary decree must direct an account to be taken of what is due to the mortgagee and what is due to the sub-mortgagee. As to the form of decree in a suit by a sub-mortgagee against the mortgagee and mortgagor, see Appendix D. form No. 9. As to the form of decree in a suit for redemption by the mortgagor against the mortgagee and sub-mortgagee, see the undermentioned case (h). See notes to r. 1 above, sub-mortgagee," p. 752.

O. 34,
rr. 2, 3.

Subsequent Incumbrancers.—For forms of decree in cases where subsequent incumbrances are dealt with in the same decree, see Appendix D, forms Nos. 6, 7 and 8 and also the undermentioned case (i).

Mortgage of chattels and of intangible property.—A mortgagee of chattels is entitled to foreclosure quite as much as a mortgagee of immoveable property. So also is a mortgagee of intangible property, such as *palas* or turns of worship in a temple (j).

Res judicata.—See notes to s. 11, "Application of above rules to suits on mortgage," p. 44 above.

3. [New. Act 4 of 1882, s. 87.] (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree

Final decree in fore-
closure-suit.

(a) ordering the plaintiff to deliver up the document which under the terms of the preliminary decree he is bound to deliver up, and, if so required,—

(b) ordering him to retransfer the mortgaged property as directed in the said decree, and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgage property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

(g) See *Muthu Vithya v. Venkatachallam* (1897) 20 Mad. 85.
(h) *Narayan v. Ganoff* (1891) 15 Bom. 692.

(i) *Gopi Narain v. Bansidhar* (1905) 7 All. 825.
(j) *Mahamayya v. Haridas* (1914) 2 Cal. 455, 477, 478.

O. 34. r. 3. Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

Power to enlarge time.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

Discharge of debt.

Transfer of Property Act, s. 87.—This rule corresponds with s. 87 of the Transfer of Property Act, except in two particulars, viz., (1) sub-r. (1) provides for the passing of a decree where payment is made; s. 87 of the Transfer of Property Act contained only the words "the defendants shall (if necessary) be put into possession of the mortgaged property." (2) Sub-r. (2) again provides for the passing of a decree where no payment is made. Under s. 87 the Court had merely to pass an order. See as to this distinction, notes to r. 5 below. "Final decree for sale: Limitation," p. 766.

Limitation.—See notes to r. 5 below. "Final decree for sale: Limitation," p. 766.

Final decree for foreclosure.—For form, see appendix D, form No. 10. Where the mortgagor fails to pay the amount due by him on the date fixed by the preliminary decree, the mortgagee may apply under sub-r. (2) for a final decree declaring that the mortgagor is debarred from all right to redeem the mortgaged property. Until such decree is passed, the mortgagor may apply under the proviso for an extension of the time for payment, and according to the Calcutta and Allahabad decisions he may, at any time before the decree is passed, pay the money into Court even without an extension and so avert foreclosure (*k*). It may be worth while to add that there cannot be two decrees or foreclosure passed in respect of one and the same mortgage. A sues B for foreclosure of a mortgage comprising two properties. A preliminary decree for foreclosure is passed as regards one of them, but the suit is dismissed as regards the other. A appeals from the portion of the decree dismissing his suit. If A applies for and obtains a final decree for foreclosure in respect of the property ordered to be foreclosed, it is not open to him thereafter, even if he succeeds in his appeal, to obtain another final decree for foreclosure of the other property. To obtain a final decree for foreclosure of both the properties, A must wait until the disposal of the appeal (*l*).

Effect of appeal on time fixed for payment.—A preliminary decree is passed in a foreclosure suit fixing a period of six months from the date of the decree for payment by the mortgagor of the amount due. The mortgagor prefers an appeal from the decree, but the decree is confirmed in appeal. The decree of the appellate Court is silent as to the time allowed for redemption. This does not amount to an extension of the time for payment so as to enable the mortgagor to redeem the mortgage within a period of six months from the date of the appellate decree. The mortgagee is entitled notwithstanding the appeal, to a final decree for foreclosure after the expiration of six months from the date of the original decree, though six months may not have expired from the date of the appellate decree. The appellate decree, simply confirming the original decree, cannot be read as giving the mortgagor six months from the date of the decree on appeal (*m*). This is in accordance with the general principle that where time is

(*k*) *Somesh v. Ram Krishna* (1900) 27 Cal. 706; *Salig Ram v. Muradan* (1903) 25 All. 231; see also *Debi Prasad v. Jai Karan* (1902) 24 All. 479.

(*l*) *Sham Sundar v. Muhammad* (1905) 27 All. 501.

(*m*) *Bhola Nath v. Kanti Chandra* (1898) 25 Cal.

311. See also *Chiranjil Lal v. Dharam Singh* (1896) 18 All. 455; *Manavikraman v. Unnappan* (1892) 15 Mad. 170; *Kanara v. Govinda* (1893) 16 Mad. 214, where the same question arose in suits for redemption.

prescribed by the decree of the lower Court for the performance of a condition precedent, and the appellate Court simply confirms the decree of the lower Court, it cannot be regarded as enlarging the time fixed by the original decree for the performance of the condition (n). The result is the same where the appeal is withdrawn, and no decree is passed in appeal. The withdrawal does not give the mortgagor a fresh period for redemption (o). To avoid the difficulty arising in such cases, the mortgagor should take care to have a fresh day fixed for payment by the appellate Court, offering at the same time to pay interest up to that date (p), or he should apply under the proviso for an extension of the time for payment.

O. 34,
rr. 3, 4.

Power to enlarge time.—The Court may under the proviso postpone the day fixed for payment upon good cause shown and upon such terms as it thinks fit. The mere fact that a final decree for foreclosure has not yet been passed does not entitle the mortgagor to an extension of time (q).

It is not necessary that the application for extension of time should be made before the expiry of the time originally fixed for payment. It may be made even after the expiry of that time, but it should be made before the final decree is passed (r). It follows from this that if the mortgagor deposits the redemption money into Court before the final decree is passed, though after the date fixed for payment, and the deposit is accepted by the Court, it becomes an effectual deposit. It makes no difference whether the acceptance of such a deposit is or is not preceded by a formal order extending the time. If the Court accepts a deposit after due time has elapsed, it must be assumed, in the absence of anything to the contrary, that the Court is satisfied that there has been good cause for the delay (s). See notes to s. 148, "Act prescribed or allowed by this Code," p. 320 above.

Note that the application for a final decree for foreclosure has to be made by the plaintiff, that is, the mortgagee (t).

Discharge of debt on foreclosure.—The effect of a final decree for foreclosure is to vest the mortgaged property absolutely in the mortgagee and to extinguish the mortgage-debt. The ownership becoming vested in the mortgagee, the mortgagor is debarred from all right to redeem the property (u). And the debt being extinguished, the mortgagee can no longer proceed against the mortgagor personally.

Appeal.—An appeal lies from an order under this rule refusing to extend the time for payment of mortgage-money [O. 43, r. 1, cl. (o)].

4. [New. Act 4 of 1882, s. 88.] (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 2 and also directing that, in default of the defendant paying as therein mentioned

Preliminary decree in suit
for sale.

- (n) *Ramaswami v. Sundara* (1908) 81 Mad. 28; *Aminabi v. Sidu* (1898) 17 Bom. 547.
(o) *Patloji v. Ganu* (1891) 15 Bom. 370; *Chudasama v. Ishwargar* (1892) 16 Bom. 248.
(p) *Rafikunnessa Bibi v. Tarini Churn* (1898) 20 Cal. 279.
(q) *Murugesu v. Ramasami* (1915) 39 Mad. 882; *Ratnakar v. Chamra* (1919) 4 Pat. L. J. 347.
(r) *Narayana v. Papayya* (1899) 22 Mad. 133; *Malkarjunadu v. Lingamurti* (1902) 25

- Mad. 244, 289; *Vedapuratti v. Vallabha* (1901) 25 Mad. 300; *Nandram v. Babaji* (1898) 22 Bom. 771; *Ishwar v. Gopal* (1904) 28 Bom. 102; *Murugesu v. Ramasami* (1916) 39 Mad. 882.
(s) *Bepin Behary v. Mokunda Lal* (1909) 86 Cal. 122.
(t) *Ratnakar v. Chamra* (1919) 4 Pat. L. J. 347, 353.
(u) *Ladu v. Babaji* (1889) 7 Bom. 582.

O. 34, r. 4. the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

Transfer of Property Act, s. 88.—This rule corresponds with s. 88 of the Transfer of Property Act, excepting the words “together with subsequent interest and subsequent costs” in sub-r. (1), which are new. See notes below under the head “Preliminary decree for sale.”

Preliminary decree for sale.—A suit for sale of mortgaged property can only be brought where the mortgage is an English mortgage or a simple mortgage, or where the property is subject to a charge within the meaning of s. 100 of the Transfer of Property Act (see r. 15 below). The preliminary decree to be passed in a suit for sale corresponds to the preliminary decree in a suit for foreclosure in all respects except that instead of a direction providing for foreclosure, the decree contains a direction providing for sale of the mortgaged property. The notes therefore to r. 2 relating to the taking of accounts and the determination of principal, interest and costs apply equally to this rule. But there is this difference as regards interest, that while there is no provision made for interest subsequent to the date fixed for payment in the case of a decree for foreclosure, the present rule expressly provides for such interest. This subject has already been dealt with in the notes to s. 34, “Interest on suits for enforcement of mortgage,” p. 101 and in the notes to r. 2 above, “Interest subsequent to the date fixed for payment,” p. 760.

Form of decree.—As to the form of a preliminary decree for sale, see Appendix D, form No. 4. On referring to the form it will be observed that it does contain any declaration of *personal* liability of the defendant for principal, interests or costs. Such a declaration, in fact, ought not to be included in the decree for sale. If the sale-proceeds are not sufficient to pay the amount due to the mortgagee the mortgagee may apply for a decree against the mortgagor personally under r. 6 below (v). See Appendix D, form No. 11.

Subsequent Incumbrancers.—For the contents of a decree for sale in a suit by the first mortgagee (v) see Appendix D, form No. 7. For the contents of a decree for sale in a suit by the second mortgagee, see Appendix D, form No. 8.

(v) See *Kamalama v. Komandur* (1907) 80 Mad. 464. | (v) See *Berhamdeo v. Tara Chand* (1909) 88 Cal. 92, 111.

Rights of second mortgagee in a suit for sale by first mortgagee.—*M* mortgages certain property first to *A*, and then to *B*. *A* sues *M* for a sale of the mortgaged property, making *B* a party defendant. In such a suit the only right of *B*, the second mortgagee, is to redeem *A*'s mortgage or to receive his mortgage money or part of it out of the surplus sale proceeds after satisfaction of *A*'s mortgage. But he cannot, having regard to the provisions of the Code, claim the right to treat the suit brought by *A*, the first mortgagee, as one for his benefit. It follows, therefore, that *B* could not insist upon a sale of the property if *A*'s claim is satisfied by *M* before sale. And it also follows that if a decree for sale is passed in *A*'s suit, *B* cannot claim to be entitled to a decree for sale of another property of *M* included in his mortgage. In either case, *B* must bring a separate suit for sale on his mortgage (*x*).

O. 34,
rr. 4, 5.

Power to decree sale in foreclosure-suit.—This power will generally be exercised where there are several mortgages of the same property. In such a case it is clear that the rights of the several mortgagees can be better adjusted by means of a sale. See Conveyancing Act, 1881 [44 and 45 Vict., c. 41, s. 25].

5. [New. Act 4 of 1882, S. 89.] (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

Final decree in suit for sale.

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,—

(b) ordering him to retransfer the mortgaged property as directed in the said decree, and also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4.

Transfer of Property Act, s. 89.—This rule corresponds with s. 89 of the Transfer of Property Act except in the following particulars :—

1. The provision contained in sub-r. (1) for the passing of a decree in the case where payment is made in accordance with the terms of the preliminary decree is new.

O. 34, r. 5.

2. By sub-rule (2) it is provided that the application which follows a preliminary decree for sale is not for an order for sale as it was in s. 89 of the Transfer of Property Act, but for a decree for sale. See notes below, "Final decree for sale : Limitation."
3. The words "to the plaintiff or" which occurred in s. 89 after the word "pays" (see l. 2 of this rule) have been omitted. See notes below, "Payment into Court".
4. The words "and thereupon the defendant's right to redeem and the security shall both be extinguished," which occurred at the end of s. 89, have been omitted (y). See notes to r. 1 above, "Consequences of non-joinder", p. 753.

Final decree for sale : Limitation.—Where no payment is made by the mortgagor of the amount due on or before the day fixed, the mortgagee may apply for a final decree for sale. The procedure prescribed by the Transfer of Property Act in suits for foreclosure, redemption and sale, was in the first place to pass a "decree," and then an "order absolute." This phraseology gave rise to conflicting decisions. In some cases it was held that an application for an order absolute for sale under s. 89 of the Transfer of Property Act was an application to execute the decree, and that the period of limitation was therefore three years from the date of the decree as provided by art. 179 of the Limitation Act of 1877 [Limitation Act, 1908, art. 182]. In other cases it was held that such an application was one to obtain a further decree, that the only article of the Limitation Act that could possibly apply to it was the general article 178 [now art. 181], that that article applied only to applications under the Code of Civil Procedure, and that there being no other article, there was no period of limitation for an application for an order absolute under the Transfer of Property Act. [It is interesting to note that the former view was taken by the Privy Council in cases under the Transfer of Property Act decided in 1914 (z)]. To put an end to this conflict of decisions it is now provided that the application which follows a preliminary decree for sale is to obtain a decree for sale so as to bring it within the purview of art. 181 of the Limitation Act of 1908 [old art. 178]. And with the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code (a). The result is that an application for a final decree for foreclosure, sale, or redemption is now governed by the residuary article 181 of the Limitation Act, 1908, and the period of limitation is three years from the date on which the right to apply accrues (b). Where an appeal is preferred from the preliminary decree, the right to make such an application accrues not on the expiry of the time limited by the preliminary decree but on the date of the decree of the Court of appeal (c). Where a decree was passed before the new Code came into force, and the application for a final decree was made after the new Code came into force, it was held that "the right to apply" never having accrued to the decree-holder until the new Code conferred it upon him, the period of limitation under art. 181 did not begin to run until the new Code came into force, that is, until 1st January 1909 (d).

(y) See *Het Ram v. Shadi Lal* (1918) 45 I.A., 130, 40 All. 407.

(z) *Abdul Majid v. Jawahir Lal* (1914) 36 All. 350 [F.C.]; *Batuk Nath v. Munni Dai* (1914) 36 All. 284, 41 I. A. 104, followed in *Muhammad v. Abdul Karim* (1916) 39 Mad. 544.

(a) *Amlook Chand v. Sarat Chunder* (1911) 38 Cal. 918, 921-922, affmd. sub-nominee *Munna Lal v. Sarat Chunder* (1914) 42 I. A. 88 42 Cal. 778.

(b) *Datto v. Shankar* (1913) 38 Bom 32; *Bent Singh v. Berhamdeo* (1915) 19 O. W.

N. 473; *Munna Lal v. Sarat Chunder* (1914) 42 I. A. 88; *Subbalakshmi v. Ramanujam* (1918) 42 Mad. 52 [acknowledgment under s. 19 of the Limitation Act]; *Bala Ram v. Kanhai* (1916) 1 Pat. L. J. 364.

(c) *Gajadhar v. Kishan* (1917) 39 All. 641, overruling *Madho v. Nihal* (1915) 38 All. 21; *Nizam-ud-din v. Bohra* (1918) 40 All. 203.

(d) *Narsingrao v. Bando* (1918) 42 Bom. 309. See also *Keshaweswarindra v. Rani Debdara* (1918) 4 Pat. L. J. 213.

Payment into Court.—Under s. 89 of the Transfer of Property Act, the defendant **O. 34, r. 5** may pay the amount to the plaintiff or into Court. Under the present rule [sub-r. (1)] the payment has to be made into Court. If the money is not paid into Court, there is to be a decree for sale. If any payment is made out of Court or the decree is adjusted in part and the payment or adjustment is certified under O. 21, r. 2, credit should be given to the defendant in respect thereof (e).

Sub-rule (2): "Where such payment is not so made."—Sub-r. (2) provides that where the mortgagor does not *pay into Court* the amount payable by him, the Court shall pass a final decree for sale. This gives the Court no option in the matter and if payment has not been made into Court on or before the fixed date, the Court must pass a final decree for sale. The result is that if no payment is made into Court and the mortgagee applies for a final decree for sale, the Court must pass such a decree though it may be proved that the mortgagee had after the preliminary decree and before the application for a final decree agreed to take over a portion of the mortgaged property in satisfaction of the debt. Sub-r. (2) recognizes no settlement except by payment into Court (f).

Enlargement of time.—This rule does not contain any provision such as is to be found in rr. 3 and 8 enabling the Court to extend the time for payment. This being so, when the money is not paid by the mortgagor by the day fixed in the decree, he cannot obtain an extension of the time for payment (g). But though the Court cannot extend the time for payment, the mortgagor is entitled to have the sale stopped under O. 21, r. 69, by payment of the amount due and costs at any time before sale (h), and, if the property is sold, to recover it back by making the deposit required under O. 21, r. 89 (i). The reason is that the provisions of the Code relating to the execution of decrees apply to sales under mortgage decrees. This was the view taken by the High Courts of Bombay, Madras and Allahabad in the cases just cited. On the other hand, it was held by the Calcutta High Court that the sections of the Code relating to execution did not apply to sales under mortgage decrees (j). To negative the view taken by the Calcutta High Court, the sections of the Transfer of Property Act relating to decrees in mortgage suits have been transferred to this Code.

Effect of sale under mortgage decree.—By a sale of property in execution of a decree for the payment of money, the interest of the judgment-debtor alone passes to the purchaser (k). By a sale of mortgaged property in execution of a decree for sale of such property, the interest both of the mortgagor and mortgagee passes to the purchaser (l). See notes to r. 1 above under the head "Consequences of non-joinder," p. 753.

Injunction restraining mortgagor from receiving income of mortgaged property.—After a final decree for sale is passed, it is not competent to the Court to restrain the mortgagor from receiving the income of the mortgaged property, merely because the property, when sold, may not realize a sufficient sum of money to satisfy the mortgage claim (m).

(e) *Singa Raja v. Pethu Raja* (1918) 42 Mad. 61; *Jugeshwar v. Jagatdhari* (1917) 2 Pat. L. J. 538.

(f) *Banarsi Das v. Nathu Mal* (1913) Punj. Rec. No. 12, p. 47.

(g) *Taniram v. Gajanan* (1900) 24 Bom. 300.

(h) *Harjas Rai v. Rameshar* (1898) 20 All. 354; *Raja Ram v. Chunni Lal* (1897) 19 All. 205; *Bibijan v. Sachi* (1904) 31 Cal. 803; *Adipuranan v. Gopalasami* (1908) 81 Mad. 354.

(i) See *Tirumal v. Syed Dastaghiri* (1899)

22 Mad. 286; *Mallikarjunadu v. Linga murti* (1902) 25 Mad. 244; *Krishnaji v. Mahadev* (1901) 25 Bom. 104.

(j) *Pramatha Chandra v. Kheta* (1902) 29 Cal. 651.

(k) See notes to O. 21, r. 94.

(l) *Magantal v. Shakra* (1898) 22 Bom. 945; *Desai Lallubhai v. Mundas* (1896) 20 Bom. 390; *Perumal v. Kaveri* (1893) 16 Mad. 121.

(m) *Muhammad Inamullah v. Narain* (1915) 37 All. 423.

O. 34,
rr. 5, 6.

Appeal.—Under the present Code, a party aggrieved by a preliminary decree passed under r. 4 of this Order may appeal from it ; if he does not appeal from it, he is precluded from disputing its correctness in an appeal which may be preferred from the final decree passed under this rule [s. 97]. “ Even under the old Code the correctness of the decree under section 88 of the Transfer of Property Act [now O. 34, r. 4] could not be questioned in an application for an order absolute under section 89 [now O. 34, r. 5] or in an appeal from an order absolute made on such an application ” (n). See notes above, “ Final decree for sale : limitation,” p. 786.

An adjudication dismissing an application under this rule for a final decree for sale is not an order under s. 47, but a decree and is appealable as a decree under s. 96 (o).

Dekkhan Agriculturists Relief Act 17 of 1879.—As to the applicability of this rule to cases under the above Act, see the undermentioned case (p).

Costs ordinarily recoverable from mortgaged property.—In a mortgage decree for sale costs are part of the amount due upon the mortgage and are recoverable from the mortgaged property, and not personally from the mortgagor unless the decree itself so directs (q).

6. [New. Act 4 of 1882, S. 90.] Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

Recovery of balance due
on mortgage.

Decree against mortgagor personally.—Where after the sale of the mortgaged property, there is still a balance due to the mortgagee and that amount is legally recoverable from the mortgagor, the mortgagee can ask for and obtain a decree under this rule for realization of the balance from other properties of the mortgagor (r). A decree under this rule is a decree to be passed in the original suit and not in a fresh suit (s). The object of the rule is to obviate the necessity of the mortgagee having to bring a fresh suit to recover the balance (t). Such a suit, in fact, could not be brought except where the mortgagee had reserved his right to do so with the leave of the Court under O. 2, r. 2 (u). In several cases decided under the corresponding s. 90 of the Transfer of Property Act, it was held by the Indian Courts that a personal decree for the balance should not be passed until after the mortgaged property had been sold and the proceeds found insufficient to pay the mortgage-debt ; in other words, that a Court could not while passing a decree for sale under s. 88 of that Act (now r. 5) pass a personal decree for the balance and that a personal decree could only be passed when the proceeds were found to be insufficient to satisfy the mortgagee's claim (v). In a recent case, however, the Judicial Committee held that a decree for sale under s. 88 (now r. 4) could validly provide that if the proceeds of sale were not

(n) *Muridhar v. Vishnudas* (1916) 40 Bom. 321, 327.

(o) *Subbalakshmi v. Ramanujam* (1918) 42 Mad. 52.

(p) *Kashinath v. Rama* (1916) 40 Bom. 492.

(q) *Matukdhari v. Ramdas* (1916) 2 Pat. L.J. 51; *Dambar Singh v. Kalyan Singh* (1917) 40 All. 109; *Maqbul v. Lalla* (1898) 20 All. 523.

(r) *Sinatun Shah v. Ali Nawaz* (1889) 16 Cal. 423.

(s) *Raj Singh v. Parmanand* (1889) 11 All. 486; *Musahab v. Inayat-ul-lah* (1892) 14 All.

513.

(t) *Mallikarjunadu v. Lingamurti* (1902) 25 Mad. 244, 286.

(u) *Ibid.*, p. 237.

(v) *Lal Behary Singh v. Habibur Rahman* (1899) 20 Cal. 166; *Ram Rangjan v. Indra Narain* (1906) 33 Cal. 890; *Damodar v. Vyanku* (1907) 31 Bom. 244; *Badr Das v. Inayat Khan* (1900) 22 All. 404; *Aiyasamier v. Venkatachela* (1917) 40 Mad. 989, 996; *Karimulla v. Mirza Muhammad* (1918) 3 Pat. L. J. 649.

sufficient to pay the mortgage-debt, the mortgagor should pay the balance personally though the personal decree could not be executed until after the sale had failed to satisfy the debt (*w*). There is no reason why the same interpretation should not be put upon the present rule. The addition of the words "found to be" in the present rule do not affect that interpretation (*ww*). It seems, however, from two Forms relating to mortgage suits, namely, Form No. 45 in App. A [form of plaint] and Form No. 4 in App. D [form of decree] that the Legislature intended that a decree for sale under r. 4 should not contain a direction that the balance should be recovered from the mortgagor personally and that the decree should merely reserve to the plaintiff liberty to apply for a personal decree under this rule if the proceeds were found insufficient to pay the mortgage-debt.

It has been stated above that a personal decree cannot be obtained under this rule unless all the properties directed to be sold under rr. 4 and 5 have been sold. There may, however, be cases in which some of the properties comprised in the decree for sale could not be sold without any default on the part of the mortgagee; in such a case the fact that all the properties have not been sold does not disentitle the mortgagee to a personal decree. It is only if the Court is satisfied that the properties which were included in the decree, and which could not be sold in pursuance of the decree, were in fact not sold owing to some action or default of the mortgagee so as to inform on the mortgagor a personal liability to which otherwise he would not have been liable, that the mortgagee would be debarred from obtaining a decree for personal liability under this rule (*x*). It has similarly been held that the omission to include in the plaint a portion of the mortgaged property does not debar the mortgagee from obtaining a personal decree under this rule provided the omission was not intended to prejudice, and has not prejudiced the mortgagor (*y*).

Where net proceeds of "any such sale" are found insufficient.—The expression "any such sale" refers to a sale under a decree absolute passed under r. 5 above. It therefore follows that a personal decree under this rule can only follow *the mortgage-decree under which the sale is held*. Therefore, if a sale has taken place under a decree on a prior mortgage, that would not entitle a subsequent mortgagee, who has also obtained a decree for sale, to apply for and obtain a decree under this rule. The reason is that the sale was not held under *his* decree (*z*). Similarly, where a person holding two mortgages over the same property brings two suits on those mortgages and obtains two decrees, and the mortgaged property is sold under one of those decrees, the fact that the sale proceeds, after discharging that decree, are not sufficient to pay the amount due *under the other decree*, would not entitle him to apply for and obtain a personal decree under this rule for the balance due under the other decree. The reason is that the property was sold, not under that, but under the first decree (*a*).

"Amount due."—A personal decree under this rule can only be passed where the net proceeds of the sale are insufficient to pay the *amount due* to the mortgagee. The expression "amount due" includes costs (*b*). It also includes, when a puisne mortgagee is plaintiff, the amount paid by him in satisfaction of prior mortgages (*c*).

(*w*) *Jenna Bahu v. Parmeshwar* (1919) 4 I. A. 294.

(*ww*) (1919) 46 I. A. 294, 298, line 13, *supra*.

(*x*) *Satish Ranjan v. Mercantile Bank of India, Ltd.* (1917) 45 Cal. 702; *Ram Ranjan v. Indra Narain* (1906) 33 Cal. 890; *Badri Das v. Inayat Khan* (1900) 22 All. 404, explained in 45 Cal. 702, 716.

(*y*) *Gopal v. Baikuntha* (1917) 2 Pat. L. J. 538.

(*z*) *Badri Das v. Inayat Khan* (1900) 22 All. 104.

(*a*) *Bulaki Das v. Secretary of State* (1909) 31 All. 371.

(*b*) *Kamalamma v. Komandur* (1907) 30 Mad. 404; *Raj Kumar v. Sheo Narayan* (1908) 35 Cal. 431; *Maqbul v. Latta* (1898) 20 All. 523.

(*c*) *Ali Jan v. Mariam Bibi* (1904) 26 All. 93.

O. 34,
rr. 6. 7

"Legally recoverable."—No decree can be passed for the balance under this rule unless the balance is *legally recoverable*. The balance would not be legally recoverable if, where the plaintiff was relying on his personal remedy against the defendant, his suit for the personal remedy was barred by limitation, that is, if the suit were brought after the expiration of six years from the due date of payment (*d*). Thus if the suit for sale is brought *more than six years* after the due date of payment, no decree can be passed under this rule for the balance. But if the suit for sale is brought *within* six years from the due date of payment, a personal decree may be passed for the balance, though the *application* under this rule is made more than six years after the due date of payment (*e*), provided it is made within three years from the date when the proceeds of the sale are found to be insufficient to pay the amount due to the mortgagee [Limitation Act, 1908, art. 181] (*f*). The view taken by the Calcutta High Court in the undermentioned case (*g*) that there is no period of limitation for an application under this rule can no longer be treated as good law since the decisions referred to in the notes to r. 5 above under the heading "Final decree for sale : limitation" on p. 766 above.

"Legally recoverable from the defendant otherwise than out of the property sold."—These words mean, by way of illustration, that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold (*h*). See s. 68 of the Transfer of Property Act, 1882.

Personal covenant to pay.—The mere fact that there is no personal covenant to pay the mortgage-money is no bar to the mortgagee obtaining a personal decree under this rule against the mortgagor (*i*).

Personal liability of purchaser from mortgagor.—The transferee of the equity of redemption in mortgaged property who has agreed with the *mortgagor* to pay to the mortgagee the amount due to him, is not a person from whom "the balance" is legally recoverable within the meaning of this rule, there being no contract between him and the mortgagee. Hence no personal decree can be passed against the transferees under this rule at the instance of the mortgagee (*j*).

Costs against puisne mortgagee.—A prior mortgagee is not entitled to a decree under this rule against a puisne mortgagee for the amount of his costs. The present rule does not apply to such a case (*k*).

Insolvency of mortgagor.—No decree can be passed under this rule against an insolvent mortgagor (*l*). See Provincial Insolvency Act, 1907, s. 16.

Limitation.—See notes above, "Legally recoverable."

Appeal.—An appeal from a decree under this rule lies to the District Judge and not to the High Court notwithstanding that the decree be for a sum exceeding Rs. 5,000, if the original mortgage suit was valued at less than Rs. 5,000 (*m*). See notes to s. 96, "Forum of appeal," p. 246 above.

(*d*) Limitation Act, art. 116; *Musaheb Zaman v. Inayat-ul-lah* (1892) 14 All. 513, 518; *Ram Din v. Kalka* (1885) 7 All. 502; 12 I. A. 12; *Müller v. Runga Nath* (1886) 12 Cal. 389; *Gulam Hussein v. Mahamadalli* (1910) 34 Bom. 540; *Makrand v. Kalu* (1919) 41 All. 581.
(*e*) *Hamid-ud-din v. Kedar Nath* (1898) 20 All. 386; *Chattar Mal v. Thakure* (1898) 20 All. 512; *Jangti Singh v. Chandar Mol* (1908) 30 All. 388; *Rahmat Karim v. Abdul Karim* (1907) 34 Cal. 672.
(*f*) *Muhammad v. Alim-un-Nissa* (1918) 40 All. 551.

(*g*) *Biswambhar v. Ram Sundar* (1914) 42 Cal. 294.
(*h*) *Musaheb Zaman v. Inayat-ul-lah* (1892) 14 All. 513, 518.
(*i*) *Jangti Singh v. Chandar Mol* (1908) 30 All. 388.
(*j*) *Jamna Das v. Ram Autar* (1911) 34 All. 63. [P. C.] affirming (1909) 31 All. 352.
(*k*) *Ram Lal v. Sil Chand* (1901) 23 All. 439; *Mata Amber v. Sri Dhar* (1904) 26 All. 507.
(*l*) *Mamraj v. Brij Lal* (1911) 34 All. 106.
(*m*) *Badr-un-Nissa v. Shankar* (1919) 41 All. 384.

7. [New. Act 4 of 1882, s. 92.] In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—

Preliminary decree in redemption-suit.

- (a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or
- (b) declaring the amount so due at the date of such decree, and directing—
- (c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

Preliminary decree for redemption.—This rule, excepting cl. (d), corresponds with r. 2 above which relates to a preliminary decree for foreclosure. The notes to that rule on p. 757 above apply *mutatis mutandis* to this rule. For the form of a preliminary decree for redemption, see Appendix D, form No. 5.

Sub-rule (c) : "pays into Court the amount due on a day within six months".—If no day is fixed in the decree for payment, the period of limitation for execution of the decree is governed by art. 182 of the Limitation Act, 1908, that is, three years from the date of the decree (n).

Sub-rule (d).—See notes to r. 2 under the heads, "Right to foreclosure or sale" and "Right to redemption," p. 757 above.

O. 34, r. 8. 8. [*New. Act 4 of 1882, s. 93.*] (1) Where on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

Final decree in redemption-suit.

- (a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,—

- (b) ordering him to re-transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

- (c) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed for payment.

Power to enlarge time.

Sub-rule (1): decree for mortgagor.—Sub-rule (1) of this rule corresponds with sub-rule (1) of rules 3 and 5. See notes to rules 3 and 5. Where the amount declared due in a decree for redemption is paid by the mortgagor into Court, the mortgagor does not lose his right to a decree under sub-rule (1), because he has attached and withdrawn from Court a portion of the sum so paid in execution of that portion of the decree which awarded him costs against the mortgagee (o).

Sub-rule (2): decree for foreclosure.—The mere fact that the preliminary decree for redemption does not contain a direction for foreclosure or sale in default of payment on the day fixed does not disentitle the mortgagee to a decree for foreclosure or sale as the case may be. The omission of the Court to draw up the proper decree under r. 7 does not deprive the mortgagee of the relief provided by this rule (p). The decree for foreclosure or sale under this rule should be passed by the Court which passed the preliminary decree for redemption, notwithstanding that the latter decree has been varied by the appellate Court (q).

Final decree.—See notes to r. 5, "Final decree for sale: Limitation" p. 766 above.

Application for sale by mortgagor.—There is nothing to preclude a mortgagor in a suit for redemption of a mortgage in which he fails to pay the mortgage amount according to the decree, from himself applying for a decree for sale. Sub-rule (4), while enabling the mortgagee [defendant] to apply for such a decree, does not take away the right of the mortgagor to ask for such a decree. If it were otherwise, a mortgagee may not apply for sale, in which case the relation of mortgagor and mortgagee would continue until the mortgagee chose to apply for sale (r). •

Discharge of debt.—See notes to r. 3 under the same head on p. 763 above.

Power to enlarge time.—The proper Court to which the application for enlargement of time should be made is the Court of first instance even though the decree for redemption was passed by the Court of Appeal (s). See notes to r. 3 under the same head on p. 763 above. See also notes to s. 148.

The proviso as to enlargement of time applies even if the suit is originally one for sale, provided the decree provides not only for sale, but for redemption of a prior mortgage. A mortgages his property first to B, and then to C. C sues A and B for a sale of the property. A decree is passed providing for redemption of B's mortgage by C, and for sale. The decree is a decree for redemption as between B and C, and the Court may allow further time to C for redemption upon good cause shown (t).

Appeal.—An appeal lies from an order under this rule refusing to extend the time for the payment of mortgage-money [O. 43, r. 1, cl. (o)]. But no appeal lies from an order extending the time for payment (u).

9. [New.] Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to retransfer the

Decree where nothing is found due or where mortgagee has been overpaid.

(o) *Parmanand v. Lokman Das* (1905) 27 All. 392.
(p) *Murlihar v. Parsharam* (1901) 25 Bom. 101.
(q) *Venkata v. Thyagaraya* (1900) 23 Mad. 521;
Sheonarain v. Churni Lal (1901) 23 All. 88.
(r) *Govinda v. Veeran* (1911) 36 Mad. 32.

(s) *Ram Dhan v. Lalit Singh* (1909) 31 All. 828; *Dharmaraja v. Srinivasa* (1916) 39 Mad. 876; *Beni Prasad v. Harnam Das* (1917) 39 All. 396.
(t) *Kalian v. Sadho Lal* (1912) 35 All. 116.
(u) *Dharmaja v. Srinivasa* (1916) 39 Mad. 876.

O. 34, rr. 9-12. property and to pay to the plaintiff the amount which may be found due to him ; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

This rule is new. It provides for cases where nothing is found due to the mortgagee and for cases where the mortgagee has been overpaid as may well happen where he is in possession. There was no such provision in the Transfer of Property Act, but the practice followed under that Act was the same as that prescribed by this rule (v).

10. [New. Act 4 of 1882, s. 94.] In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

Costs of mortgagee subsequent to decree.

Cost subsequent to decree.—This rule provides for costs incurred by the mortgagee subsequent to the decree. See the first part of rr. 3, 5 and 8.

11. [New.] Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

Right of mesne mortgagee to redeem and foreclose.

This rule is new. It has been inserted in compliance with the suggestion of the Judicial Committee in the undermentioned case (w).

12. [New. Act 4 of 1882, s. 96.] Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

Sale of property free from prior mortgage.—A puisne mortgagee may sue for foreclosure or sale without making the prior mortgagee a party to the suit [see the Explanation to r. 1]. In such a case, as also where the prior mortgagee is joined as a party and his mortgage is admitted (x), the prior mortgagee may consent to the property being sold free from his mortgage, in which case he acquires the right to have his claim satisfied first out of the proceeds of the sale of the mortgaged property [see r. 13 below].

(v) See *Kachu v. Lakshmansingh* (1901) 25 Bom. 115; *Vinayak v. Dattatraya* (1902) 26 Bom. 661.

(w) *Gopi Narain Khauna v. Banaiidhar* (1905) 27 All. 825, 32 I. A. 123.

(x) *Srinivasa v. Yamunabhai* (1906) 29 Mad. 84.

Where the prior mortgage is a usufructuary mortgage.—A holds two mortgages on the same property, the first a usufructuary and the second a simple mortgage. Can A sue for sale of the mortgaged property on the simple mortgage free from the usufructuary mortgage, and claim to be paid out of the sale proceeds the amount due upon the usufructuary mortgage under this and the next rule? Yes according to the Madras rulings (y). No, according to the Allahabad rulings unless the two mortgages are in favour of different persons (z). O. 34,
rr. 12, 13.

It has been held by the High Court of Patna that where a person holds two mortgages on the same property, the first a usufructuary and the second a simple mortgage, he is entitled to sue for sale of the mortgaged property on the simple mortgage subject to his prior usufructuary mortgage, and, further, he is entitled to have the prior mortgage notified at the sale in execution of the decree obtained on the subsequent mortgage for the information of bidders at the sale though he did not mention the prior mortgage in his plaint. The omission to mention the prior mortgage in the plaint does not preclude her from keeping alive that mortgage by notifying it at the sale (a).

13. [New. Act 4 of 1882, s. 97.] (1) Such proceeds shall be brought into Court and applied as follows :—
Application of proceeds.

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

(y) *Rangasami v. Subburoya* (1907) 80 Mad. 408.
(z) *Shagwan Das v. Bhawani* (1904) 28 All. 14.

(a) *Jagernath v. Mohra Kuwar* (1916) 2 Pat. L. J. 118.

O. 34, rr. 13, 14. **Application of proceeds.**—Compare s. 73, proviso (c), which relates to sub-quent and not prior incumbrances. See notes to s. 73, "Clauses (a), (b) and (c)," on p. 203 above.

Whatever is due to the prior mortgagee.—This includes interest on the mortgage up to the date of the confirmation of the sale (b).

"Persons interested in the property sold."—It is provided by the last clause of sub-r. (1) that the residue of the sale proceeds should be paid to "*persons interested in the property sold.*" This expression includes subsequent incumbrances (c). But it does not include unsecured creditors who cannot be said to be interested in the property sold; they are at liberty, however, to enforce their claims against any surplus payable to the mortgagor (d).

Usufructuary mortgage.—See notes to r. 12 above.

14. [New. Act 4 of 1882, s. 99.] (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

Suit for sale necessary for bringing mortgaged property to sale.

(2) Nothing in sub-rule (1) shall apply to any territories in which the Transfer of Property Act, 1882, has not been extended.

Scope and object of the rule.—This rule corresponds with s. 99 of the Transfer of Property Act except that the words "a claim arising under the mortgage" have been substituted for the words "any claim, whether arising under the mortgage or not." The effect of this alteration is to confine the operation of the present rule to cases where a mortgagee has obtained a personal decree against the mortgagor on the *mortgage-debt*. In such a case the rule provides that the mortgagee shall not be entitled to bring the *mortgaged property* to sale in execution of the decree: he can have the property sold only by instituting a *regular suit for sale* (e) and obtaining a decree for sale under rules 4 and 5. It is clear that where a mortgagee brings a regular suit for sale, and a decree is passed in such suit, what would be sold is the mortgaged property free from the mortgage; while in the other case where the suit is not for sale, but on the mortgage-debt only what would be sold is the mortgaged property subject to the mortgage, in other words it is only the mortgagor's equity of redemption that would be sold. The object of the present rule is to prevent mortgagees from suing their mortgagors on the mortgage-debt as such and in execution selling the bare equity of redemption, thereby depriving the mortgagor of the right of redemption that would be given to him by the decree for sale (f) [see r. 4 above]. A mortgages his property to B to secure repayment of Rs. 5,000. B sues A to recover Rs. 5,000, and obtains a personal decree against A. B then applies for attachment and sale of A's interest in the mortgaged property in execution of the decree. The property may be attached, for there is nothing in this rule to bar the

(b) *Benode v. Hariak* (1910) 15 C. W. N. 783.
(c) See *Padmanabh v. Khemu* (1894) 18 Bom. 684, 687-688.
(d) *Padmanabh v. Khemu* (1894) 18 Bom. 684.

(e) See Transfer of Property Act, 1882, s. 67.
(f) See *Syad Emam v. Raj Coomar Doss* (1876) 23 W. R. 187; *Kharajmal v. Daim* (1905) 32 Cal. 296, 32 I.A. 23.

attachment (g), but the sale must be refused under this rule. B cannot bring the property to sale except by means of a regular suit for sale. Suppose now that B sues A on a debt unconnected with the mortgage, and obtains a decree against A. Is he entitled to have A's interest in the mortgage sold in execution of such decree? Yes, for the rule only precludes B from bringing the mortgaged property to sale in execution of a decree for the payment of money in satisfaction of a claim arising under the mortgage. Under s. 99 of the Transfer of Property Act, however, B could not bring the mortgaged property to sale even if the decree was for a debt unconnected with the mortgage-debt (h). The provisions of that section were sweeping: they precluded a mortgagee from bringing the mortgaged property to sale in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not. It may here be stated that the present rule is a rule of procedure, and not a rule of substantive law; it has, therefore, a retrospective operation (i).

Effect of sale made in contravention of the rule.—It was at one time thought that a sale made in contravention of this rule was absolutely void (j) and that the purchaser at such sale was not therefore entitled to recover possession from the mortgagor (k), and that if he did acquire possession, he was bound to account for the rents and profits realized from the mortgaged property during the term of his possession (l). But this view is no longer tenable, and it has been held in recent cases that a sale in contravention of this rule is not void, but voidable at the instance of the mortgagor or other persons interested in the equity of redemption (m). The sale, in other words, is valid until it is set aside. The procedure to set aside the sale is by way of application under s. 47; a separate suit is barred under that section. The application must be made before confirmation of the sale unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale. The sale cannot be set aside after it is confirmed by the Court (n). Nor is it open to the mortgagor after confirmation of the sale to redeem the mortgage, whether the property has been purchased by a third person (o) or by the mortgagee himself (p).

"Decree".—An order directing a person who has stood surety on behalf of a judgment-debtor for the performance of a decree to pay the amount specified in the surety bond is not a "decree" within the meaning of this rule. It is therefore competent to the decree-holder to have the property secured by the bond for the performance of the decree sold in execution under s. 145 without instituting a regular suit for sale (q).

"Decree for the payment of money in satisfaction of a claim arising under the mortgage."—This rule does not apply unless the decree obtained by the mortgagee is "for the payment of money in satisfaction of a claim arising under the mortgage". The "mortgage" referred to in this rule must be a mortgage existing prior to the date of the decree, and not one created by the decree [ills. (1) and (2)]. Further, it must be a subsisting mortgage, and not one which by reason of the efflux of time or any other like circumstance has ceased to be enforceable at law [ill. (3)].

(g) *Chundra Nath v. Burroda* (1895) 22 Cal. 813; *Nathubhai v. Bai Ujam* (1908) 32 Bom. 205.

(h) *Tarak Nath v. Bhubaneswar* (1914) 42 Cal. 780.

(i) *Bai Ganga v. Rajaram* (1911) 35 Bom. 248.

(j) *Sheodent v. Ram Saran* (1899) 26 Cal. 164; *Sonu Sing v. Behari Sing* (1906) 33 Cal. 288; *Vigneswara v. Bapayya* (1893) 16 Mad. 435.

(k) *Basiruddin v. Kailas* (1906) 33 Cal. 113.

(l) *Shib Das v. Kaili Kumar* (1908) 30 Cal. 463.

(m) *Kharajmal v. Daim* (1905) 32 Cal. 296, 32 I. A. 23; *Ashutosh v. Behari Lal* (1908) 35 Cal. 61; *Muhammad Abdul v. Dileukh Rai* (1905) 27 All. 517; *Kishan Lal v.*

Umrao Singh (1908) 30 All. 146.

(n) *Ashutosh v. Behari Lal* (1908) 35 Cal. 61; *Kishan Lal v. Umrao Singh* (1908) 30 All. 146; *Ishuvan v. Ishuvan* (1907) 30 Mad. 313; *Mehr Baksh v. Sanjhe Khan* (1916) Punj. Rec. no. 18, p. 44; *Bhaichand v. Ranchhodas* (1920) 22 Bom. L. R. 670.

(o) *Ishuvan v. Ishuvan* (1907) 30 Mad. 313.

(p) *Dharnikota v. Budharazu* (1907) 30 Mad. 362; *Lal Bahadur v. Abharan* (1914) 37 All. 165 [F. B.]; *Pandit Sheo Narain v. Ram Jalan* (1917) 2 Pat. L. J. 687. But see *Marand v. Dhondo* (1899) 22 Bom. 624.

(q) *Ganga Deo v. Joti Lal* (1917) 2 Pat. L. J. 197.

Illustrations.

O. 34, r. 14. (1) *A* mortgages certain property to *B* which was then in the possession of *X*, and agrees to deliver possession thereof to *B* after recovering possession thereof from *X*. *A* recovers possession of the property from *X*, but does not deliver possession thereof to *B*. *B* sues *A* for possession, and a decree is made in *B*'s favour for possession and for costs. In execution of the decree for costs, *B* applies for attachment and sale of the mortgaged property. Is *B* entitled to the order applied for? Yes, for the claim in respect of costs is not a "claim arising under the mortgage" within the meaning of this rule. It arises under the decree passed for costs (*r*).

(2) In a suit for money a decree is passed by consent whereby the defendant is directed to pay to the plaintiff Rs. 35,000. It is further declared by the decree that the plaintiff should have a first charge on certain immoveable property belonging to the defendant. Is the plaintiff entitled to have the property sold in execution of the decree without instituting a regular suit for sale on the charge? Yes, because there being no mortgage or charge prior to the decree, the decree cannot be said to have been obtained "for the payment of money in satisfaction of a claim arising under the mortgage" within the meaning of this rule. The immoveable property must have been made security for the payment of the money before the decree was obtained, otherwise the provisions of this rule do not apply (*s*).

(3) *A* mortgages two properties *X* and *Y* to *B*. Subsequently by reason of the wrongful act of *A*, *B* is deprived of part of his security, namely, property *Y*. *B* thereupon sues *A* under s. 68 of the Transfer of Property Act, and obtains a personal decree for the mortgage debt against *A*. In execution of the decree *B* applies for sale of property *X*. At this date *B*'s remedy on the mortgage had become barred by limitation. The mortgage not being a subsisting mortgage [and *A* not having to redeem it], *B* is entitled to have property *X* sold in execution without bringing a regular suit for sale on the mortgage (*t*).

(4) *A* executes a usufructuary mortgage in favour of *B* to secure a debt of Rs. 8,000 whereby he mortgages a fixed rate holding and his right to receive offerings at a temple. By a subsequent agreement between him and *B*, *A* binds himself to pay annually Rs. 700 to *B* in lieu of the offerings. Subsequently *B* sues *A* on that agreement and obtains a decree against *A* for Rs. 3,200 being the arrears of the annual payments. This is a decree for the payment of money in satisfaction of a claim arising under the mortgage within the meaning of this rule, and *B* is not entitled to bring the mortgaged property to sale in execution of the decree. *B*'s right to receive the money rested on his position as mortgagee (*u*).

"He may institute such suit notwithstanding anything contained in O. 2, r. 2."—See notes to O. 2, r. 2, under the head "Exceptions to the rule against the splitting of reliefs," p. 366 above.

Charge.—This rule applies to persons holding a charge on immoveable property within the meaning of s. 100 of the Transfer of Property Act (*v*). See r. 15 below..

Transferee of money-decree from mortgagee.—It has been held by the High Courts of Bombay and Madras that the transferee of a money-decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the

(*r*) *Haribans Rai v. Sri Nivasa* (1913) 35 All. 518.
 (*s*) *Ambalal v. Narayan* (1919) 43 Bom. 631;
Raja Brajrasunder v. Sarai Kumari (1916)
 2 Pat. L. J. 55 [charge created by a
 decree in a suit for maintenance];
Gobinda v. Kailas (1917) 45 Cal. 530
 [charge existing prior to decree].
 (*t*) *Ohedi Lal v. Saadat-ur-Rissa* (1916) 39

All. 36; *Ganesh Singh v. Debi Singh*
 (1910) 32 All. 377 [mortgage put an end
 to by consent of parties].
 (*u*) *Kadma v. Muhammad Ali* (1919) 41 All. 399;
Bhaichand v. Runchhodas (1920) 22
 Bom. L. R. 670.
 (*v*) *Audhoyessury v. Gouri Sunkur* (1895) 22
 Cal. 859.

mortgagee by this rule, and that he cannot therefore bring the mortgaged property to sale in execution of the decree (w). The contrary has been held by the High Court of Allahabad (x). **O. 34, rr. 14, 15.**

15. [*New. Cf. Act 4 of 1882, s. 100.*] All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

Charges.

Charge.—Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property [Transfer of Property Act, s. 100]. A charge for rent created by s. 65 of the Bengal Tenancy Act (y), or by s. 5 of the Madras Estates Land Act I of 1908 (z), is not a charge within the meaning of s. 100 of the Transfer of Property Act. See Ghose on Mortgage, 4th ed., pp. 103-104, 837-846.

Sale.—The right of a party having a charge is a sale and not foreclosure (a).

ORDER XXXV.

Interpleader.

1. [*S. 471.*] In every suit of inter-pleader the plaintiff shall, in addition to the other statements necessary for plaints, state —

Plaint in interpleader suit.

- (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs ;
- (b) the claims made by the defendants severally ; and
- (c) that there is no collusion between the plaintiff and any of the defendants.

Interpleader suits.—See s. 88 and notes thereto.

2. [*S. 472.*] Where the thing claimed is capable of being paid into Court or placed in the custody of the Court the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

Payment of thing claimed into Court.

(w) *Chhagan v. Lakshman* (1907) 31 Bom. 462 ; *Jivarathnam v. Srinivasa* (1908) 31 Mad. 33. *(z) Suramma v. Surianarayana* (1918) 42 Mad. 114. *(y) Banā Bal v. Mennt Lal* (1905) 27 All. 450. *(a) Tennant v. Trenchard* (1869) L. R. 4 Ch. 537, per Hatherley, L.J. *(v) Patick Chunder v. Foley* (1888) 15 Cal. 492 ; *Royruddi v. Kali Nath* (1906) 83 Cal. 985.

O. 35.
rr. 2-4.

"May be required to so pay or place it."—These words have been substituted for the words "*must so pay or place it*" in view of the addition of the words "*immoveable property*" in s. 88. The procedure by payment or deposit is plainly not applicable to immoveable property.

3. [S. 476.] Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject-matter of such suit the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

Procedure where defendant is suing plaintiff.

Alteration in the rule.—The words "on being informed by the Court in which the interpleader suit has been instituted" have been substituted for the words "on being duly informed by the Court which passed the decree in the interpleader suit in favour of the stakeholder, that such decree has been passed." Under the old section proceedings in other litigation relating to the same subject-matter could only be stayed on the *passing of a decree* in the interpleader suit. Under the present rule they can be stayed on the very *institution* of the interpleader suit.

Appeal.—An appeal lies from an order under this rule [O. 43, r. 1, cl. (p)].

Procedure at first hearing.

4. [S. 473, R. S. C., O. 57, r. 7.] (1) At the first hearing the Court may—

- (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or
- (b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

- (a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

O. 35,
rr. 4, 5.

and shall proceed to try the suit in the ordinary manner.

Non-appearance of claimant defendants.—Where the claimants do not appear at the first hearing, the Court may, if the suit is properly instituted, declare under sub-r. (1) that the plaintiff is discharged from all liability to the defendants in respect of the money claimed, award him his costs and dismiss him from the suit (b).

Sub-rule 3.—This sub-rule has been taken from O. 57, r. 7, of the English Rules.

Appeal.—An appeal lies from an order under this rule [O. 43, r. 1, cl. (p)].

5. [s. 474.] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Agents and tenants may not institute interpleader suits.

Illustrations.

(a) *A* deposits a box of jewels with *B* as his agent. *C* alleges that the jewels were wrongfully obtained from him by *A*, and claims them from *B*. *B* cannot institute an interpleader suit against *A* and *C*.

(b) *A* deposits a box of jewels with *B* as his agent. He then writes to *C* for the purpose of making the jewels a security for a debt due from himself to *C*. *A* afterwards alleges that *C*'s debt is satisfied, and *C* alleges the contrary. Both claim the jewels from *B*. *B* may institute an interpleader suit against *A* and *C*.

Interpleader suit by agents.—In ill. (a), *C* does not claim through *A* (principal), but *adversely* to him; hence no interpleader suit can be brought. In ill. (b) *C* claims *through A*; hence *B* may institute an interpleader suit against *A* and *C*.

Interpleader suit by tenants.—*A* lets certain lands to *B*. *C* alleges that the lands never belonged to *A*, and claims the rent from *B*. *B* cannot institute an interpleader suit against *A* and *C*; the reason is that *C* claims *adversely* to *A* (landlord). But if *C* claims the rent, alleging that the lands were sold to him by *A* after the same were let to *B*, *B* may institute an interpleader suit against *A* and *C*; the reason is that in this case *C* claims *through A*, that is, as purchaser from *A*. The result is that an interpleader suit by a tenant can only be maintained if the defendant other than the landlord claims *through* the landlord (c). The following is a peculiar case. *A* grants a perpetual lease of certain villages to his wife *B*. *B* sub-lets the villages to *C*. *A*, alleging that the lease granted by him to *B* was executed by him *benami* in the name of *B*, gives notice to *C*, claiming the rents of the villages. *B* denies that the transaction was *benami*, and she also claims the rents from *C*. *C* can maintain an interpleader suit against *A* and *B*. The reason given is that *A* must be deemed to claim *through B* (d). See Indian Evidence Act, s. 116.

(b) *Khemchand v. Khairuddin* (1919) 21 Bom. L. R. 948.
(c) *Shelly Bonnerjee v. Raj Chandra Datt*

(1910) 37 Cal. 552.
(d) *Orr v. Chidambaram* (1909) 33 Mad. 220.

O. 35,
rr. 5, 6.

Interpleader suit by a Railway Company.—A Railway Company is not an “agent” of the consignor within the meaning of this rule, so as to preclude it from filing an interpleader suit against the consignor and a third party claiming adversely to the consignor (e).

6. [S. 475.] Where the suit is properly instituted, the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

Charge for plaintiff's costs.

Appeal.—An appeal lies from an order under this rule [O. 43, r. 1, cl. (p).]

ORDER XXXVI.

Special Case.

O. 36, r. 1.

1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

Power to state case for Court's opinion.

- (a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them ; or
- (b) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or
- (c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

2. [S. 528.] Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

Where value of subject-matter must be stated.

O. 36,
rr. 3-5.

3. [S. 529.] (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

Agreement to be filed and registered as suit.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

4. [S. 530.] Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

Parties to be subject to Court's jurisdiction.

5. [S. 531.] (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable.

Hearing and disposal of case.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit, —

- (a) that the agreement was duly executed by them,
- (b) that they have a *bona fide* interest in the question stated therein, and
- (c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

ORDER XXXVII.

Summary Procedure on Negotiable Instruments.

1. [S. 538.] This Order shall apply only to—

Application of order.

O. 37,
rr. 1, 2.

- (a) the High Courts of Judicature at Fort William, Madras and Bombay ;
- (b) the Chief Court of Lower Burma ;
- (c) the Court of the Judicial Commissioner of Sind; and
- (d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied.

Courts of Small Causes in Calcutta, Madras and Bombay.—The corresponding Chapter of the Code of 1882 applied also to Presidency Small Cause Courts. Cl. (c) of s. 538 of that Code, which expressly mentioned those Courts, has been omitted in this rule, the reason given being that its appropriate place would now be in rules under the Presidency Small Cause Courts Act. See O. 51, r. 1.

2. [S. 532.] (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed ; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

Institution of summary
suits upon bills of
exchange, etc.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a judge as hereinafter provided so to appear and defend ; and, in default, of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith.

Old section.—This rule corresponds with s. 532 of the Code of 1882 except in the following particulars :—

1. The explanation to s. 532 has been omitted, and in lieu thereof the words “ the allegations in the plaint shall be deemed to be admitted ” have been added into sub-r. (2). See notes below under the head “ The allegations in the plaint shall be deemed to be admitted.”

2. The fourth paragraph of s. 532, which provided that the Court should not require the defendant to pay the amount claimed into Court or to give security therefor unless the Court thought that the defendant had not a *prima facie* case or that the defence was not made in good faith, has been omitted. See r. 3, sub-r. (2), below.

O. 37 r. 2-

Points of difference between a summary suit and a suit brought in the ordinary manner on negotiable instruments :—

- (1) A plaintiff proposing to sue upon a negotiable instrument may either bring a *summary* suit or he may bring a suit in the *ordinary* manner. The advantage of a summary suit is that the defendant is not, as in a suit brought in the ordinary manner, entitled as of right to defend the suit. The defendant in a summary suit must *apply for leave* to defend within 10 days from the service of the summons upon him (see Limitation Act, 1908, sch. I, art. 159), and such leave will be granted only if the affidavit filed by the defendant discloses such facts as would make it incumbent on the plaintiff to prove consideration, or such other facts as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree.
- (2) A summary suit must be brought within 6 months from the date on which the debt becomes due and payable (Limitation Act, 1908, sch. I, art. 5). The period of limitation for a suit brought in the ordinary manner on a negotiable instrument is 3 years.
- (3) A summary suit can only be brought in the Courts mentioned in r. 1.

A negotiable instrument means a promissory note, bill of exchange, or cheque, expressed to be payable to a specified person or his order, or to the order of a specified person or to the bearer thereof, or to a specified person or the bearer thereof (Negotiable Instruments Act 26 of 1881, s. 13).

A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument (Negotiable Instruments Act, s. 5).

A promissory note is an instrument in writing (not being a bank-note or a currency-note) containing an *unconditional* undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument (Negotiable Instruments Act, s. 4).

Illustrations.

(a) A executes an instrument whereby he promises to pay Rs. 5,000 to B on demand. The instrument is a promissory note.

(b) A executes an instrument whereby he promises to pay Rs. 5,000 to B on demand. By the same instrument it is provided that B should not be entitled to call for payment of the said sum *unless* A failed to deliver certain goods to B within six months. The instrument is not a promissory note, for the undertaking to pay Rs. 5,000 is *conditional* upon A's failure to deliver the goods : *Simon v. Hakim Mahomed* (1896) 19 Mad. 368.

(c) A executes an instrument whereby he promises to pay Rs. 5,000 to B on demand. At the same time a *separate* agreement is made between the parties whereby B agrees not to demand payment of the sum of Rs. 5,000 unless A failed to deliver certain goods to him within six months. The instrument is a promissory note : *Simon v. Hakim Mahomed* (1896) 19 Mad. 368.

O. 37.
rr. 2, 3.

Form of summons in a summary suit.—The summons in such a suit requires the defendant to obtain leave from the Court within 10 days from the service thereof to appear and defend the suit and within such time to cause an appearance to be entered on his behalf: see Appendix B, Form No. 4. The Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time (*f*).

“Unless he obtains leave.”—See r. 3 below.

“Together with interest at the rate specified (if any).”—In a suit under this Order the plaintiff is not entitled to recover any interest, unless the interest is specified in the promissory note itself (*g*). See in this connection Negotiable Instruments Act, 1881, ss. 79-80.

The allegations in the plaint shall be deemed to be admitted.—These words have been substituted for the Explanation to the old section. The Explanation was inserted to negative the effect of a Calcutta decision (*h*). But the Explanation was characterized as “wholly unintelligible and meaningless” by Amir Ali, J., in the undermentioned case (*i*), and it has accordingly been replaced by the words cited in the head note. The effect of those words is to enable the plaintiff to succeed on his own allegations, though the allegations may be of such a nature that if the defendant appeared and denied them, they would have to be proved by the plaintiff.

3. [S. 533.] (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

Defendant showing defence on merits to have leave to appear.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

Alterations in the rule.—Under the old section it was obligatory upon the Court to grant leave to the defendant to appear and defend, if he paid into Court the amount claimed by the plaintiff and mentioned in the summons. It is no longer so under the present rule. The words “upon the defendant paying into Court the sum mentioned in the summons or,” which occurred in s. 533 after the word “suit” in the third line have been omitted.

Limitation.—The application for leave to appear and defend must be made within 10 days from the date of service of the summons on the defendant. The date shown in the Sheriff's return as the date of service is the only date to which reference could be made to determine the question of limitation arising on an application under this section (*j*).

(*f*) *Mahmudār v. Sarat Chandra* (1900) 5 Cal. W. N. 259.
(*g*) *Bhupatī v. Sourendra* (1903) 30 Cal. 446.
(*h*) *Remfry v. Shillingford* (1876) 1 Cal. 130.

(*i*) *Bhupatī v. Sourendra* (1903) 30 Cal. 446.
(*j*) *Madhub Lall v. Woopendranarain* (1896) 23 Cal. 573.

Appeal.—No appeal is allowed under the Code from an order under this rule. It has been recently held by the High Court of Calcutta that an order under this rule directing a defendant to give security as a term on which leave to defend should be given is not a "judgment" within the meaning of cl. 15 of the Letters Patent, and not therefore appealable as such (*k*). O. 37,
rr. 3-7.

4. [S. 534.] After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

5. [S. 535.] In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs, thereof.

6. [S. 536.] The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

7. [S. 537.] Save as provided by this order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

ORDER XXXVIII.

Arrest and Attachment before Judgment.

Arrest before Judgment.

1. [S. 477, 478.] Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

Where defendant may be called upon to furnish security for appearance.

O. 38, r. 1.

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance :

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim ; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

The proviso to the rule is new.

Scope of the Order.—Order 21 deals with the arrest of a judgment-debtor and the attachment of his property *in execution of a decree* passed against him. The present Order lays down rules for the arrest of a defendant and the attachment of his property *before judgment*. The object of these rules is to secure the plaintiff against any attempt on the part of the defendant to defeat the execution of any decree that may be passed against him,

“Reasonable probability.”—Where the defendant is about to leave British India, it is not necessary to prove any “intent” on his part to obstruct or delay the execution of any decree that may be passed against him. It is enough if the circumstances under which he is about to leave British India afford a “reasonable probability” that any decree that may be passed against him in the suit will thereby be obstructed or delayed in execution (1).

The suit must be bona fide.—In every case where an application is made under this rule, the Court must be satisfied that the suit is *bona fide*. Where the plaintiff is indisputably entitled to a part of the relief claimed in the plaint, the mere circumstance of the rest of the plaintiff's claim being of a disputable character does not render the suit *mala fide* (m).

Consequences of obtaining arrest on insufficient grounds.—See s. 95.

Form. For form of warrant of arrest before judgment, see App. F, form no. 1.

2. [s. 479.] (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

Deposit in Court.—Where money is deposited by the defendant in Court under this rule, it is a payment into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour. Where after payment into Court other judgment-creditors of the defendant attach the money or the defendant becomes an insolvent, the plaintiff on obtaining his decree is entitled to priority over the claims of the attaching creditors and the Official Receiver. The reason is that the amount so paid cannot be taken to have been ordered and levied as security for the defendant's appearance (n).

Appeal—An appeal lies from an order under this rule [O. 43, r. 1, cl. (q)].

Form.—For form of security, see App. F, no. 2.

3. [s. 480.] (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure on application by surety to be discharged.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(m) *Probodh Chunder v. Dowry* (1887) 14 Cal. 695. | (n) *Ramiah v. Gopaltar* (1918) 41 Mad. 1057.

O. 38,
rr. 3-5.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Appeal.—An appeal lies from an order under this rule [O. 43, r. 1, cl. (q)].

Form.—For form of summons to defendant, see App. F, form no. 3.

4. [S. 481.] Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit, or, where a decree is passed against the defendant, until the decree has been satisfied :

Procedure where defendant fails to furnish security or find fresh security.

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees.

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Form.—For form of order for committal, see App. F, form no. 4.

Attachment before Judgment.

5. [Ss. 483, 484.] (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property.

- (a) is about to dispose of the whole or any part of his property, or
- (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy

the decree, or to appear and show cause why he should not O. 38, r. 5. furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

Alterations in the rule.—The words “or has quitted the jurisdiction of the Court leaving therein property belonging to him” which occurred in the old section after cl. (b) of Sub-r. (1) have been omitted.

Object of the rule.—The main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree, supposing a decree is eventually passed, from the defendant's property (o).

“Is about to dispose of the whole or any part of his property.”—The expression “property” includes property of every description whether moveable or immoveable (p). The expression “his property” refers to the property of the defendant. It does not refer to property which is the joint property of the plaintiff and the defendant. Thus where A sued B for partnership accounts, and applied for an attachment before judgment of the *partnership* property on the allegation that B was about to dispose of the same, it was held that the case was not one for an attachment before judgment, but for the appointment of a receiver under O. 40 below (q).

Effect of vesting order on attachment before judgment.—See notes to r. 10 below under the same head.

Money paid into Court.—There is nothing in the language of this rule to give the plaintiff a charge on the money furnished by the defendant as security. Hence if the defendant becomes an insolvent, the money vests in the Official Assignee. The reason is that the money must be taken to have been ordered and levied *as security* to do what is specified in the rule, namely, to produce and place at the disposal of the Court, when required, the property referred to therein or the value thereof (r).

Surety for defendant.—Where the defendant dies pending the suit and the cause of action survives against his legal representatives and the legal representatives are brought on the record, the death of the defendant does not operate as a discharge of the surety (s).

Mortgage suit.—An attachment before judgment may be granted in a suit on a mortgage (t).

Principle of s. 64 applies to attachment before judgment.—S. 64 of the Code provides that when property is attached *in execution of a decree*, any private transfer of the property contrary to the attachment shall be void as against all claims enforceable under the attachment. The same principle applies to the case of attachment.

(o) *Ganu Singh v. Jangi Lal* (1899) 26 Cal. 531, at p. 533.

(p) *Chedi Lal v. Kuarji* (1895) 17 All. 82; *Bishambar v. Sukhdevi* (1894) 16 All. 186.

(q) *Damodar v. Panalal* (1907) 9 Bom. L. R. 540.

(r) *Errikulappa v. The Official Assignee* (1915) 39 Mad. 903.

(s) *Chandulal v. Jeshangbhai* (1916) 41 Bom. 402.

(t) *Jogemaya v. Baidyanath* (1918) 46 Cal. 245.

O. 38,
rr. 5-7.

before judgment, provided that a decree is ultimately passed for the plaintiff at whose instance the attachment was made. This clearly appears from r. 9 below which provides that an attachment before judgment shall be removed when the suit is *dismissed* (u).

Divorce proceedings.—An order for attachment before judgment will not be made in divorce proceedings governed by the Indian Divorce Act 4 of 1869 (v).

Forms.—For form of attachment before judgment with order to call for surety, see App. F, form no. 5. For form of security for production of property, see App. F, form no. 6.

6. [S. 485.] (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

Attachment where cause not shown or security not furnished.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

"Property specified."—That is, the property specified by the plaintiff as required by r. 5, sub-r. (2). Such property may be within or beyond the jurisdiction of the Court. The words in s. 483 of the Code of 1882 were, "property within the jurisdiction of the Court." It was accordingly held by the High Courts of Madras and Bombay that the only property that could be attached *before judgment* was property *within* the jurisdiction of the Court (w). On the other hand, it was held by the High Court of Calcutta and recently also by the Madras High Court that s. 483 was to be read with s. 648 [now s. 136], and that the two sections read together enable the Court to attach before judgment property situate beyond the local limits of its jurisdiction (x). The omission of the words "within the jurisdiction of the Court" clearly shows that the Court may attach property before judgment, even though it may be situate beyond the local limits of its jurisdiction.

Appeal.—An appeal lies from an order under this rule [O. 43, r. 1, cl. (q)].

Form.—For form of attachment before judgment, see App. F, form no. 7.

7. [S. 486.] Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Mode of making attachment.

Mode of attachment.—See O. 21.

(u) *Ganu Singh v. Jangt Lal* (1899) 28 Cal. 581.
(v) *Phillips v. Phillips* (1910) 87 Cal. 818.
(w) *Krishnasami v. Engel* (1895) 8 Mad. 20;
Raja v. Jankibat (1908) 5 Bom. L. R.

570.
(x) *Ram Pertab v. Madho Rai* (1902) 7 C. W. N. 218; *Amara v. Annamala* (1908) 31 Mad. 502.

8. [S. 487.] Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money. O. 38,
rr. 8-10.

Investigation of claim to property attached before judgment.

9. [S. 488.] Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

Removal of attachment when security furnished or suit dismissed.

Removal of attachment where suit dismissed.—The latter part of the rule which requires that the attachment shall be removed when the suit is dismissed is no more than directory. Hence even if no order is made withdrawing the attachment, the attachment falls to the ground on dismissal of the suit. *A* sues *B* and obtains an attachment before judgment. The suit is dismissed, but the Court omits to make an order withdrawing the attachment. *A* then appeals from the decree. Pending the appeal *B* sells the property that was attached before judgment to *C*. Thereafter the suit is decreed on appeal. *A* then applies for execution of the decree by the sale of the property on the footing that the attachment before judgment subsisted and that it was not therefore necessary to re-attach it. *A* is not entitled to have the property sold. The attachment before judgment came to an end on the dismissal of *A*'s suit though no order was made withdrawing the attachment (*y*).

10. [S. 489.] Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Attachment before judgment not to affect rights of strangers nor bar decree-holder from applying for sale.

Effect of vesting order on attachment before judgment.—Attachment before judgment does not confer any priority as against the Official Assignee, though the plaintiff at whose instance the attachment was made may ultimately obtain a decree in the suit. *A* sues *B*, and attaches *B*'s property before judgment. A decree is then passed for *A*. Between the date of the attachment and the date of the decree *B*'s property vests in the Official Assignee under a vesting order. The Official Assignee applies to the Court for removal of the attachment on the ground that the property has vested in him. *A* contends that the attachment being prior to the date of the vesting order, his claim has a priority over that of the Official Assignee. *A*'s contention will not be

O. 38,
rr. 10-12.

upheld, and the attachment will be removed (z). See notes to s. 64 under the head "Effect of vesting order on attachment," p. 177 above.

Attachment before judgment not to affect rights of persons not parties to the suit.—*A* and *B* are members of a joint Hindu family. *C* sues *A*, and obtains an attachment before judgment of *A*'s interest in the joint family property. *C* then obtains a decree against *A*. *A* dies after the decree. On *A*'s death, his interest in the property passes by survivorship to *B*, and *C* is not entitled to have *A*'s share sold in execution of the decree (*a*).

Attachment before judgment not to bar rights of other decree-holders.—*A* institutes a suit against *B*, and obtains an attachment before judgment of *B*'s property. Subsequently *C*, another creditor of *B*, obtains a decree against *B*. *C* is entitled to have the property attached and sold in execution of his decree. The attachment before judgment does not confer any right upon *A* to have his decree satisfied in priority to that of *C* (*b*).

11. [S. 490.] Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Property attached before judgment not to be re-attached in execution of decree.

Scope of the rule.—The effect of this rule is merely to take away the necessity for a re-attachment of the property. But it does not exempt the plaintiff, when a decree follows the attachment, from making the usual application for execution under O. 21, r. 11 (2) (c). This is now made clear by the substitution of the words, "it shall not be necessary upon an application for execution of such decree to apply for re-attachment of the property," for the words, "it shall not be necessary to re-attach the property in execution of such decree." Nor does the rule give the decree-holder at whose instance the property was attached before judgment any right to preferential treatment over other decree-holders who may have applied for a rateable distribution under s. 73 (*d*).

Objection that property attached before judgment is not saleable.—

An omission on the part of the defendant to take objection that the property sought to be attached before judgment is not saleable within the meaning of s. 60, at the time when the application is made for attachment before judgment, does not preclude the defendant from raising that objection when an application is made for execution of the decree passed in the suit (*e*).

12. [New.] Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

Agricultural produce not attachable before judgment.

(z) *Shib Kristo v. Miller* (1884) 10 Cal. 150 ;
Sadayappa v. Ponnama (1885) 8 Mad. 554; *Turner v. Pestonji Fardunji* (1896) 20 Bom. 403 ; *Kristnasawmy v. Official Assignee of Madras* (1903) 26 Mad. 678.
(a) *Suberao v. Mahadevi* (1913) 38 Bom. 105.
(b) *Bisheshar Das v. Ambika* (1915) 37 All.

575.
(c) *Pallonji v. Jordan* (1888) 12 Bom. 400 ;
Arunachellam v. Haji Sheek Meera (1910) 34 Mad. 25.
(d) *Sewdut Roy v. Sree Canto* (1906) 33 Cal. 639.
(e) *Basiram v. Kattayani* (1911) 38 Cal. 448.

ORDER XXXIX.

Temporary Injunctions and Interlocutory Orders.

Cases in which temporary injunction may be granted.

1. [S. 402.] Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

Temporary and perpetual injunctions.—Injunctions are of two kinds, temporary and perpetual. Temporary injunctions are regulated by rr. 1 and 2 of this Order: perpetual injunctions are regulated by ss. 55-57 of the Specific Relief Act I of 1877. A party against whom a perpetual injunction is granted is thereby restrained *for ever* from doing the act complained of. A perpetual injunction can only be granted by *final decree* made at the hearing and upon the merits of the suit. A temporary or *interim* injunction, on the other hand, may be granted *on an interlocutory application* at any stage of the suit. The injunction is called *temporary*, for it endures only *until* the suit is disposed of or *until* the further order of the Court (f). Thus if A's neighbour commences to build on a plot of land belonging to him a house which, if completed, would obstruct the access of light and air enjoyed by A over the said plot to the windows of his house in respect of which he claims an easement, he (A) may sue his neighbour for a *perpetual* injunction restraining him from building so as to disturb the easement claimed by him (A), and may at any time after the institution of the suit apply to the Court under r. 2 below for a *temporary* injunction restraining the defendant from building *until the suit is disposed of*. Interference with A's easement is an "injury" within the meaning of r. 2 below.

Principles governing temporary injunction.—"The granting of a temporary injunction under the powers conferred by this [rule] is a matter of discretion. True it is a matter of judicial discretion. But if the Court which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion" (g). One of those principles is that the Court in granting a temporary injunction must first see that there is a *bona fide* contention between the parties, and then, on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue (h). Or, as stated in the judgment of

(f) Specific Relief Act, 1877, s. 53.

(g) *Per White, C. J., in Subba v. Haji Badsha* (1903) 26 Mad. 168, 174.

(h) *Doherty v. Allman* (1878) 3 App. Cas. 706; *Subba v. Haji Badsha* (1903) 26 Mad. 168, 175.

- O. 39, r. 1.** Cotton, L.J., in *Preston v. Luck* (i), to entitle a plaintiff to an interlocutory injunction the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. The real point, upon an application for a temporary injunction, is not how the question ought to be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in *statu quo* until that question can be finally disposed of (j). Another principle is that where a perpetual injunction is sued for, and the plaintiff applies for a temporary injunction, the Court should grant a temporary injunction if the effect of not granting such an injunction will be to deprive the plaintiff for ever of the right claimed by him in the suit (k). See notes to r. 2, "Principles governing temporary injunction to restrain breach of contracts."

Duration of temporary injunction.—A temporary injunction may be granted *until* the suit is disposed of or *until* the further order of the Court. When a temporary injunction is granted "until the further order of the Court," and the injunction is not dissolved pending the suit, it comes to an end when the suit is disposed of. *After* the decree is passed, the Court that passed the decree has no power to grant a further temporary injunction (l). But if an appeal is preferred from the decree, the Appellate Court, it would seem, may grant a temporary injunction under this rule (m).

Illustration.

A sues B in the Court of a Subordinate Judge for a declaration of his title to certain property, and obtains a temporary injunction restraining B from selling the property, which B was about to sell, "until the suit is disposed of." A fails to prove his title to the property, and the suit is dismissed. A appeals from the decree to the High Court. [The suit being dismissed, the injunction is dissolved, and B can therefore sell the property]. A then applies to the Court of the Subordinate Judge for a further injunction restraining B from selling the property until the appeal to the High Court has been heard. The Subordinate Judge has no power to grant the injunction: *Gossain Money v. Guru Pershad* (1885) 11 Cal. 146. In the above case, the Court said: "If any Court has a right to grant an injunction now, we presume it would be the Court of Appeal."

Effect of temporary injunction.—The effect of a temporary injunction granted under this rule is not to make a subsequent alienation of the property void. Hence if a party, against whom a temporary injunction is granted restraining him from alienating the property, sells or mortgages the property pending the injunction, the sale or mortgage is not void. The only penalty A incurs by alienating the property in spite of the injunction is that prescribed by r. 2 (3), namely, that his other property may be attached and sold for awarding out of the sale proceeds compensation to the party on whose application the injunction was granted, and he may also be detained in the civil prison. In this respect a temporary injunction has a different effect from an attachment, for it will be seen on referring to s. 64 that when property is attached, any private transfer of the property contrary to the attachment is void against all claims enforceable under the attachment (n).

(i) (1884) 27 C. D. 497, 506.

(j) *Ierail v. Shamsar* (1913) 41 Cal. 436, 442-443.

(k) *Nanabhai v. Janardhan* (1888) 12 Bom. 110; *Hemanta v. Baranagore* (1914) 19 C. W. N. 442.

(l) *Shaikh Mohesooddeen v. Shaikh Ahmad* (1870) 14 W. R. 384; *Gossain Money v.*

Gour Pershad (1885) 11 Cal. 146.

(m) *Gossain Money v. Gour Pershad* (1885) 11 Cal. 146, 149; *Chando Bibi, in the matter of, the petition of* (1904) 26 All. 811.

(n) *Delhi and London Bank v. Ram Narain* (1887) 9 All. 497; *Manohar Das v. Ram Autar* (1908) 25 All. 481.

"Property in dispute in a suit."—Note that the property in respect of which **O. 39, r. 1.** an injunction may be granted in the circumstances mentioned in cl. (a) of this rule must be property in dispute in the suit, and no other (o). Where a plaintiff who is out of possession claims possession, the Court will not grant an injunction against a defendant in possession under a claim of right unless the threatened injury will be irreparable. In any event the plaintiff must show a *prima facie* case in support of the title asserted by him (p). See notes to r. 7 below.

An application for an injunction restraining a party to the suit from interfering with the applicant's right to worship in, and to free access to, a temple which was the subject-matter of the suit, pending the disposal of the suit, does not fall either under cl. (a) or cl. (b) of this rule (q).

"Property in danger of being wrongfully sold in execution of a decree."—Certain property attached in execution of a decree obtained by A against B is notified for sale at the instance of A. C, alleging that the property belongs to him and not to B, sues A and B for a declaration of his title to the property, and applies for an injunction under this rule to restrain A from bringing the property to sell until the suit is disposed of. Has the Court power to grant the injunction under this rule? Yes, for the case is one in which the property in dispute in the suit is "*in danger of being wrongfully sold in execution of the decree.*" It is immaterial that the Court in which the suit is brought is different from the Court executing the decree, or, so long as it has jurisdiction to entertain the suit, that it is a Court of lower grade than the Court executing the decree. Thus if the Court executing the decree is the Court of a District Judge, and the Court in which the suit is brought is the Court of a Subordinate Judge, the latter Court though a Court of inferior grade, has power under this rule to stay the sale and execution proceedings pending before the District Court (r).

Injunction against a person not a party to the suit.—No injunction can be granted under this rule against a person who is not a party to the suit (s).

Appeal.—An appeal lies from an order refusing, as well as from one granting, a temporary injunction (t). An appeal also lies from an order purporting to be made under his rule, though not warranted by it (u). See O. 43, r. 1, cl. (r).

Revision.—No appeal lies to the High Court from an order made by the lower Appellate Court under this rule [s. 104, sub-s. (2)]. In two recent cases where a temporary injunction was refused by the lower Appellate Court, the High Court of Calcutta, without deciding whether it had power to revise the order, made an order granting an injunction in the exercise of powers conferred upon High Courts by s. 15 of the Charter Act (v).

Power of Chartered High Courts "to restrain a party" from proceeding with a suit pending in another Court.—As regards Chartered High Courts, it has been held that the powers of these Courts to grant an injunction are not confined to the terms of rules 1 and 2 of this Order. A carrying on business at D, sues B in the Court of the Subordinate Judge of D to recover from B a sum

- (o) *Joynarain v. Shibpersad* (1866) 6 W. R. Mls. B.
(p) *Keshto Prasad v. Srinibash* (1911) 38 Cal. 791; *Begg, Dunlop & Co. v. Satish Chandra* (1919) 46 Cal. 1001.
(q) *Karori v. Maharaj Bahadur* (1916) 1 Pat. L. J. 560.
(r) *Brojendra v. Rup Lal* (1886) 12 Cal. 515; *Amr Dulhin v. Administrator-General of Bengal* (1896) 23 Cal. 351; *Abdullah*

- Khan v. Banke Lal* (1910) 33 All. 79 [F. B.].
(s) *Ram Sunder v. Ram Dheyam* (1918) 3 Pat. L. J. 456, 458.
(t) *Lachmi v. Ram Cheran* (1913) 35 All. 425.
(u) *Abdul v. Ganapathi* (1900) 23 Mad. 517.
(v) *Israel v. Shamsar* (1913) 41 Cal. 436; *Hemanta v. Baranagore* (1914) 19 C. W. N. 442.

O. 39, r.1. of Rs. 1,100 as balance due to him in respect of certain goods sent by him from *D* to *B* in Calcutta for sale as commission agent. *B* then sues *A* in the High Court of Calcutta to recover from *A* a sum of Rs. 2,300 as balance due to him in respect of the same transactions, and applies to the High Court of Calcutta for a temporary injunction to restrain *A* from proceeding with the suit in the Court at *D* until the disposal of the suit in the High Court. It is clear that this case is not covered either by r. 1 or r. 2 of this Order. Has the High Court power to grant the injunction? It has been held by the Calcutta High Court that the powers of High Courts to grant a temporary injunction are not confined to the terms of rr. 1 and 2, and that these Courts have *inherent* power under their general equity jurisdiction to grant such an injunction independently of the provisions of the Code, and, further, that such power can be exercised by a single Judge sitting on the Original Side of the High Court (*w*). The same view has been recently taken by the High Court of Bombay, but the injunction granted in that case was rather peculiar in form, namely, that *A* should be restrained from proceeding with the suit in the Court of the Subordinate Judge at *D* in such a way as to delay or embarrass the trial of the suit in the High Court (*x*). The Calcutta decisions, however, are not uniform as to whether this power can be exercised if *A* did not reside within the local limits of the ordinary original civil jurisdiction of the Calcutta High Court, it being held by Sale, J., that the power can be exercised even if *A* did not reside within the limits of the jurisdiction (*y*), while by Fletcher, J., (*z*) and Stephen, J., (*a*), that it cannot be exercised unless *A* resided within those limits. The point arose in a Bombay case but it was there held that as *A* had been served and had appeared in the suit without protest, he must be deemed to have submitted to the jurisdiction of the Bombay Court and the Court had therefore power to grant the injunction (*b*).

It has also been held by the High Court of Bombay that it has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Causes Court at Bombay with a suit filed by the defendant referring to the same matter to which the High Court suit relates (*c*).

The next question to consider is, whether the power of a Chartered High Court to restrain a party from proceeding with a suit pending in another Court is confined to suits pending in a *Court subordinate thereto*, or whether it extends to suits pending in *any Court in British India*. In one of the cases cited above (*d*), the High Court of Calcutta made an order restraining a party from proceeding with a suit pending in the Court of the Subordinate Judge of Bareilly, a Court subordinate to the High Court of Allahabad. In a recent Bombay case, Macleod, J., expressed the opinion that though the High Court has power to restrain a party from proceeding with a suit pending in a Court subordinate to it, it has no such power in respect of a suit pending in a Court *not* subordinate to it (*e*). In support of the above view, the learned Judge relied on the provisions of s. 56, cl. (b), of the Specific Relief Act, 1877, by which it is enacted that an injunction cannot be granted to stay proceedings in a Court not subordinate to that from which the injunction is sought.

A further question that arises in this connection is whether a British Indian Court has power to restrain a party from proceeding with a suit pending in a Court of a *Native State*. It has been held by the High Court of Allahabad that it has not (*f*). The contrary, however, was assumed by the High Court of Bombay in a recent case (*g*).

(*w*) *Mungle Chund v. Gopal Ram* (1907) 34 Cal. 101; *Rash Behary v. Bhowani Churn* (1907) 34 Cal. 97.
 (*x*) *Mulchand v. Gill & Co.* (1919) 21 Bom. L. R. 963, 969.
 (*y*) (1907) 34 Cal. 101, *supra*.
 (*z*) *Vulcan Iron Works v. Bishumbhur* (1909) 38 Cal. 233.
 (*a*) *Jumna Dass v. Harcharan Dass* (1911) 38 Cal. 405.

(*b*) *Mulchani v. Gill & Co.* (1919) 21 Bom. L.R. 963, 970.
 (*c*) *Uderam v. Hyderally* (1909) 33 Bom. 469, distinguishing *Jairamdas v. Zamonial* (1903) 27 Bom. 357.
 (*d*) (1907) 34 Cal. 101, *supra*.
 (*e*) *Narayan v. Jankibai* (1915) 39 Bom. 604.
 (*f*) *Maqbul v. Amir Hasan* (1914) 37 All. 1.
 (*g*) *Vantchand v. Lakhmichand* (1919) 21 Bom. L. R. 955.

No appeal lies from an order of a High Court refusing to restrain a defendant from prosecuting his suit in another Court. Such an order is not appealable under the Code. Nor is it a "judgment" within the meaning of cl. 12 of the Charter (h).

O. 39,
rr. 1,2.

Power of High Court "to stay proceedings" pending in a subordinate Court.—We have dealt in the preceding paragraph with the power of a Chartered High Court to *restrain a party* to a suit pending before it from proceeding with a suit pending in another Court. The question we have now to consider is whether a Chartered High Court has power in a suit pending before it to issue a *prohibition to a subordinate Court* in the mufassal from proceeding with a suit pending before the latter Court, and if so, whether that power can be exercised by a single Judge sitting on the *Original Side* of the High Court. It has been held by a Full Bench of the Bombay High Court that a Chartered High Court has power to make an order directing a Subordinate Court not to proceed further with a suit pending in the latter Court, but that such an order appertains to the *Appellate* and not to the *Original Side* of the High Court, and that it can therefore only be made by those Judges to whom the Appellate Side work is assigned by Rules made under s. 13 of the Charter Act, that is, by a Division Court consisting of two Judges, and that it cannot be made by a single Judge sitting on the Original Side of the High Court (i). In the case cited above, an order was made by Macleod, J., in a suit pending before him, *staying a suit* pending in the Ratnagiri Court. It was assumed by a majority of the Full Bench that such an order was a prohibition to the *Ratnagiri Court*, and not merely to the *parties*, from proceeding with the suit in that Court, and it was held that Macleod, J., had no jurisdiction to make the order. On the other hand, Macleod, J., who was one of the Judges constituting the Full Bench, declined to read his order as a *direct prohibition to the Ratnagiri Court*, and held that a single Judge sitting on the Original Side was competent to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's Court in the mufassal, and so in effect *stay the proceedings* within the meaning of s. 56, cl. (b) referred to above. As to transfer of suits from Presidency Small Cause Courts to High Court, see notes to cl. 13 of the Letters Patent.

This rule does not apply to probate proceedings.—An injunction cannot be granted under this rule in a probate proceeding. The reason is that the only question in controversy in such a proceeding is that of *representation* of the estate of the deceased; there is no question of *title* in such a proceeding, and it cannot therefore be said that there is "any property in dispute" in such a proceeding as contemplated by this rule. If the Court is satisfied that the estate of the deceased is in danger of being wasted or wrongfully alienated, it may appoint an administrator *pendente lite*, and it may also make an order under r. 7 below, but it cannot grant an injunction under this rule (j).

Form.—For form of temporary injunction, see App. F, form no. 8.

2. [S. 493.]

Injunction to restrain
repetition or continuance
of breach.

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to

(h) 21 Bom. L. R. 955, *supra*.

(i) *Narayan v. Jankibai* (1915) 39 Bom. 604.

(j) *Nirod v. Chamatkarini* (1914) 19 C. W. N. 205.

O.39, r. 2. restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

Alterations in the rule :—

1. The words " of any kind " after the word " injury " in sub-r. (1) are new. See notes below under the head " Scope of the rule."
2. The words, " unless in the meantime the Court directs his release " in sub-r. (3) are also new. See in this connection the undermentioned case (k).

Scope of the rule.—Rule 1 enables the Court to grant temporary injunctions in the cases specified in cls. (a) and (b) thereof. The present rule enables the Court to grant temporary injunctions to restrain a defendant from committing the breach of a contract or other injury of any kind. The words " of any kind " are new. They have been added to supersede an Allahabad decision where it was held that the words " other injury " in the old section did not include acts of trespass upon property (l). Such acts would now come under this rule.

Principles governing temporary injunction to restrain breach of contract.—*Temporary* injunctions to restrain the breach of a contract are regulated by the present rule. *Perpetual* injunctions to restrain the breach of a contract are regulated by the Specific Relief Act, 1877, s. 56, cl. (f), and s. 57. Section 56, cl. (f), of the Specific Relief Act, provides that a perpetual injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. Now the performance of a contract is not specifically enforced where damages would afford adequate relief. Hence no injunction can be granted where damages afford adequate relief. " The very first of principle of injunction law is that you do not obtain injunctions for

(k) *Advocate-General of Bombay v. Gangji* (1896) 19 Bom. 152. | (l) *Darab Kuar v. Gombi Kuar* (1900) 22 All. 449

actionable wrongs [or for breach of contracts] for which damages are the proper remedy" (m). In the Bombay case of *Nusserwanji v. Gordon* (n), it was observed by Sir Charles Sargent that the issue of a *temporary* injunction is governed by the same principles as the granting of a *permanent* injunction at the trial of a case. Referring to these observations, Sir Arnold White in a recent Madras case said: "Now, having regard to the fact that the law with regard to the granting of a perpetual injunction is to be found in the Specific Relief Act and is laid down with great precision, and that the law with regard to the granting of a temporary injunction is to be found in the Code of Civil Procedure and is declared to be a matter for *discretion*, if it were necessary to consider the point, I am not sure I should be prepared to go quite so far as Sir Charles Sargent" (o). However that may be, the following two rules seem to govern all cases on the subject now under consideration:—

1. If a suit is brought for specific performance of a contract and for an injunction to restrain the defendant from committing a breach of the contract, and the plaintiff applies for a temporary injunction to prevent the breach of the contract until the suit is disposed of, the Court will decline to grant a temporary injunction if the plaintiff and the affidavits filed by the parties show *on the face of them* that the case is not one for a perpetual injunction or for specific performance. The refusal of the application for a temporary injunction in (1) *Bhikaji v. Bapu Saju* (p), (2) *Haji Abdul v. Haji Abdul* (q), (3) *Nusserwanji v. Gordon* (r), (4) *Assur v. Ratanbai* (s), and (5) *Gunpat v. Rajun Koor* (t) may be referred to this rule. In the first of these cases, the suit was by an association of artisans consisting of 57 members for an injunction against one of them to restrain him from committing the breach of a contract which provided that all the members of the association should bring the business of working and carving in wood into one shop and should divide the profits among them and *that no member should take any order on his own account*. The plaintiffs applied for a temporary injunction against the defendant to prevent the breach of the contract until the disposal of the suit, but the injunction was refused, for the agreement being on the face of it illegal (as the association, though it consisted of 57 members, was not registered as a Company), no specific performance or injunction could be granted. In the second case, the suit was for a perpetual injunction to prevent the breach of an *agreement* for a charter-party. The Court refused to grant a temporary injunction to restrain the breach on the ground that a perpetual injunction could not be granted to restrain the breach of such an agreement, though a perpetual injunction might be granted to prevent the breach of an *actually completed charter-party*. In the third case, an application for a temporary injunction was made by the agents of a company as plaintiffs to restrain the company from employing a firm of solicitors in contravention of an agreement between the company and the agents whereby the plaintiff's firm were appointed agents of the company for 25 years and the agents were empowered to employ solicitors for the company during that period. The Court refused the application on the ground that since a perpetual injunction could not be granted to restrain the company from employing persons other than the plaintiff's firm as agents of the company, a temporary injunction should not be granted to restrain the company from employing solicitors other than those of the plaintiff's choice. In the fourth case, the Court refused to grant a temporary injunction to restrain a Hindu widow from adopting a son in breach of an agreement entered into by her not to adopt a son. The order of refusal was based on the ground that the Court could not grant a perpetual injunction to prevent the breach of such a contract. In the

(m) *Per Lindley, L.J., in London and Blackwall Ry. Co. v. Cross* (1886) 31 C.D. 354, 369.
 (n) (1882) 6 Bom. 266, p. 379.
 (o) *Subba v. Haji Badsha* (1903) 26 Mad. 163, 175.

(p) (1877) 1 Bom. 550.
 (q) (1882) 6 Bom. 5.
 (r) (1882) 6 Bom. 266.
 (s) (1889) 13 Bom. 56.
 (t) (1876) 1 Cal. 74.

- O. 39, r. 2. last of the case cited above the parties were Hindus, and the suit was brought by the plaintiff against the defendant for specific performance of a contract whereby the defendant agreed to give his minor daughter in marriage to the plaintiff. The plaintiff applied for an interim injunction to restrain the defendant from giving away the girl in marriage to another person to whom the defendant was about to marry the girl, but the application was refused on the ground that the contract was not one of which specific performance could be enforced or the breach of which could be restrained by a perpetual injunction.

2. The converse of rule (1) is not always true; that is, the Court will not grant a temporary injunction before the hearing in every case where a perpetual injunction might fitly be granted at the hearing; for to justify a temporary injunction, not only must the case be such that an injunction is the appropriate relief, but there must be the further ingredient that unless the defendant is restrained *forthwith* by a temporary injunction, irreparable injury or inconvenience may result to the plaintiff before the suit is decided upon its merits (u). But if a case is a proper one for specific performance, and irreparable injury is likely to be caused to the plaintiff unless the breach of the contract is forthwith restrained, the Court will grant a temporary injunction to restrain the breach of the contract. Thus where A sued B for specific performance of a contract whereby in consideration of A having advanced money to B for working certain mica mines, B agreed to deliver all the mica produced from the mines to A, and not to deliver any portion thereof to any other person, and also for an injunction to restrain the breach thereof and applied for a temporary injunction to restrain B from delivering any portion of the mica to another firm to whom B had arranged in breach of his contract to consign a portion, the Court held that the case was a fit one for a temporary injunction, and the injunction was granted (v).

Sub-rule (3).—The powers conferred by this sub-rule can only be exercised if the Court is set in motion by a party who deems himself aggrieved; hence where a District Court committed a defendant to jail of its own motion for disobeying an injunction of the Court, it was held that the order of committal was *ultra vires*. Note, however, that a High Court has inherent power to commit a defaulting party for contempt; hence a High Court can commit a defendant to jail of its own motion for disobeying an injunction issued by such Court (w). See s. 151 above.

Under sub-r. (3) the Court can in its discretion order either arrest or attachment of property; it is not bound in the first instance to make an order of attachment and then order imprisonment. There is no foundation for the proposition that the Court can only make an order of imprisonment after an order of attachment.

If the application to commit was made while the suit was pending, the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court to take action for disobedience to the injunction (x).

Temporary mandatory injunction.—The Courts in England have the power to grant mandatory injunctions on interlocutory applications (y). And so have Chartered High Courts in the exercise of their ordinary original civil jurisdiction (z). The same power is possessed by Courts in the mofussal (a).

(u) See Colett's Specific Relief Act, 263, 264; *Nanabhai v. Janardhan* (1888) 12 Bom. 110.

(v) *Subba v. Haji Badsha* (1903) 26 Mad. 168; *Madras Ry. Co. v. Rust* (1891) 14 Mad. 18.

(w) *Kochappa v. Sakti Devi* (1908) 26 Mad. 494.

(x) *Suppi v. Kunhi* (1910) 39 Mad. 907.

(y) *Robinson v. Lord Byron* (1785) 1 Brown Ch. Cas. 588; *Hervey v. Smith* (1855) 1 K. and

J. 389; *Allport v. Securities Co., Ltd.* (1895) 72 L. T. 533; *Bonner v. Great Western Ry. Co.* (1888) 24 Ch. D. 1.

(z) *Champsey v. Jumna Flour Mills* (1914) 16 Bom. L. R. 566.

(a) *Kandaswami v. Subramania* (1917) 41 Mad. 208 [yes]; *Rasul Karim v. Pirubhai* (1914) 38 B. 1381 [Yes, according to Shah, J., No., according to Beaman, J.]; *Israel v. Shamser* (1913) 41 Cal. 436, 443-445 [yes].

O. 39.
rr. 2-7.

Appeal.—An appeal lies under O. 43, r. 1 (r), from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction granted under this rule, and the Appellate Court can on appeal pass the order which the lower Court should have passed (c).

3. [S. 494.] The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Before granting injunction Court to direct notice to opposite party.

4. [S. 496.] Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Order for injunction may be discharged, varied or set aside.

Appeal.—An appeal lies from an order under this rule [O. 43, r. 1, cl. (r)].

5. [S. 495.] An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Injunction to corporation binding on its officers.

Interlocutory Orders.

6. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Power to order interim sale.

The words "or which for any other just and sufficient cause it may be desirable to have sold at once" have been added so as to empower the Court to order a sale of securities where the state of the market requires such a course.

7. [S. 499 S. C. R., O. 50, r. 3.] (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

Detention, preservation, inspection, etc., of subject matter of suit.

(a) make an order for the detention, preservation or inspection of any property which is the subject-

O. 39,
rr. 7-9.

matter of such suit, or as to which any question may arise therein ;

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit ; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

The words " or as to which any question may arise therein " in sub-r. 1, cl. (a), are new,

Inspection of property which is the subject-matter of the suit.—In a suit by *A* against *B* for damages for injury alleged to have been caused to *A*'s house by the erection of *B*'s house, the Court may make an order on *B*'s application for inspection of *A*'s house, to determine the alleged injury, *A*'s house being in such a case " the subject-matter of the suit " (d).

8. [s. 500.] (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.

Application for such orders to be after notice.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

9. [s. 501.] Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due

When party may be put in immediate possession of land, the subject-matter of suit.

previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure, O. 39,
rr. 9-10

and the Court in its decree may award against the default-er the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

10. [S. 502.] Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

Deposit of money, etc.,
in Court.

Deposit of money in Court.—Suppose *A* sues *B* to recover a sum of Rs. 5,000. Suppose *B* admits Rs. 4,000 to be due to *A*, and contests *A*'s claim as to the balance of Rs. 1,000. In such a case, *A* may apply to the Court to direct *B* to deposit Rs. 4,000 in Court, or to deliver the same to him (*A*).

Holds.—This rule applies only when the party making the admission holds the property or other thing which the party in whose favour the order is made seeks to have delivered to him (*e*).

"Appeal".—An appeal lies from an order under this rule [O. 43, r. 1, cl. (r)].

ORDER XL.

Appointment of Receivers.

1. [S. 503.] (1) Where it appears to the Court to be just and convenient the Court may by order— O. 40, r. 1

Appointment of receivers.

- (a) appoint a receiver of any property, whether before or after decree ;
- (b) remove any person from the possession or custody of the property ;
- (c) commit the same to the possession, custody or management of the receiver ; and

O. 40, r. 1.

(h) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person ~~whom any party to the suit has not a present right so to remove.~~ *not to be removed*

Alterations in the rule—

1. The words "to be just and convenient" have been substituted for the words "to be necessary for the realization, preservation or better custody, or management of any property, moveable or immovable, the subject of a suit or attachment." The result is that the Court may now appoint a receiver not only in the particular cases specified in the old section, but in every case in which it appears to the Court to be *just and convenient* to do so. Thus a receiver may be appointed in a suit for partition (ee). See notes below under the head "Just and convenient." As to execution of decrees by appointment of a receiver, see s. 51, cl. (d).
2. The words "whether before or after decree" in cl. (a) are new. They give effect to the undermentioned decision under the old section (f).
3. The words "subject-matter of a suit" which occurred in the corresponding s. 503 of the Code of 1882 have been omitted. See notes below under the head "Receiver in proceedings other than a suit."

Receiver in proceedings other than a suit.—S. 503 of the Code of 1882 contained the words "subject-matter of a suit." The result was that under that section a receiver could only be appointed in a suit. Those words have been omitted in the present rule so that a receiver may now be appointed even in proceedings other than a suit (g).

Courts empowered under this order.—Under the Code of 1882 (s. 505), a receiver could only be appointed by High Courts and District Courts, and not by Courts subordinate to District Courts. This bar has been now removed by the omission of s. 505. A receiver may now be appointed by Subordinate Judges also.

A receiver is an officer of the Court.—"The object and purpose of the appointment of a receiver may generally be stated to be the preservation of the subject matter of the litigation pending a judicial determination of the rights of the parties thereto" (h). "The receiver is appointed for the benefit of all concerned; he is the representative of the Court and of all parties interested in the litigation, wherein he is

(ee) *Ramji Ram v. Saligram* (1909) 14 Cal. W. N. 248.

(f) *Shunmugam v. Moldin* (1885) 8 Mad. 220.

(g) *Asadali v. Mahomed* (1916) 43 Cal. 986.

(h) *Jagat Tarini Datt v. Baba Gopal* (1907) 34 Cal. 305, 316.

appointed" (i). The appointment [of a receiver] is the act of the Court and made in the interests of justice. [A receiver] is an officer or representative of the Court, and subject to its orders. His possession is the possession of the Court by its receiver, and the tenants in possession, when he is appointed to receive rents and profits of immoveable property, become virtually tenants *pro hac vice* of the Court, their landlord. His possession is the possession of all the parties to the proceedings according to their titles. The moneys in his hands are in *custodia legis* for the person who can make a title to them (j).

Legal consequences arising from the fact that a receiver is an officer of the Court:—(1) *Attachment*.—Property in the hands of a receiver cannot be attached without the leave of the Court first obtained. Thus if a receiver is appointed of certain property in a suit between A and B, and C obtains a decree against A or B, C cannot in execution of his decree attach the property in the hands of the receiver without the leave of the Court; such an attachment is an interference with the Court's possession through its officer, the receiver (k). But if a receiver is appointed of certain property in a suit between A and B, and the property was mortgaged by A to C before the receiver was appointed, and C obtains a decree for sale of the mortgaged property, C may bring the property to sale, though it may be in the hands of the receiver, without the leave of the Court. The reason is that no attachment is necessary before sale in the case of a mortgage-decree, and no attachment being necessary, there cannot be any interference with the possession of the receiver (l).

(2) *Suit by or against receiver: leave of Court*.—A receiver cannot sue or be sued except with the leave of the Court by which he was appointed receiver (m). A party feeling aggrieved by the conduct of a receiver may seek redress against him in the very suit in which he was appointed receiver, or he may bring a separate suit against the receiver in which case he must obtain the leave of the Court (n). There is no statutory provision which requires a party to take the leave of the Court to sue a receiver. The rule has come down to us as a part of the rules of equity, binding upon all Courts of Justice in this country. It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it, the authority of the Court is not to be obstructed by suits designed to disturb the possession of the Court. The institution of such suits is in the eye of the law a contempt of the authority of the Court, and therefore the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made not in exercise of any power conferred by statute, but in exercise of the inherent power which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority (o). In *Pramatha Nath v. Khetra Nath* (p), Bodilly, J., held that the leave of the Court to sue a receiver was a condition precedent to the right to sue, and that if the leave was not obtained before suit, it could not be granted subsequent to the institution of the suit and the suit should be dismissed. This decision was dissented from in subsequent Calcutta cases where it was held that the leave may be granted even after the institution of the suit (q). In a recent Bombay case (r), Pratt, J., after an exhaustive review of the case-law on the subject, came to the same conclusion; the learned judge held that failure to obtain leave prior to the

(i) *Ib.*, p. 317.

(j) *Orr v. Muthia* (1894) 17 Mad. 501, 503; *Administrator-General v. Prem Lall* (1895) 22 Cal. 1011, 1015, 22 I. A. 208.

(k) *Kahn v. Ali Mahomed* (1892) 16 Bom. 577.

(l) *Jogendra v. Debendra* (1899) 26 Cal. 127.

(m) *Miller v. Ram Rajan* (1894) 10 Cal. 1014; *Dunne v. Kumar Chandra* (1903) 30 Cal. 598; *Pink v. Corporation of Calcutta* (1903) 30 Cal. 721.

(n) *Kamatshi v. Sundaram* (1903) 26 Mad. 492.

(o) *Braja Bhusan v. Sris Chandra* (1918) 4 Pat. L. J. 20, 28.

(p) (1904) 32 Cal. 270.

(q) *Banku Behari v. Harendra Nath* (1910) 15 C. W. N. 54; *Sarat Chandra v. Apurba* (1911) 15 C. W. N. 925 [execution proceedings]; *Maharaja of Burdwan v. Apurba* (1911) 15 C. W. N. 872.

(r) *Jamesdaji v. Hussainbhai* (1920) 22 Bom. L.B. 319.

O. 40, r. 1. institution of the suit was cured by subsequent leave. As regards suits by a receiver, it has been recently held by the High Court of Calcutta that if the suit is instituted without the leave of the Court, the Court may grant leave after the institution of the suit to continue the suit (s).

It may here be noted that a receiver is not a necessary party to a suit for a declaration of title and possession of property of which he is appointed receiver (t); nor can he be made a party to a proceeding under sec. 145 of the Criminal Procedure Code merely in his capacity of receiver (u).

(3) *Debts incurred by receiver in business.*—If a receiver is appointed of the estate of a deceased person with authority to continue the business carried on by the deceased, and in the course of such business debts are properly incurred by the receiver, the persons to whom the debts have become due may proceed not only against the receiver personally, but also against the estate of the deceased, for the recovery of their debts, and they are entitled to payment of their debts in priority to other creditors of the estate. The right to proceed against the estate is founded on the just and equitable principle that as the acts of a receiver acting within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefits of those acts without being held liable for the obligations arising out of them (v).

(4) *Loss occasioned by receiver's default.*—If any loss is occasioned to the property by the wilful default or gross negligence of the receiver, the loss is to be borne not by the party on whose application the receiver was appointed (for a receiver is not an agent of such party), but by the estate in the first instance. The party damaged by the loss may then proceed against the receiver (w). See r. 4 below.

(5) *Agreement controlling receiver's powers.*—A receiver being an officer of the Court, it is contempt of Court on the part of any of the parties to enter into an agreement with him restricting and controlling his powers. The Court alone has the power to determine the powers of a receiver (x).

(6) *Remuneration.*—A receiver being an officer of the Court, the Court alone has to determine his fees or remuneration (r. 2 below). Hence a promise by a party to pay the remuneration of a receiver without leave of the Court is against law, and is not binding on the promisor (y).

(7) *Criminal Procedure Code, s. 145.*—Where a receiver is appointed by a Court of property the subject of a suit, a Magistrate has no jurisdiction under sec. 145 of the Code of Criminal Procedure to interfere with him in respect of his possession of the property without the sanction of the Court, his possession being the possession of the Court (z). It may here be noted that a Civil Court has no power under this rule to appoint a receiver in supersession of a receiver appointed by a Magistrate under sec. 146, cl. (2), of the Criminal Procedure Code (a). See sub-rule (2).

(8) *Prosecution of receiver.*—A receiver appointed by the High Court, who has under its orders taken possession of property, cannot be prosecuted for criminal breach of trust in respect thereof without first obtaining the leave of the Court (b).

(s) *Rustomjee v. Frederic Gaebels* (1918) 46 Cal. 352.

(t) *Suttya v. Golap* (1900) 5 Cal. W. N. 27; *Rodger v. Ashutosh* (1902) 6 Cal. W. N. 829.

(u) *Dunne v. Kumar Chandra* (1908) 30 Cal. 593.

(v) *Mohari Bibi v. Shyama Bibi* (1903) 30 Cal. 937; *Short v. Pickering* (1883) 6 Mad. 138.

(w) *Orr v. Muthia* (1894) 17 Mad. 501; *Muthia*

v. Orr (1897) 20 Mad. 224.

(x) *Manick Lal v. Surrat Coomares* (1895) 22 Cal. 648.

(y) *Prakash Chandra v. Adlam* (1908) 30 Cal. 898.

(z) *Dunne v. Kumar Chandra* (1908) 30 Cal. 593.

(a) *Bidayprasad v. Ashrafi* (1918) 40 Cal. 862.

(b) *Santok Chand v. Emperor* (1918) 46 Cal. 432.

"Just and convenient."—These words have been taken from the Judicature Act, 1873, s. 25, sub-s. (8). The words in that Act are "just or convenient," but they have been construed to mean just *and* convenient (c). The words "just and convenient" do not mean that the Court is to appoint a receiver simply because the Court thinks it convenient; they mean that the Court should appoint a receiver for the protection of rights or for the prevention of injury *according to legal principles* (d). Hence the Court should not appoint a receiver of property in the possession of the defendant claiming the same by a *legal* title, unless the plaintiff can show *prima facie* that he has a strong case and a good title to the property (e). The mere circumstance that the appointment of a receiver will do no harm to any one is no ground for appointing a receiver (f). See notes "alterations in the rules," No. 1, p. 806 above, and notes below "Cases in which a receiver may be appointed" See also Specific Relief Act 1 of 1877, s. 44.

Which Court may appoint a receiver.—The power to appoint a receiver rests only with the Court in which the suit is brought in which it is sought to appoint a receiver. Hence a District Judge has no power to appoint a receiver of property which is the subject of a suit in *another* Court, even though such Court may be subordinate to his own (g).

Whether a receiver can be appointed when an executor is in possession.—In England the rule is that the Court will not appoint a receiver against an executor unless gross misconduct is shown, and the same rule, it is submitted, applies to the case of an executor of the will of a person subject to the provisions of the Indian Succession Act. This rule, however, does not apply in the case of an executor of the will of a Mahomedan. The reason is that while in the case of persons governed by the Succession Act, a testator can dispose of the *whole* of his property by his will, a Mahomedan testator cannot dispose of more than one-third of his property by his will (h).

Where a receiver is appointed of the estate of a deceased person, and the estate is being administered by the Court, the Court may authorise the receiver to pay out of the estate in his hands pressing claims against the estate (i).

Temporary injunctions and appointment of receiver.—The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed is that while in either case it must be shown that the property should be preserved from waste or alienation, in the former case it is sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while in the latter case a good *prima facie* title to the property over which the receiver is sought to be appointed has to be made out (j).

Cases in which a receiver may be appointed.—A and B constitute members of a trading joint family. A sues B for partition of the joint family property, and applies for the appointment of a receiver on the ground that B has misappropriated large sums of money and thrown the accounts into confusion. Here it is *just and convenient* that a receiver should be appointed, for the object is the preservation of the property which is the subject of the suit (k). The removal of a large amount of property by the defendant under circumstances which might fairly give rise to suspicion during the

(c) *Beddow v. Beddow* (1878) 9 C. D. 89, 93; *Day v. Brownrigg* (1878) 10 C. D. 294, 307.

(d) *Asiatic v. Corporation of Southampton* (1880) 16 C. D. 143, 148; *Robinson v. Pickering* (1881) 16 C. D. 660, 661; *Holmes v. Millage* [1893] 1 Q. B. 551, 557.

(e) *Sidheswari v. Abhoyeswari* (1888) 15 Cal. 818; *Chandidat v. Padmanand* (1895) 22 Cal. 459.

(f) *Srimati v. Beni Madhab* (1888) 5 All. 556

Harris v. Beauchamp [1894] 1 Q. B. 801.
(g) *Latafut v. Anunt* (1896) 23 Cal. 517.

(h) *Hafizabai v. Kazi Abdul Karim* (1895) 19 Bom. 83.

(i) *Motivahu v. Premvahu* (1892) 16 Bom. 511.

(j) *Chandidat v. Padmanand* (1895) 22 Cal. 459
See also *Sham Chand v. Bhaya Ram* (1900) 5 Cal. W. N. 365.

(k) *Hanumayya v. Venkatasubbayya* (1895) 18 Mad. 23.

- O. 40, r. 1. pendency of a suit in which the question of title to that property would be determined. is a sufficient strong ground for the appointment of a receiver (l). Likewise a receiver may be appointed of mortgaged property in a suit for foreclosure or sale, if a proper case is made out (m). A receiver may also appointed in a testamentary suit (n).

Partnership suits.—In considering the question of the appointment of a receiver in partnership suits, a distinction has to be drawn between cases in which the contest is between partners and cases in which the contest is between partners on the one hand and non-partners on the other.

In the first class of cases, that is, where one partner seeks to have a receiver appointed against his co-partners, it is necessary to distinguish cases in which the partnership has already been dissolved from those in which the partnership is still subsisting. If the partnership is already dissolved, the Court usually appoints a receiver, almost as a matter of course (o). The jurisdiction of the Court to appoint a receiver is not ousted by an arbitration clause providing for a reference to arbitration of all matters in dispute between the parties (p). But if the partnership is still subsisting, no receiver will be appointed unless some special grounds for the appointment can be shown. There must be fraud or gross misconduct of some kind (q), or wilful denial of the complaining partner's rights (r), or persistence under cover of right in conduct endangering the assets (s).

In the second class of cases, that is, where the contest is between partners on the one hand and non-partners on the other, e.g., legal representatives of a late partner, a receiver will not be granted *against a member of the firm* at the instance of the legal representatives, unless some special grounds for the interference of the Court can be established. But it is a matter of course to appoint a receiver where such appointment is sought by a partner *against the legal representatives* of his late co-partner, or where all the partners are dead and an action is pending between their representatives (t).

Decree for maintenance.—Where a decree is passed for maintenance and a charge is created on a specified property to secure payment of the allowance, it is desirable, in order to avoid difficulty in executing the decree and to make a fresh suit unnecessary in case of default of payment, to appoint a receiver by the decree itself with directions, in case of default of payment to take possession of the property and sell the same, and out of the sale proceeds to pay the allowance (u).

Criminal Procedure Code, sec. 145.—The fact that there exists in respect of any immoveable property an order of a Magistrate passed under section 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by this rule to appoint a receiver in respect of the same property (v). It is, however, different where a receiver is appointed by a Magistrate under s. 146, cl. (2), of that Code. See p. 808, case (7).

Receiver and administrator pendente lite.—A receiver may be appointed under this rule in a testamentary suit governed by the Probate Act, 1881 (vv). The Chancery Division of the High Court of England may appoint a receiver of the estate of the deceased, though proceedings have been commenced by the defendant in the Probate Court and though the defendant is prepared to apply at once in that Court for an administrator *pendente lite* (w).

(l) *Sia Ram v. Mohabir* (1900) 27 Cal. 279.

(m) *Ghanashyam v. Gobinda* (1902) 7 Cal.W. N. 452; *Jatissondas v. Zenabai* (1890) 14 Bom. 481.

(n) *Yeswant v. Shankar* (1893) 17 Bom. 388.

(o) *Pint v. Roncoroni* [1892] 1 Ch. 633; *Taylor v. Neale* (1888) 39 Ch. D. 538.

(p) *Pint v. Roncoroni* [1892] 1 Ch. 638, 637.

(q) *Ex parte Broome*, 1 Rose, 69; *Sturwick v. Conningsby* (1882) 1 Vern. 118 [one partner colluding with debtors of the firm] *Smith v. Jeyes* (1841) 4 Beav. 508

making away with partnership assets. (r) *Hale v. Hale* (1841) 4 Beav. 369.

(s) *Madgwick v. Wimble* (1848) 6 Beav. 495.

(t) *Lindley on Partnership*, Book III, Chap. 10, sec. 6, sub-sec. 3 (Of receivers).

(u) *Hemanginee v. Kumode Chander* (1899) 26 Cal. 441.

(v) *Barkat-un-nissa v. Abdul Aziz* (1900) 22 All. 214.

(vv) *Yeswant v. Shankar*, (1892), 17 Bom. 388.

(w) *Oakes, In re* (1917). 1 Ch. 230.

Security not furnished by receiver.—Where the order whereby a person **O. 40, r. 1.** is appointed receiver requires him to give security so that the order is *conditional* upon his giving the security, he cannot be receiver until the security is given (x). It is otherwise where the order is not conditional but absolute in its terms; in such a case the order takes effect immediately it is made (y).

Receiver of future earnings of judgment-debtor.—The Court has no jurisdiction to enforce satisfaction of a judgment-debt by appointing a receiver of the future earnings of the judgment-debtor. "Unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable" (z). Similarly, a receiver cannot be appointed of future allowances of maintenance payable to a judgment-debtor (a).

Receiver in execution proceedings—See notes to s. 51. See also notes to **O. 21, r. 46**, under the head "Procedure where garnishee denies debt," p. 595 above.

Receiver after decree.—A receiver may be appointed even after a decree has been passed (b). See cl. (a) of the rule.

"All such powers as to bringing and defending suits as the owner himself has."—These words are wide enough to empower the Court to authorise a receiver to sue *in his own name*; hence where a receiver is authorised in that behalf, he may sue in his own name (c). And it has been held by the High Court of Calcutta that where a receiver is appointed with full powers under sub-r. (1), cl. (d), that is, with such powers as to bringing suits *as the owner himself has*, the receiver is entitled to sue in his own name though not expressly authorized to do so (d). As regards suits for *possession*, it is to be noted that though ordinarily a suit to recover possession of property can only be brought by him in whom there is a present title to it, yet if a receiver is appointed under this rule with such powers as to bringing suits *as the owner himself has*, he is entitled to sue for possession (e). But a receiver takes such title as the owner himself had in the property, and he cannot therefore sue for possession in a case in which the owner himself would not have been entitled to sue for possession (f).

"Realization of property."—After the dismissal of a suit in which a receiver has been appointed, the Court has no power to give the receiver any fresh power, as for instance, liberty to sell (g).

"All such powers as to the execution of documents which the owner himself has."—This includes a power to the receiver to execute a conveyance including the share of a minor defendant (h).

Suit by or against receiver—leave of Court—See notes under the same head, p. 807 above.

Contempt proceedings.—Where a receiver is appointed of property the subject of a suit, and the property is forcibly taken possession of by any person, not only the parties interested in the property, but also the receiver may proceed against such

x) *Edwards v. Edwards* (1876) 2 Ch. D. 291.
See also *Srinivas v. Kesho* (1911) 14 Cal. L. J. 489.

y) *Bhairab v. Nandiram* (1917) 46 Cal. 70.
z) *Holmes v. Millage* [1893] 1 Q. B. 551.
See also *Asad Ali v. Hasder Ali* (1911) 38 Cal. 13; *Ranees Annappurni v. Swaminatha* (1911) 34 Mad. 7, 9.

a) *Palikandy v. Krishnan* (1917) 40 Mad. 302.
b) *Shunmugam v. Moidin* (1885) 8 Mad. 229.

(c) *Oriental Bank Corporation v. Gobinoll* (1884) 10 Cal. 713, 732-733.

(d) *Fink v. Maharaj Bahadur Singh* (1898) 25 Cal. 612; *Jagat Tarini Dast v. Naba Gopal* (1907) 34 Cal. 305.

(e) *Haji Cassim v. Dutt* (1914) 19 C. W. N. 45.

(f) *Mahamed v. Panchapekesa* (1911) 35 Mad. 578.

(g) *Rabeholme v. Smith* (1907) 34 Cal. 336.

(h) *Basir Ali v. Hafiz* (1915) 43 Cal. 124.

40, r. 1. person for contempt. There is nothing to prevent the receiver from himself applying for a rule for contempt (i).

Appointment of new receiver in place of old receiver.—Where a receiver appointed under this rule institutes civil proceedings, and is then replaced by another receiver, it is necessary that the new receiver should be made a party to the proceedings (j).

Continuance of office.—A Court appointing a receiver may by its order provide that the office should continue permanently after the decree when such continuance is necessary, or for so long as it may be so (k).

A sues B in the Court of a Subordinate Judge. The suit is dismissed on a preliminary ground. A appeals to the High Court, and pending the appeal R is appointed receiver of the property in dispute in the suit. The High Court sets aside the decree of the lower Court, and the case is remanded to the lower Court for trial on the merits. After the appeal is over, T forcibly enters into possession of the property in the possession of R as receiver. R applies to the High Court that T may be committed for contempt. It is contended for T that the appeal being over, R must be decreed to have been discharged from the office of receiver when the appellate decree was passed. This contention will not prevail, for though the appeal may be over, R must be regarded as receiver of the property until he is finally discharged by the Court. Hence R is entitled to make the application to commit T for contempt (l).

Receiver's liability to account.—The Court appointing a receiver in a suit has authority, incidental to its jurisdiction, to order him to account, although the suit may be no longer pending (m). See r. 3 (b) below.

Suit by subsequent against former receiver.—A suit cannot be maintained by a present receiver of an estate against the former receiver for the recovery of money alleged to be due by the former receiver to the estate (n).

Receiver's lien.—A receiver, though discharged, is entitled to a lien on the estate for all his just claims and allowances. Hence the Court will not compel a receiver, who has been discharged, to make over the property in his possession, until his lien has been satisfied or provided for by a sufficient indemnity (o).

Joint receivers.—As a general rule appointment of more than one receiver whether by the same or a different Court, except in case of joint receivers, is not allowable (p).

Appeal.—An appeal lies not only from an order granting an application to appoint a receiver, but from an order rejecting such application (q) [O. 43, r. 1, cl. (s)]. But no appeal lies from directions given by a Court in passing receiver's accounts. Such directions do not come within any of the four clauses of sub-r. (1) (r). No appeal, however, lies to the Privy Council from an order refusing to appoint a receiver (s).

(i) *Grey v. Woogramohun* (1901) 28 Cal. 790.

(j) *Akula v. Dhella* (1905) 28 Mad. 157.

(k) *Mathuri v. Mathuri* (1896) 19 Mad. 120, 28 I. A. 28.

(l) *Grey v. Woogramohun* (1901) 28 Cal. 790.

(m) *Administrator-General v. Prem Lall* (1895) 22 Cal. 1011, 22 I. A. 203.

(n) *Per Fletcher, J., in Dutt v. Shamal* (1913) 41 Cal. 92.

(o) *Prem Lall v. Sumbhoonath* (1895) 22 Cal. 980, 978.

(p) *Woodroffe on Receivers*, p. 78.

(q) *Venkatasami v. Stridavamma* (1886) 10 Mad.

179; *Sangappa v. Shivbasawa* (1899) 24

Bom. 38; *Cursetji v. Gangaram* (1915) 17

Bom. L. R. 680; *Baidya Nath v. Makhan*

Lal (1890) 17 Cal. 680; *Khagendra v.*

Shashadhar (1904) 31 Cal. 495; *Muni*

Lal v. Jagannath (1916) I. O. 735;

Sant Ram v. Ram Chand (1910) Punj.

3 Dec. no. 36, p. 99. Cf. *Lachmi v.*

Ram Charan (1913) 35 All. 425 [In-

junction].

(r) *Keshobati v. Macgregor* (1908) 35 Cal. 568.

(s) *Chundil Dutt v. Pudmanund* (1895) 22 Cal.

928.

It has been held by the High Court of Calcutta (*t*), Bombay (*u*), and Allahabad (*v*), that an order that a receiver be appointed without appointing anybody by name as receiver and adjourning the application to a later date for so appointing one is not an order within the meaning of this rule and it is not therefore appealable under O. 43, r. 1, cl. (s). The contrary has been held by a Full Bench of the Madras High Court (*w*).

O. 40,
rr. 1-3.

A receiver is appointed of *B*'s property in a suit by *A* against *B*. *C* claims to be in possession of the property under an agreement between him and *B*, and he objects to the appointment of the receiver, but the objection is dismissed. The order comes within this rule, though *C* is not a party to the suit and is therefore appealable (*x*). An order appointing a receiver pending an application for the appointment of a common manager under s. 93 of the Bengal Tenancy Act 8 of 1885 also falls under this rule, and is therefore appealable under O. 43, r. 1, cl. (s) (*y*).

Letters Patent appeal.—An order directing a receiver in a suit to advance money to a guardian *ad litem* to enable him to conduct the defence on behalf of a minor defendant is not a "judgment" within the meaning of cl. 15 of the Letters Patent, and no appeal lies therefrom (*z*).

A receiver cannot delegate his powers to others—Where a receiver is appointed to collect the rents of an estate, it is his duty to collect the rents himself, or where the rents are collected by a clerk on his behalf, to receive the rents and to keep proper accounts thereof. If the rents received by the clerk are misappropriated, the receiver is bound to make good the loss. He is not justified in delegating or entrusting to another a duty entrusted to him by the Court (*a*).

Summary jurisdiction.—Where the matter complained of rests on an agreement which has not been carried out, the Court may interfere to prevent its receiver giving effect to the proposed agreement, and this it may do on the mere application of a party to the suit (*b*). But where the matter has passed out of the stage of agreement as where a lease has already been granted by the receiver, no summary order could be passed to set aside the lease, but the party aggrieved must proceed by suit against the receiver (*c*).

Form.—For form of appointment of receiver, see App. F., no. 9.

2. [S. 503, cl. (d).] The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

Remuneration.

Remuneration.—See notes under the same, p. 808 above. See also notes to r. 1, "Receiver's lien," p. 812 above.

3. [S. 503, 2nd part.] Every receiver so appointed shall—
Duties.

- (*t*) *Upendra Nath v. Bhupendra Nath* (1910) 13 Cal. L. J. 187.
- (*u*) *Narbadashankar v. Kevaldas* (1910) 17 Bom. L. R. 510.
- (*p*) *Ramji v. Koman* (1914) 13 All. L. J. 79.
- (*w*) *Palaniappa v. Palaniappa* (1916) 40 Mad. 18.
- (*x*) *Hudson v. Morgan* (1909) 36 Cal. 713; *Agabeg*

- v. Sundari* (1918) 3 Pat. L. J. 573.
- (*y*) *Asadali v. Mahomed* (1916) 43 Cal. 986.
- (*z*) *Kuppusami v. Rathnavelu* (1901) 24 Mad. 511.
- (*a*) *Balaji v. Ramchandra* (1895) 19 Bom. 660.
- (*b*) *Surendro Keshub Roy v. Durgasoondery* (1888) 15 Cal. 253.
- (*c*) *Krista Chandra Ghose v. Krista Sakha Ghose* (1909) 36 Cal. 52.

O. 40,
rr. 3-5.

- (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property ;
- (b) submit his accounts at such periods and in such form as the Court directs ;
- (c) pay the amount due from him as the Court directs ; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Appeal.—There is no right of appeal from the orders of the Court giving directions in passing a receiver's accounts (d).

Form.—For form of bond to be given by receiver, see App. F, form no. 10.

Enforcement of receiver's duties,

4. [New.] Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the amount due from him as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence.

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

Loss to property occasioned by wilful default of receiver.—"Property" includes the *income* of property (e). See notes to r. 1 "Loss occasioned by receiver's default," p. 808 above.

The Court may direct his property to be attached.—The property may be attached, even after the receiver's death, in the hands of his legal representatives (f).

Appeal.—An appeal lies from an order under this rule [O. 43, r. 1, cl. (s)]. But no appeal lies from an order declaring a receiver liable in respect of a sum of money unless the order includes a direction for the attachment of his property (g). ✓

5. [s. 504.] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the in-

When Collector may be appointed receiver.

terests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

(d) *Keshobati v. McGregor* (1908) 85 Cal. 578.
(e) *Raman v. Gopala* (1915) 89 Mad. 584.
(f) *Raman v. Gopala* (1915) 89 Mad. 584.

(g) *Ganesh Lal v. Kumar Satya Narayan* (1919) 4 Pat. L. J. 636.

ORDER XLI.

O. 41, r. 1

Appeals from Original Decrees.

1. [S: 541.] (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded.

Form of appeal. What to accompany memorandum.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

Contents of memorandum.

Appeal from original decree.—See s. 96 and notes thereto.

Defective vakalatnama.—A memorandum of appeal cannot be said to be properly presented, if it is presented by a vakil whose name does not appear in the vakalatnama, though by an oversight. In such a case the appeal should be dismissed though the objection to its validity is taken at a very late stage of the proceedings (h).

Memorandum shall be accompanied by a copy of decree and of judgment.—O. 41, r. 1, makes it an inflexible rule that in the case of appeals from decrees the memorandum of appeal shall be accompanied by a copy of the decree. The Court cannot dispense with it. A copy merely of the judgment is not sufficient. If a copy of the decree is filed after the expiration of the period of limitation prescribed for the appeal, the appeal is time-barred; the reason is that there is no valid appeal until a copy of the decree is filed. The same rule applies where an appeal is preferred from an order; in such a case the memorandum should be accompanied by a copy of the order (i): see O 43, r. 2. On the same principle, if the memorandum is not accompanied by a copy of the judgment, the appeal must be dismissed as time-barred unless the appellate Court dispenses with such copy (j).

Grounds of objection.—The grounds of objection must be such as arise from the pleadings and evidence, and are necessary for the decision of the case (k). The appellant must not be allowed in appeal to make out a new case (l), or a case inconsistent with the case set up by him in the lower Court (m). Nor could an appellate Court make an entirely new case for a plaintiff which he never made for himself at any period of the trial (n).

- (h) *Muhammad v. Jas Ram* (1913) 36 All. 46 [objection taken after the orders of remand].
 (i) *Qasim Ali v. Bhagwanta* (1918) 40 All. 12.
 (j) *Dhanpat Mal v. Meeta Mal* (1917) Punj. Rec. no. 87, p. 251.
 (k) *Nazur Ali v. Ojoodhyaram* (1866) 10 M. I. A. 540, 558.
 (l) *Indur Chunder v. Radhakishore* (1892) 19 Cal. 507, 19 I. A. 90; *Annamalay v.*

- Pitchu* (1905) 28 Mad. 122, 123.
 (m) *Gajapathi v. Vasudeva* (1892) 15 Mad. 508.
 19 I. A. 179; *Ilahi Khan v. Sher Ali* (1904) 26 All. 331; *Puran Mal v. Krant Singh* (1898) 20 All. 8, 10; *Gopee Lali v. Chundrasolee* (1872) 19 W. R. 12, I. A. Supp. vol. 131.
 (n) *Irangowda v. Seshapa* (1893) 17 Bom. 772, 773.

O. 41,
rr. 1, 2.

In drawing up the grounds of appeal it should be remembered that no subsequent event or devolution of interest can affect the decision of a question as it stood at the time the decree appealed against was pronounced. To give effect to these, some supplementary proceeding, and not an appeal, is the right procedure (o).

Grounds of objection which may be taken for the first time in appeal.—There are certain points which, though not taken in the lower Court, may yet be taken for the first time before the appellate Court. Thus an objection to the jurisdiction of the lower Court to entertain the suit may be taken for the first time in appeal (p). Similarly an objection on the score of a defect fatal to the suit may be taken for the first time in appeal, e. g., that a person interested in the mortgaged property was not joined as a party to the suit as required by O. 43, r. 1 (q), or that a notice required to be given by a zamindar to a putnidar under s. 8 of Regulation 18 of 1819 was defective in some essential particulars (r). But the defect in each case must appear on the face of the proceedings, otherwise the objection will not be entertained (s). Similarly the plea of *res judicata* may be taken for the first time in appeal, provided it can be decided upon the record before the Court (t). But where in a suit for a declaratory decree, it was contended for the first time in appeal that the Court had no power to pass a declaratory decree having regard to the facts of the particular case, it was held that the objection should not be entertained. Such an objection does not go to the *jurisdiction* of the Court (u).

Limitation.—As to the period of limitation for appeals, see Limitation Act, 1908, sch. I, arts. 151, 152 and 156. S. 5 of the Limitation Act provides that an appeal may be admitted after the period of limitation, if the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within such period. S. 12 of the same Act provides that in computing the period of limitation provided for an appeal, the time requisite for obtaining a copy of the decree appealed from should be excluded. See notes to r. 2 below, "Leave of Court: Limitation."

When appellate Court may not interfere with findings of fact.—Generally speaking it is undesirable for an appellate Court to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses. The view of the trial judge as to the credibility of witnesses should not be put aside on a mere calculation of probabilities by the appellate Court (v).

Form.—For form of memorandum of appeal, see App. G, form no. 1.

2. [s. 542.] The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the appellate Court, in deciding the appeal, shall not be confined

Grounds which may be taken in appeal.

- (o) *Anundmoyee v. Sheeb Chunder* (1862) 2 W. B. P. C. 19.
(p) *Ramayya v. Subbarayudu* (1890) 13 Mad. 25.
(q) *Ghulam Kadir v. Mustakim* (1896) 18 All. 109.
(r) *Ahsanulla v. Harioharn* (1893) 20 Cal. 86, 19 I. A. 191.
(s) *Ib.*
(t) *Kanahai Lal v. Suraj Kunwar* (1899) 21

All. 446.

- (u) *Bombay Burmah Trading Corporation v. Smith* (1893) 17 Bom. 197, 220-221.
(v) *Bombay Cotton Mfg. Co. v. Motilal Shivalal* (1915) 42 I. A. 110, 39 Bom. 386; *Ram Parkash Das v. Anand Das* (1916) 43 I. A. 73, 83, 43 Cal. 707, 722; *Nandalal v. Panchanan* (1917) 45 Cal. 60, 71; *Sundar Singh v. Krishna Mills Co. Ltd.* (1914) Punj. Rec. no. 63, p. 214.

to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule : b. 41, r. 2.

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

Leave of Court: Limitation.—The appellant cannot, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. Thus if the plea that the *suit* is barred by limitation is not taken in the memorandum of appeal, the appellant cannot urge that plea in appeal *without the leave of the Court*. The appellate Court may grant leave, but it is not bound to do so. But the leave should not be refused if the point of limitation arises on the face of the *plea* (w). And, further, under the latter part of this rule, the appellate Court can of its own motion take cognizance of the question as to whether the *suit* is barred by limitation, though the plea of limitation has not been taken in the memorandum of appeal and rest its decision on that ground provided the opposite party is given an opportunity of being heard on the point. In either case, however, the bar of limitation must be patent on the face of the proceedings (x). The same rules apply where the plea that the *suit* is barred by limitation is raised for the first time in second appeal (y).

The case put above must be distinguished from the case contemplated by s. 3 of the Limitation Act, 1908. That section provides that every suit instituted and every appeal preferred after the period of limitation shall be dismissed although limitation has not been set up as a defence. This means that under s. 3 it is the duty of the Court of first instance to dismiss a *suit* if it is barred by limitation, *whether the plea of limitation has been taken by the defendant or not* (z). Similarly it is the duty of the appellate Court to dismiss an *appeal* before it, if the appeal was barred by limitation when presented, *whether limitation has been set up as a defence or not*; that is to say, if it is a first appeal, the appeal should be dismissed by the first appellate Court, and if it is a second appeal it should be dismissed by the second appellate Court. But that section does not impose any duty upon an appellate Court to entertain the plea of limitation, if the question is not whether the *appeal* before it is barred by limitation, but whether the *suit* was so barred. Similarly the said section does not impose any duty upon the second appellate Court to entertain the plea of limitation, if the question is not whether the second appeal is barred by limitation, but whether the *first appeal* was so barred. It is the provisions of the present rule that apply to the two last-mentioned cases, and not the provisions of s. 3 of the Limitation Act. Hence in those cases the plea of limitation must be specifically taken in the memorandum of appeal or by leave of the Court under this rule.

Proviso to the rule.—The appellate Court is not precluded from basing its decision upon a ground not set forth in the memorandum of appeal nor taken by leave of the Court under this rule (a); but this power is to be exercised by the Court alone and neither party can claim it as of right (b). But though the appellate Court may rest its decision on a ground not set forth in the memorandum of appeal, it has no power to do so where a particular point taken in the pleadings has been *deliberately abandoned* by a party at the trial of the *suit* before the lower Court (c).

(w) *Balaram v. Mangta Dass* (1907) 34 Cal. 941.
 (x) *Ahmad Ali v. Wario Hussain* (1898) 15 All. 123; *Deo Narain v. Webb* (1901) 28 Cal. 86; *Venkata v. Bhaskyakurru* (1902) 25 Mad. 367, 29 I. A. 76.
 (y) *Bhadat v. Shatish Manowar* (1919) 4 Pat. L. J.

645, 649-650.
 (z) *Ghulam Khan v. Muhammad Hassan* (1902) 29 Cal. 167, 185, 29 I. A. 51.
 (a) *Thakuri v. Kundan* (1895) 17 All. 289.
 (b) *Bansidhar v. Sita Ram* (1891) 13 All. 38.
 (c) *Govindrav v. Balu* (1892) 16 Bom. 53.

O. 41,
rr. 2-4.

New questions of fact.—In this connection we may note the following observations made in the course of a judgment in a Madras case: "Though we may perhaps consider in appeal any *question of law* arising from facts which are either admitted or undisputed, we cannot allow without any satisfactory reason new *questions of fact* to be raised for the first time in appeal (d).

* **Making a new case in appeal.**—A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit (e).

3. [S. 543.] (1) Where the memorandum of appeal is not drawn up in the manner herein-before prescribed, it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

Rejection or amendment
of memorandum.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

Returned for amendment.—When a memorandum of appeal is returned for amendment, the Court should fix a time for its return (f). See s. 107.

Appeal.—A decision rejecting a memorandum of appeal on the ground that it is barred by limitation (g), or that it is insufficiently stamped (h), or that it was not duly presented (i), has the force of a decree within the meaning of s. 2, and is therefore appealable.

Appellate Court to have same power as Courts of original jurisdiction.—It is important to note at this stage the provisions of s. 107. That section provides that the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed on Courts of original jurisdiction in respect of suits instituted therein.

4. [S. 544.] Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

One of several plaintiffs or defendants may obtain reversal of whole decree where the proceeds on ground common to all.

(d) *Narayana v. Changalamma* (1887) 10 Mad. 1, 8.
(e) *Nathu v. Umedlal* (1909) 33 Bom. 35.
(f) *Jagan Nath v. Lalman* (1876) 1 All. 260.
(g) *Gulab Rai v. Mangil Lal* (1885) 7 All. 42;
(h) *Raghunath v. Nilu* (188.) 9 Bom. 452;

Gunga Dass v. Ramjoy (1886) 12 Cal. 30.
(h) *Rup Singh v. Mukhras* (1885) 7 All. 887.
(i) *Ayyanna v. Nagabhooshanam* (1893) 6 Mad. 285.

Ground common to all the defendants.—This rule provides that where O. 41, r. 4. there are more defendants than one, and the decree appealed from proceeds on any ground common to all the defendants, any one of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the defendants (j). It is not necessary for the application of this rule that the decree should proceed on *every* ground common to all the plaintiffs or to all the defendants; it is quite sufficient if it proceeds on *any* ground common to all the plaintiffs or to all the defendants. A sues B, C and D for recovering possession of certain lands on declaration of title thereto alleging that he was dispossessed by all the defendants together in pursuance of a conspiracy between them. B, C and D file separate written statements denying A's title and also denying dispossession and each claiming to hold separate parcels of land from third parties. The Court of first instance finds in favour of the title and the possession of A and that A was dispossessed by B, C and D. B alone appeals from the decree. The appellate Court finds that A had failed to prove the title set up by him or that he was in possession of the land. Should the appellate Court reverse the decree of the lower Court in favour of B alone who appealed from the decree, or should it reverse the decree of the lower Court in favour also of C and D though they did not join in the appeal? The answer is that if the decree of the lower Court proceeded on a ground common to all the three defendants, the decree should be reversed under this rule not only in favour of B but also in favour of C and D. Now the ground of defence common to all the defendants was that A had no title to the lands and the decree of the lower Court proceeded on the ground that A had a title to the lands. The decree therefore proceeded on a ground common to all the defendants. The appellate Court should therefore reverse the decree not only in favour of B but also in favour of C and D. It is quite immaterial that the defendants claimed to be interested by different titles in separate portions of the lands. It is enough if *any one ground* on which the decree appealed from proceeds is common to all the defendants (k). But the provisions of this rule do not apply, unless the lower Court whose decree is appealed from has proceeded upon some ground common to all the plaintiffs, or all the defendants. If the lower Court has not proceeded upon any such ground, it is not competent to the appellate Court to reverse the decree as to all the plaintiffs or all the defendants upon a ground which the appellate Court considers to be common to all the plaintiffs or all the defendants (l).

If in the case put above, the appellate Court while reversing the decree in favour of B, refuses to reverse it in favour also of C and D on the ground that it has no power to do so, the decree of the appellate Court will be subject to revision for failure of exercise of jurisdiction (m). See s. 115, cl. (b). If the decree appealed from proceeds on a ground common to all the defendants, the appellate Court may reverse the decree in favour of all the defendants even if some of the defendants suffered the decree to be passed ex parte against them (n).

Ground common to all the plaintiffs.—A and his son B jointly sue C to recover Rs. 2,000. A decree is passed for the plaintiffs for Rs. 500 only. A alone appeals from the decree. C files cross-objections under r. 22 below. The appellate Court rejects the plaintiff's claim *in toto*, and reverses the decree of the lower Court. Subsequently B, who did not join in the appeal, applies for execution of the original decree against C. B is not entitled to take out execution, for although he was not a party to the appeal, he is bound under this rule by the decree of the appellate Court (o).

(j) See *Somasundaram v. Vaitilinga* (1916) 40 Mad. 846, 867 [reverser v. Allenees from widow].

(k) *Ram Kamal v. Ahmed Ali* (1908) 30 Cal. 429; *Dhulaloor v. Paidiyantam* (1907) 30 Mad. 470; *Annamalai v. Pitchu* (1905) 28 Mad. 122; *Ambika Prasad v. Pardip Singh* (1914)

19 C. W. N. 233.

(l) *Puran Mal v. Krant Singh* (1898) 20 All. 8; *Chajju v. Umrao* (1900) 22 All. 386.

(m) *Seshadri v. Krishna* (1885) 8 Mad. 192.

(n) *Ram Tahal v. Sukeswar* (1916) 1 Pat. L. J. 143.

(o) *Babaji v. Collector of Salt Revenue* (1887) 11 Bom. 596.

O. 41,
rr. 4,5.

See notes to r. 22 below under the head "A respondent may urge cross-objections against the appellant but not as a rule against a co-respondent."

May reverse decree in favour of all plaintiffs or defendants.—The word "may" shows that the appellate Court is given a discretion in the matter. It may therefore reverse the decree in favour of *some* only of the plaintiffs or defendants. It is not bound to do so in favour of *all* of them (p).

Death of one of several appellants in cases where the decree appealed from proceeds on a ground common to all of them.—See notes to O. 22, r. 3, 'The suit shall abate so far as the deceased plaintiff is concerned,' p. 663 above.

Stay of proceedings and of execution.

5. [S. 545.] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate Court may for sufficient cause order stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

Alterations in the rule :—

O. 41, r. 5.

1. The first part of sub-r. (1), namely, "An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order" is new. The object is to make express provision for a stay of proceedings from a decree pending an appeal from the decree. Thus if a preliminary decree is passed in a suit for accounts between a principal and an agent [O. 20, r. 16], and an appeal is preferred from the decree, the appellate Court may under this rule stay the inquiry into the accounts pending the appeal from the decree. Under the Code of 1882 the Court directed a stay in cases like these in the exercise of its *inherent power*, as there was no express provision in the Code in that behalf (q).
2. Sub-r. (4) is new. It authorizes an *ex parte* stay. The need for such an order constantly arises in practice.

"Stay of proceedings under a decree."—See notes above, "Alterations in the rule."

Stay of execution.—Once an appeal is preferred from a decree, it is the appellate Court alone that is seized of the matter, and an application for a stay of execution should be made to that Court. Where no appeal is preferred, the application should be made to the Court *which passed the decree*, but the application will not be entertained unless the decree is one from which an appeal lies, and the application is made before the expiry of the time allowed by law for appealing therefrom (r).

Although the appellate Court may under this rule stay proceedings in execution when an appeal is preferred from a decree, it has no power to stay execution of a decree when an appeal is preferred from an order appealable under s. 104. A obtains a decree *ex parte* against B. B applies under O. 9, r. 13, to have the decree set aside, but the application is rejected. B appeals from the order rejecting the application under O. 43, r. 1, cl. (d), and applies to the appellate Court to stay execution of the *ex parte* decree against him. It is not competent to the appellate Court to stay execution of the decree there being no appeal preferred from the decree (s). Contrast r. 8 below.

Where decree has been executed.—An order for a stay of execution implies that the decree has not been executed. Therefore where a decree has been executed, no order can be made under this rule (t). See r. 6 below.

Circumstances under which stay of execution may be granted.—The Court has the power under this rule to make an order for a stay of execution for "sufficient cause." But no order should be made for a stay of execution unless the Court is satisfied that substantial loss may result to the party applying for a stay of execution if the execution is not stayed (u). And even if the Court is satisfied that substantial loss may result, no order should be made unless the application has been made without unreasonable delay, and, further, unless the Court is satisfied that security has been given by the applicant for the due performance of such decree as may ultimately be binding upon him [sub-r. (3)]. The Court should not accept a security the validity of which is not free from reasonable doubt and the enforcement of which may lead to protracted litigation (v).

(q) *Balkishan Sahu v. Khugnu* (1904) 31 Cal. 722.

(r) *Amir Hasan v. Ahmed Ali* (1887) 9 All.

36; *Ishan Chunder v. Ashanoollah* (1884)

10 Cal. 317.

(s) *Bhagwat v. Shoo Golam* (1904) 31 Cal. 1081.

(t) *Dharram Singh v. Kishan Singh* (1888) 12

C. L. R. 532.

(u) *Gaikwar Sirkar v. Ghansi* (1901) 25 Bom. 248.

(v) *Srinibash Prasad v. Kesho Prasad* (1911) 38

Cal. 754, 775.

O. 41, r. 5. **Notice to decree-holder.**—It has been held by the High Court of Bombay that a final order staying execution should not be made without notice to the decree-holder; if it is made without notice, it is illegal and it may be set aside under s. 115 above (w). The High Court of Patna has held differently (x). An *interim* stay, however, may be granted *ex parte* [see sub-r. (4)].

Application of the rule.—A obtains a decree against B for the recovery of certain immoveable property, and applies for execution of the decree. If B has preferred an appeal from the decree, B may apply to the appellate Court for a stay of execution on the ground that if execution is not stayed and the property is delivered to A, A may do away with the property which may result in substantial loss to him. If the appellate Court is satisfied that substantial loss may result if the execution is not stayed, and if the application has been made without unreasonable delay, the appellate Court may order execution to be stayed under this rule upon security being given by B that if the decree of the lower Court is confirmed, he will deliver possession of the property to A. If the decree of the lower Court is confirmed, and if B fails to deliver possession of the property to A, A may proceed against the surety.

Security for performance of decree.—The nature and extent of the liability of a surety under this rule depends on the words of the security-bond (y). Thus where the bond was to perform all orders and decrees passed in appeal, it was held that the obligation under the bond extended to the final decree passed in second appeal (z). When immoveable property is given by a judgment-debtor as security for the due performance of a decree under sub-r. (3) (c), it can be realized in execution without attachment. The provision of O. 34, r. 14, do not apply to such a case, and, further, the matter being one relating to execution within s. 47, a separate suit does not lie (a). As to the mode of enforcing a security-bond given under this rule, see notes to s. 145 under the head "Security for the performance of any decree," p. 316 above.

A security-bond given under this rule mortgaging immoveable property exceeding Rs. 100 in value requires registration under the Transfer of Property Act, s. 59, and the Registration Act, s. 17, in order to make it effective against the property (b).

Effect of uncommunicated order staying execution.—It has been held by the High Court of Calcutta (c), that where an order is made by an appellate Court staying execution of a decree, but before the order is communicated to the Court executing the decree, the property of the judgment-debtor is sold in execution, the sale is invalid and cannot stand, the reason given being that when an unconditional order for stay of execution is made, the order becomes operative the moment it is made and suspends the power of the lower Court to continue the proceedings in execution. On the other hand, it has been held by the Madras High Court (d) that such sale is valid, the reason given being that the Court of first instance still retains jurisdiction to execute its decree notwithstanding an appeal from it, and that the power to execute the decree can only be taken away by some communication to it of the order of the appellate Court. The latter view, it is submitted, is correct.

(w) *Mullachand v. Kharsedji* (1891) 15 Bom. 536.

(x) *Mulchand v. Tarni Prasad* (1919) 4 Pat. L. J. 642.

(y) *Ameer Ali, In the matter of* (1870) 13 W. R. 408.

(z) *Shivlal v. Apaji* (1878) 2 Bom. 654, 3 Bom. 204.

(a) *Subramanian v. Raja of Ramnad* (1917) 41 Mad. 327; *Shyam Sundar v. Bajpat* (1903) 30 Cal. 1060; *Mukta Prasad v. Mahadeo* (1916) 88 All. 327. The decision in *Tokhan Singh v. Girwar Singh* (1905) 32 Cal. 494, is no longer law in view of the al-

teration in the language of s. 99 of the transfer of Property Act, 1882, now O. 34, r. 14.

(b) *Tokhan Singh v. Girwar Singh* (1905) 32 Cal. 494; *Nagaruru v. Tangatur* (1908) 31 Mad. 330.

(c) *Hukum Chand v. Kamalanand* (1906) 33 Cal. 927; *Sati Nath v. Ratanmanti* (1912) 15 C. L. J. 335.

(d) *Muthu Kumarasami v. Kuppusami* (1909) 33 Mad. 74; *Venkatachalapati v. Kameswaramma* (1917) 41 Mad. 151, overruling *Ramanathaiah v. Arunachellam* (1915) 33 Mad. 766.

Costs.—The applicant who asks for stay of execution should, as a rule, pay the costs of the application, even if the application is successful. The reason is that an applicant asking for stay of execution asks for an indulgence which will have the effect of interfering for the time being with the enforcement of the decree, and he who seeks such an indulgence should in the absence of special circumstances pay for it (e).

O. 41,
rr. 5, 6.

Appeal.—No appeal lies from an order by the appellate Court refusing to stay execution under this section. Such an order is not a “decree” within the meaning of s. 2, cl. 2 (f). It is not settled whether such an order is a “judgment” within the meaning of cl. 15 of the Letters Patent, and therefore appealable as such. It has been held by the High Court of Madras that an order refusing to stay execution is not a “judgment” within the meaning of cl. 15 of the Letters Patent, and that no appeal lies from it under that clause (g). The contrary has been held by the Calcutta High Court (h). The view taken by the Calcutta Court has been approved in a recent Madras case (i).

Where an order is made for stay of execution on security being furnished by the judgment-debtor, and such security is furnished, no appeal lies from the order at the instance of the decree-holder. Such an order cannot be said to conclusively determine any question relating to the rights and liabilities of parties with reference to the relief granted by the decree, and it does not therefore come within s. 47 and s. 2, cl. (2) (j). See notes to s. 47, “Appeal,” p. 136.

Review.—The Court making an order under this rule may cancel [or vary] it at any time (k).

Form.—For form of security bond, see App. G, form no. 2.

6. [S. 546.] (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the appellate Court, or the appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

(e) *Chunt Lal v. Anantram* (1898) 25 Cal. 893.

(f) *Ramchandra v. Balmukund* (1904) 29 Bom.

71; *Malamal v. Kavalappara* (1914) 27

Mad. L. J. 171.

(g) *Durga Prasad v. Malkarjuna* (1901) 24

Mad. 358.

(h) *Brij Coomares v. Ramrick Dass* (1900) 5 C. W. N. 781.

(i) *Tuljaram v. Alagappa* (1910) 35 Mad. 1, 8, 19-20, [F. B.].

(j) *Saraswati v. Golap Das* (1913) 41 Cal. 180.

(k) *Amir Hasan v. Ahmad* (1887) All. 36.

O. 41,
rr. 6-8.

Alterations in the rule:—

1. The words "or has been taken" have been added in sub-r. (1) to make it clear that security may be required though the property has already been taken in execution. These words give effect to a Calcutta decision (l).
2. The words "of money," which occurred in the old section after the words "in execution of a decree," have been omitted.
3. The words "to the Court which made the order" in sub-r. (2) are new. These words show that an application for a stay of sale is to be made to the Court which made the order for sale.

Application of the rule.—This rule does not apply unless (1) there is an order made for the execution of a decree and (2) there is an appeal pending from that decree (m). A judgment-debtor whose application for a stay of execution is refused under r. 5 may apply under this rule. The application contemplated by sub-r. (1) is an application by the judgment-debtor (who has appealed from the decree) for security to be given by the decree-holder for the restitution of any property that may be taken in execution or for the payment of the value of such property if the decree of the lower Court is reversed in appeal. Thus if A obtains a decree against B for the recovery of certain immovable property and an order is made for execution of the decree, B may, after filing an appeal from the decree, apply for an order requiring A to give security for the restitution of the property to him (B), or for the payment of the value thereof, if the appeal is decided in his favour. The application may be made to the Court which passed the decree or to the appellate Court (n). If the application is made to the Court which passed the decree, such Court shall, on sufficient cause being shown by B for requiring the security, direct A to give the security. But if the application is made to the appellate Court, that Court may, in its discretion, require security to be given.

Enforcement of security bond given under this rule.—See notes to s. 145 under the head "Security for restitution of property taken in execution of a decree," p. 317 above.

Appeal.—No appeal lies from an order under this rule.

Form.—For form of security bond, see App. G, form no. 3.

7. [S. 547.] No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

No security to be required from the Government or a public officer in certain cases.

8. [New.] The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

Exercise of powers in appeal from order made in execution of decree.

(l) *Hukum Chand v. Kamalanand* (1906) 33 Cal. 927. (n) *Lakshmanan v. Palaniappa* (1918) 41 Mad. 818.
(m) *Janardan v. Nilkanth* (1901) 25 Bom. 583.

Scope and object of the rule.—This rule is new. It has been added to meet particularly the case where the litigant does not quarrel with the decree, but appeals from an order passed in execution of that decree. In such a case the rule provides that the appellant may apply for a stay of execution of the decree under r. 5 or for security for restitution under r. 6. A obtains a decree against B, and applies for execution. B objects to the execution, but the objection is disallowed. B prefers an appeal from the order disallowing his objection. B may apply for a stay of execution of the decree under r. 5 pending the disposal of the appeal from the order. This is in accordance with the undermentioned decision under the Code of 1882 (o).

O. 41,
rr. 8-10.

Procedure on admission of appeal.

9. [S. 548.] (1) Where a memorandum of appeal is admitted, the appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal.

Register of Appeals.

(2) Such book shall be called the Register of Appeals.

10. [S. 549.] (1) The appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.

Appellate Court may require appellant to furnish security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates.

Where an appellant resides out of British India.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

Scope and object of the rule—The object of the rule is to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in getting out of the appellant. Under sub-r. (1) the appellate Court may, in its discretion, require security for costs. Under the proviso to that sub-rule the Court shall demand security for costs. If no security is furnished, the Court should reject the appeal, whether the order for security is made under the sub-rule or the proviso (p).

O.41, r. 10. **Application of the rule.**—This rule applies not only to appeals from substantive decrees, but also to appeals from interlocutory orders under s. 104 and to appeals from orders in execution under s. 47 (q), but it does not apply to appeals under cl. 15 of the Letters Patent (r). The opinion has also been expressed that every appeal from a decree of a single Judge of a Chartered High Court passed in the exercise of ordinary original civil jurisdiction to other Judges of the same Court is an appeal not under the Code, but under cl. 15 of the Letters Patent. The reason given is that the provisions of the Code relating to appeals, that is, ss. 96 and 104, relate to appeals from one Court to another of higher grade, and that the only provision of law which allows an appeal from the decree of one or more Judges of a Chartered High Court to other Judges of the same Court is that contained in cl. 15 of the Letters Patent (s). As stated by Jenkins, C.J., "the Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on cl. 15 of the Charter (t). From this point of view, neither this rule nor any other rule of this Order can apply to an appeal from a decree of a single Judge of a Chartered High Court passed in the exercise of ordinary original civil jurisdiction. However this may be, it is clear that the provisions of this rule do not apply if there be a rule inconsistent therewith made by a Chartered High Court as it is empowered to do under s. 129 of the Code (u).

Appeals in forma pauperis.—It has been held by the High Court of Madras (v) that this rule applies to pauper appeals: thus an appellant, who has presented his appeal *in forma pauperis*, may be called upon to give security for costs under this rule, but very special grounds must be shown to support such an application. On the other hand, it has been held by the High Courts of Calcutta (w) and Bombay (x) that this rule does not apply to appeals preferred *in forma pauperis*.

When power to require security for costs is discretionary.—Except in the case referred to in the proviso to sub-r. (1), the power of the appellate Court to require security for costs is discretionary. The mere fact that the appellant is poor or insolvent is no ground for demanding security for costs (y). Similarly mere non-payment of the costs of the original hearing is no ground for calling upon the appellant to furnish security under this rule, unless his conduct be shown to be vexatious, that is such as indicates a wilful determination on his part not to obey the order of the Court in respect of costs (z). But the Court will, as a general rule, demand security for costs from a poor or insolvent appellant, if it is proved to the satisfaction of the Court that the appellant is not the real litigant, but a mere puppet in the hands of others who are well able to furnish security (a), or if the merits of the case are plainly in favour of the respondent (b). See notes to O. 25, r. 1, under the head "Poverty of plaintiff," p. 674 above.

At what stage respondent should apply for security.—The respondent should apply promptly, or else it might be urged that he had waived his right (c).

(q) *Dagdu v. Chandrabhan* (1900) 24 Bom. 314.

(r) *Sesha Ayyar v. Nagarathna* (1904) 27 Mad. 121.

(s) *Sabhapati v. Narayanasami* (1901) 25 Mad. 555, 558.

(t) *Debendra Nath v. Bibudhendra* (1916) 43 Cal. 90, 98-94.

(u) *Nawab Behram Jung v. Haji Sultanali* (1912) 37 Bom. 572.

(v) *Seshayyengar v. Jainulavadin* (1880) 3 Mad. 66; *Srinivasa v. Subramania* (1907) 17 Mad. L. J. 58.

(w) *Nusseroodin v. Ufful* (1871) 17 W. R. 68. See also *Mussamat Hafizan v. Abdul Karim* (1908) 12 O. W. N. 163 cited in the notes to

O. 25, r. 1.

(x) *Khemraj v. Kishanlal* (1917) 42 Bom. 5.

(y) *Jwan Ali v. Basa Mal* (1883) 8 All. 203; *Hewetson v. Deas* (1894) 21 Cal. 528; *Maneckji v. Goolbat* (1879) 3 Bom. 241.

(z) *Ahmed v. Shaik Essa* (1889) 13 Bom. 458. *Ramsing v. Balubhat* (1908) 5 Bom. L. R. 661.

(a) *Assenoolajoo v. Solomon* (1887) 14 Cal. 533.

(b) *Muzhur v. Deno Bundo*, Bourke (1865) 119.

(c) *Bhobonath v. Radha Prosad* (1900) 5 Cal. W. N. 119; *Wise v. Jugbundo* (1859) 7 M. I. A. 431; *Thakur Das v. Kishori Lal* (1887) 9 All. 164.

O. 41,
rr. 10, 11.

Order for security.—When an order is made under this rule for security for costs, it is not necessary that any specific sum should be named in the order. It is sufficient if the order directs the appellant to furnish security “for the costs of the original suit” or “for the costs of the appeal” or “for the costs of the appeal and the original suit” (d).

Extension of time for furnishing security.—The appellate Court may, under exceptional circumstances, extend the time for furnishing security [see s. 148]. Thus where the appellant alleged that he was unable on account of plague in Bombay to raise the money required for security within the time fixed by the Court, the Court extended the time for giving security. The time for giving security may be extended either before its expiry or afterwards (e).

“Court shall reject the appeal.”—The appeal should not be rejected if the order for security has been made without notice to the appellant (f).

Restoring of appeal.—An appeal, although it may have been rejected by the appellate Court under this rule upon failure of the appellant to furnish security, may be restored on sufficient grounds at the Court’s discretion (g). But no appeal lies from an order refusing to restore it (h).

Appeal from order rejecting appeal under sub-rule (a).—An order rejecting an appeal under this rule is not appealable as an order under O. 43, for it is not one of the orders specified therein. Nor is it appealable as a decree, for it does not *conclusively* determine the rights of the parties with regard to any of the matters in controversy in the appeal within the meaning of the definition of decree [s. 2, cl. (2) (i)].

Appeal from order dismissing petition praying Court to receive security for costs.—An order is made under sub-rule (1) directing an appellant to furnish security for costs. The order is indefinite in that it does not fix the exact date on or before which security is to be given. The appellant, believing that the time for giving security has expired, applies to the Court to receive the amount fixed by the order as security. The Court holds that the time for furnishing security has expired, and refuses the application. The appellant is entitled to appeal from the order under cl. 15 of the Letters Patent, as the effect of the order would be to finally deprive the appellant of his power of prosecuting his appeal (j).

Insolvency appeal.—There is a conflict of decisions as to whether this rule applies to the case of an appeal from an order passed by a Judge in insolvency under the Presidency Towns Insolvency Act 3 of 1908, it being held by the High Court of Madras that it does not (k), while by the High Court of Calcutta that it does (l). The latter view, it is submitted, is the correct view. See Act 3 of 1908, s. 8 (2) (b).

Form.—For form of security for costs of appeal, see App. G., form No. 4.

11. [S. 551.] (1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from

Power to dismiss appeal without sending notice to lower Court.

(d) *Lekha v. Bhauna* (1896) 18 All. 101.

(e) *Badr Narain v. Sheo Koer* (1890) 17 Cal. 512.
17 I. A. 1; *Rajab Ali v. Amir Hossein* (1890)
17 Cal. 1; *Jumna Bai v. Vissandas* (1897) 21
Bom. 576.

(f) *Sirajulhaq v. Khadim* (1888) 5 All. 380;
Timmu v. Deva (1882) 5 Mad. 265.

(g) *Balwant Singh v. Daulat Singh* (1886) 8 All.
315, 13 I. A. 57.

(h) *Firozi Begam v. Abdul Latif* (1908) 30 All. 143.

(i) *Lekha v. Bhauna* (1896) 18 All. 101.

(j) *Vidhyapurana v. Vidyanidhi* (1901) 25 Mad. 854.

(k) *Sesha Ayyar v. Nagarathna* (1903) 27 Mad. 121.

(l) *Lakshpriya v. Raikishori* (1916) 43 Cal. 248.

O.41, r.11. whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

Alterations in the rule :—

1. In sub-r. (1) the words "after sending for the record if it thinks fit to do so" are new. These words have been added to empower the Court to send for the record if it thinks fit to do so before summarily dismissing an appeal without giving notice to the respondent.
2. The words "the Court may make an order that the appeal be dismissed" have been substituted for the words "the appeal shall be dismissed for default," to make it clear that no appeal lies from an order of dismissal for default. See s. 2, cl. (2), sub-cl. (b). Under the old section it was held that a decision dismissing an appeal for default was a decree and was therefore appealable (m).

Dismissal of appeal under sub-rule 1: whether judgment necessary.—Under the corresponding section of the Code of 1882 it was held by the High Court of Calcutta that the dismissal of an appeal under sub-r. (1) did not relieve the lower appellate Court from the necessity of writing a judgment in the manner prescribed by s. 571 of that Code [now r. 31 of this Order] (n). A different view, however, was taken by the High Court of Allahabad (o). The present Order is divided into distinct parts under appropriate headings, an arrangement which did not appear in the corresponding Chapter of the Code of 1882. Rule 11 comes under the heading "Procedure on admission of appeal." The next heading of the Order is "Procedure on hearing," and r. 31 comes under the next following heading "Judgment in appeal." Relying upon this classification, it was held by the High Court of Bombay in *Tanaji v. Shankar* (p) that under the present Code it is not obligatory upon the lower appellate Court, in dismissing an appeal under this rule, to write a judgment as required by r. 31. But this decision has since been overruled by a full Bench of the same Court, on the ground that it was in conflict with the previous practice of that Court which was based on a Civil Circular being Circular 51, published in 1890 under the provisions of the High Courts Act, 1861, by which it is provided that when an appellate Court dismisses an appeal under s. 551 [now r. 11 of this Order], a judgment should be written and a formal decree drawn up. In the course of the judgment Sir Basil Scott, C.J., said: "There is nothing in the new Code of Civil Procedure which introduces any change in the law, except in so far as the rules commencing with rule 9 of Order XLI are headed 'Procedure on admission of appeal.' That change is not sufficient to abrogate the rule published under the High Courts Act which is quite consistent with the provisions of the Code (q)." The result is that, according to the Bombay High Court, when an appeal is dismissed under this rule, a judgment should be written and a formal decree drawn up.

(m) *Uma Sundari v. Bindu* (1897) 24 Cal. 759.
 (n) *Ramji Deka v. Brojo Nath* (1898) 25 Cal. 97.
 (o) *Samir Hassan v. Piran* (1908) 30 All. 319.

(p) (1911) 36 Bom. 116.
 (q) *Hanmani v. Annaji* (1913) 37 Bom. 610 [F.B.].

Dismissal of appeal for default under sub-r. (2).—Where an appeal is dismissed for default, it is the decree of the lower Court alone that can be enforced in execution (r). See notes to s. 36, "What decrees may be executed."

O. 41,
rr. 11-13.

Review.—When a second appeal is dismissed under this rule, the High Court has no power to review its judgment on the ground of the discovery of new and important matter (s). See notes to O. 47, r. 1, "No review allowed on a question of fact after decision of second appeal."

Re-admission of appeal dismissed for default under sub-rule (2).—An appeal dismissed under sub-r. (2) may be re-admitted under r. 19.

12. [S. 552.] (1) Unless the appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

Day for hearing appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

13. [S. 552.] (1) Where the appeal is not dismissed under rule 11, the appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

Appellate Court to give notice to Court whose decree appealed from.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the appellate Court.

Transmission of papers to appellate Court.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

Copies of exhibits in Court whose decree appealed from.

Alteration in the rule.—In sub-rule (1) the words "where the appeal is not dismissed under r. 11" have been substituted for the words "when the memorandum of appeal is registered."

Form.—For form of intimation to lower Court of admission of appeal, see Appendix G, form no. 5.

O.14,
rr. 14-17.

14. [S. 553.] (1) Notice of the day fixed under rule 12 shall be affixed in the appellate Court-house, and a like notice shall be sent by the appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the appellate Court in the manner provided for the service of a defendant of a summons to appear and answer and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Publication and service of
notice of day for hearing
of appeal.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

Appellate Court may itself
cause notice to be served.

Form.—For form of notice to respondent, see Appendix G, form no. 6.

15. [S. 554.] The notice to the respondent shall declare that, if he does not appear in the appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Contents of notice.

Procedure on hearing.

16. [S. 555.] (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

Right to begin.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

Right to begin.—The mere fact that the respondent calls in question the right of the appellant to appeal does not give the respondent the right to begin (t).

17. [S. 556.] (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Dismissal of appeal for
appellant's default.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*. **O. 41, rr. 17-18.**

Alteration in the rule.—The words “the Court may make an order that the appeal be dismissed” have been substituted for the words “the appeal shall be dismissed for default,” to make it clear that no appeal lies from the order of dismissal for default (*u*). See s. 2, cl. (2), sub-cl. (b), and notes “Order of dismissal for default,” p. 8 above.

“Where the appellant does not appear.”—See notes to O. 9, r. 9, under the head “Meaning of appearance,” on p. 451 above.

Re-admission of appeal dismissed under this rule.—See r. 19 below.

Order that the appeal be dismissed.—See notes above, “Alteration in the rule.”

18. [s. 557.] Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed:

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

“The Court may make an order that the appeal be dismissed.”—The language of the rule clearly shows that the order of dismissal should not be made before the day fixed for the hearing of the appeal (*v*).

Re-admission of appeal dismissed under this rule.—See r. 19 below.

Appeal.—An order under this rule is not open to appeal. The proper remedy is an application under r. 19 below for re-admission (*w*).

Effect of dismissal of appeal against one of several respondents for non-service of notice.—*A, B and C* obtain a decree for joint possession against *D*. *D* appeals from the decree. *A* and *B* are served with the notice of appeal, but *C* is not. The appeal is thereupon dismissed as against *C*. Is *D* entitled to proceed with the appeal as against *A* and *B*? No, for even if the appellate Court heard the appeal and reversed the decree of the lower Court as regards *A* and *B*, the decree of the lower Court not being reversed as regards *C*, *C* could execute the entire decree (the decree being a joint decree) so as to nullify the decree of the appellate Court (*x*). See notes to O. 22, r. 4, “Cases in which suit or appeal held to abate, as a whole,” p. 668 above.

(*u*) *Rukminimayi v. Paran Chandra* (1910) 39 Cal. 341.

(*v*) *Chandra Nath v. Kaliprasana* (1908) 35 Cal. 535.

(*w*) *Attar Singh v. Karm Chand* (1919) Purnj. Rec. no. 169, p. 448.

(*x*) *Baser v. Fazole* (1914) 19 C. W. N. 290.

O. 41,
rr. 19, 20.

19. [S. 558.] Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17 or rule 18, the appellant may apply to the appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Re-admission of appeal
dismissed for default.

"Shall re-admit the appeal."—These words have been substituted for the words "*may* re-admit the appeal." The word "*may*" in the old section was construed by the High Court of Madras to mean "*shall*" (y).

"Sufficient cause."—See for an illustration the undermentioned case (z).

Appeal.—An appeal lies from an order of *refusal to re-admit* an appeal [O. 43, r. 1, cl. (t)]. But no appeal lies from an order *re-admitting* an appeal (a).

Dismissal of appeal for failure to deposit costs of paper book.—Where an appeal is dismissed under the rules of a High Court for failure to deposit the costs of preparation of the paper book as required by the rules, the decree may be set aside not by an order under this rule, but by an order on an application for a review (b).

Inherent power to restore appeal dismissed for default.—Although a cause may not amount to a "sufficient cause" within the meaning of this rule, the Court has inherent power to pass an order of restoration if it considers that a case for such an admission has been made out (c). See notes to O. 9, r. 9, "Inherent power of Court to restore suit dismissed for default," p. 453 above.

20. [S. 559.] Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

Power to adjourn hearing
and direct persons appear-
ing interested to be made
respondents.

"Interested in the result of the appeal."—See notes to r. 33 below.

Limitation.—A person *who was a party* to the proceedings in the Court below may be added as a respondent, though the time to appeal against him has expired (d).

Adding of parties under this rule discretionary.—It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by this rule (e).

(y) *Samayya v. Subbamma* (1903) 26 Mad. 599, 601.

(z) *Ram Sukhal v. Maharajah Kesho Prasad* (1917) 8 Pat. L. J. 218.

(a) *Gulab Kunwar v. Thakur Das* (1902) 24 All. 464.

(b) *Fatimunnissa v. Deoki* (1896) 24 Cal. 350.

(c) *Gauran v. Brij Raj* (1919) Punj. Rec. no. 53, p. 132.

(d) *Grish Chand v. Sati Sekharswar* (1906) 33 Cal. 329; *Shahab Din v. Miran Baksh* (1914) Punj. Rec. no. 79, p. 272; *Diwan Shib Nath v. Alliance Bank of Simla, Ltd.* (1915) Punj. Rec. no. 3, p. 10.

(e) *Amlook Chand v. Sarat Chunder* (1911) 38 Cal. 918, 919.

Adding of parties in second appeal.—Supposing a person to be a party to a suit, but not a party to the appeal before the lower appellate Court. Has the High Court power in second appeal to add such a person as a party to the appeal? No, according to the Allahabad High Court (*f*). Yes, according to the Madras High Court (*g*). O. 41,
rr. 20-22.

Form.—For form of notice to a party to a suit not made a party to the appeal, see Appendix G, form no. 7.

21. [S. 560.] Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

Re-hearing on application of respondent against whom *ex parte* decree made.

See O. 9, r. 13, and notes thereto.

“Sufficient cause.”—Where counsel for respondent was unable to appear at the hearing as the respondent's agent had taken away the papers, it was held that it was not “sufficient cause” for re-hearing the appeal (*h*).

Appeal.—An appeal lies from an order of refusal to re-hear an appeal [O. 43, r. 1, cl. (t)].

22. [S. 561.] (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow.

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

Form of objection and provisions applicable thereto.

(*f*) *Chunni v. Lala Ram* (1893) 18 All. 5; *Pich-kauri v. Ram Khilawan* (1914) 37 All. 57. | (*g*) *Paya v. Kovamel* (1895) 10 Mad. 151.
(*h*) *Baji Lal v. Nawal Singh* (1917) 39 All. 888.

Q. 41, r 22. (3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

Alterations in the rule.—The words “upon the hearing” which occurred in the first paragraph of s. 561 of the Code of 1882 [now sub-r. 1] between the words “may” and “not only support,” have been omitted, and sub-rule (4) has been added. See notes below under the head “Sub-rule (4): where the appeal is withdrawn or dismissed for default.” The words “the party who may be affected by such objection” in sub-r. (3) have been substituted for the words “the appellant” which occurred in s. 561.

Cross-objections.—Suppose that in a suit brought by *A* against *B*, *B* sets up two defences, and the Court of first instance determines in his favour as to one of them and against him as to the other, and dismisses *A*'s suit. If *A* appeals, *B* may support the decree at the hearing of the appeal not only on the ground decided in his favour, but also on the ground decided against him, without filing any cross-objections (*i*). In the case put above the decree was entirely in *B*'s (respondent's) favour. Suppose now that *A*'s claim is decreed in part. In such a case *A* may appeal from the decree, alleging that the decree ought to have been for the full amount claimed by him. And *B* also may appeal from the decree, alleging that the suit ought to have been dismissed altogether. If *A* appeals from the decree, and *B* also appeals, *B*'s appeal is called a cross-appeal. But *B* may not file a cross-appeal and he may file cross-objections under this rule. In the cross-objections filed by *B* under this rule, *B* may take any objection to the decree which he could have taken by way of appeal (*j*). If no cross-objections are filed at all by a respondent, the appellate Court has no power to grant any relief to him in a case where the granting of such relief is not necessarily incidental to the relief granted to the appellant (*k*), nor has it the power, in the absence of cross-objections, to disturb so much of the original decree as is favourable to the appellant so as to place the appellant in a worse position (*l*).

Sub-rule (4): where the appeal is withdrawn or dismissed for default.—The old section commenced with the words, “any respondent . . . may

(i) *Lala Gauri Sanker v. Janki Pershad* (1890) 17 Cal. 809, 813-814, 17 I. A. 57; *Bhagoji v. Bapuji* (1889) 13 Bom. 75.
(j) *Balak v. Kausli* (1882) 4 All. 491.
(k) *Kulatkada v. Viswanatha* (1905) 28 Mad. 229;

Casperz v. Kishori Lal (1896) 23 Cal. 922, 929.
(l) *Cheda Lal v. Badullah* (1889) 11 All. 35.
Agitil v. Dino Nath (1907) 84 Cal. 990.

upon the hearing not only support the decree," etc. It was accordingly held that a respondent could be heard in support of his cross-objections only upon the hearing of the appeal. If the appeal was withdrawn before the hearing, the respondent, it was held, had no right to be heard in support of his cross-objections (*m*), though the Court might in such a case allow him to prefer a regular appeal from the decree (*n*). But if the hearing had once commenced, the appeal, it was held, could not be withdrawn so as to prevent the cross-objections being heard and determined (*o*). This distinction has now been done away with by the omission of the words, "upon the hearing" in sub-r. (1) and by the addition of sub-r. (4). Under the present rule the withdrawal of an appeal is no bar to the hearing of cross-objections filed by a respondent, whether the appeal is withdrawn before or after the hearing. Similarly the dismissal of an appeal for default is no bar to the hearing of cross-objections. The dismissal of an appeal upon the appellant's failure to give security for costs is a dismissal "for default" within the meaning of sub-r. (4) (*p*).

Under the old section it was held by the High Court of Allahabad that the dismissal of an appeal as filed out of time was a bar to the hearing of cross-objections (*q*). It has been held by a Full Bench of the Madras High Court that the law is the same under the present rule (*r*). Similarly it has been held that where an appeal is dismissed on the ground of insufficiency of Court-fee stamp, the Court has no power to hear cross-objections (*s*). The last mentioned decision is based on the ground that except in the case of the original appeal being "withdrawn or dismissed for default" as expressly provided for in sub-r. (4), the general rule that cross-objections cannot be heard unless the appeal is decided on the merits is still in force. But the dismissal of an appeal on the ground of non-joinder of a party in a mortgage suit has been held not to be a bar to the hearing of cross-objections, the reason given being that in such a case the appeal is heard, the question of non-joinder being one that arises in the appeal itself and is not extraneous to it as would be a question as to whether it was presented in proper time or not (*t*).

Who may file cross-objections.—Cross-objections under this rule can only be filed by a party who might have appealed from the decree of the Court below, but has not done so. It is not open to the party who has appealed, and whose appeal has been dismissed, subsequently to prefer cross-objections under this rule. *A* sues *B* for damages. *A*'s claim is decreed in part. *A* appeals from that part of the decree which is against him. *B* also appeals from that part of the decree which is against him. *A*'s appeal is heard and dismissed. Before *B*'s appeal is heard, *A* files cross-objections in *B*'s appeal setting up the very grounds upon which in his own appeal he had asked for relief. *A*'s cross-objections should not be heard (*u*).

A respondent may urge cross-objections against the appellant, but not as a rule against a co-respondent.—It has been held by the High Courts of Calcutta, Bombay and Allahabad, that as a general rule the right of a

(*m*) *Jafar v. Ranjit Singh* (1895) 17 All. 518;
Ramjiwan v. Chand Mal (1888) 10 All. 587;
Maktab Beg v. Hasanali (1886) 8 All. 551.
(*n*) *Hargovindas v. Jadavahoo* (1899) 23 Bom. 692.
(*o*) *Dhondai v. The Collector of Salt Revenue* (1885) 9 Bom. 28.
(*p*) *Mowar Sheobaksh v. Mowar Thakur Deyal* (1918) 4 Pat. L. J. 164.

(*q*) *Ramjiwan v. Chand Mal* (1888) 10 All. 587.
(*r*) *Alagappa v. Chockalingam* (1918) 41 Mad. 904, 917-920.
(*s*) *Dunichand v. Aziz Khan* (1912) Punj. Rec. no. 11, p. 38.
(*t*) *Kombi Achen v. Kochunni* (1898) 21 Mad. 352.
(*u*) *Ramji Das v. Ajudhia* (1903) 25 All. 628.

O. 41, r. 22. respondent to urge cross-objections should be limited to his urging them only against the appellant; and that it is only by way of exception to this general rule that one respondent may urge cross-objections as against other respondents, the exception holding good in those cases in which the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents (v). Thus in suits for dissolution of partnership and for accounts, it is open to any respondent to prefer cross-objections against a co-respondent on any item in dispute between them. The reason is that in such suits accounts are taken not between the plaintiff on the one hand and the defendants on the other, but between all the partners. A, B and C constitute a partnership firm. A sues B and C for dissolution of partnership and for accounts. A decree is passed in the suit declaring the amount coming to the share of each partner on the taking of accounts. A appeals from the decree. B and C are joined as respondents to the appeal. In such a case it is open to B to prefer cross-objections against C in respect of an item in dispute between B and C (w). Similarly, when the decree appealed from proceeds on a ground common to all the parties against whom it is passed, and the appeal is preferred by some only of such parties, e.g., where the suit is—A v. B and C, and a decree is passed both against B and C, and the appeal is—B v. A and C, A who is the plaintiff-respondent may prefer cross-objections not only against B the appellant, but against C the co-respondent. A sues B and C to recover Rs. 5,000, alleged to be his share of the profits of certain lands. A decree is passed for A for Rs. 3,000 against B and C. B appeals from the decree. C does not join B in the appeal, and he is therefore made a party respondent. The appeal thus is—B v. A and C. In such a case, it is open to A to prefer cross-objections not only against B, but also against C, in respect of that portion of his claim that was disallowed by the Court of first instance, namely, Rs. 2,000 (x). According to the Madras High Court, a respondent may urge cross-objections against a co-respondent in any and every case (y). Note in this connection the substitution in sub-r. (3) of the words “the party who may be affected by such objection” for the words “the appellant” which occurred in s. 561 of the Code of 1882.

“Or within such further time.”—This rule requires that cross-objections should be filed by the respondent within one month from the date of the service of notice of the appeal. But the time may be extended if sufficient cause is shown (z).

Application of the rule.—Cross objections may be filed not only in first appeal, but also in second appeal (O. 42). They may also be filed in appeals from orders preferred under s. 104 and O. 43 [See O. 43, r. 2]. But they cannot be filed in Letters Patent appeals, unless the rules of the High Court allows it (a).

Second Appeal.—A second appeal will lie from a decree of the first appellate Court disallowing the cross-objections of a respondent (b).

Form.—As to form of memorandum of cross-objections, see App. G, form no. 8.

(v) *Bishun Churn v. Jogendra* (1899) 26 Cal. 114; *Shadiuddin v. Deomoorat* (1903) 30 Cal. 655; *Kattu v. Manni* (1901) 25 All. 93; *Nursey v. Harrison* (1913) 37 Bom. 511; *Jadunandan v. Deo Narain* (1911) 16 C. W. N. 612, 614; *Abdul Ghani v. Muhammad* (1906), 28 All. 95; *Mathura v. Ram Kumar* (1915) 43 Cal. 780, 828; *Musisha v. Ram Narain* (1918) 40 All. 586.
(w) *Balgotind v. Ram Sarup* (1914) 36 All. 505.

(x) *Abdul Ghani v. Muhammad* (1906) 28 All. 95.
(y) *Kulaikada v. Viswanatha* (1905) 28 Mad. 229; *Munisamy v. Abbu* (1912) 38 Mad. 705 [F. B.]; *Alagappa v. Chockalingam* (1918) 41 Mad. 904, 917.
(z) *Sullemar v. Joosub* (1890) 14 Bom. 111.
(a) *Mirza Himmatt, in the matter of* (1866) B. L. R. F. B. 429; *Kausalia v. Gulab Kwar* (1899) 21 All. 297.
(b) *Ganapati v. Sitharama* (1887) 10 Mad. 292.

23. [S. 562.] Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Remand of case by appellate Court.

Alterations in the rule.—The words, “ and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand,” at the end of the rule are new.

Scope of the rule.—It is not competent to the appellate Court under this rule to remand the case for further evidence to the lower Court and to require that Court to *pass another decree*. All that the appellate Court is empowered to do is to frame an issue and to send down that issue to the Court below for the return of a finding; and it is the duty of the appellate Court after receiving that finding to dispose of the appeal upon the evidence before it (c).

Preliminary point.—This rule enables the appellate Court to remand a case to the lower Court for determination on the merits, if the lower Court has disposed of the suit upon a *preliminary point*, and the decree of that Court is *reversed* in appeal. The expression “ preliminary point ” is not confined to such legal points only as may be pleaded in bar of a suit, but comprehends all points or issues *whether of fact or of law*, the determination of which has precluded the necessity for determining other points or issues, and such other points or issues have therefore been left undetermined (d). Thus where the lower Court dismisses the plaintiff's suit on the ground that it is barred by *limitation*, or that the Court has no *jurisdiction* to hear the suit, or that the *necessary leave* has not been obtained, or that the plaint does not on the face of it disclose any *cause of action* (e), and the appellate Court reverses the decree of the lower Court on those grounds it may remand the case to the lower Court to be proceeded with on the merits. Where several issues are raised in a suit one of which is that of undue influence, and the Court dismisses the suit on a finding that there was undue influence without a finding on the other issues, the decision amounts to a disposal of the suit upon a preliminary point within the meaning of this rule (f). Similarly if A sues B to recover a sum of money on the basis of an award, and four issues are framed one of which is whether the award is valid and binding, and the Court after recording evidence on all the issues dismisses the suit on the ground that the award is invalid *leaving the other issues undecided*, the appellate Court may, if it finds that the decision of the lower Court on the issue as to the validity of the award is wrong, remand the case to the

(c) *Haradhan v. Iswar Das* (1916) 2 Pat. L. J. 61, 64.

(d) *Sheocambar v. Lallu* (1887) 9 All. 26, note at p. 32; *Muhammad v. Muhammad* (1898) 10 All. 289; *Ramohandra v. Hasi Kaesim*

(1898) 16 Mad. 207.

(e) *Kanakammal v. Rangachariar* (1897) 20 Mad. 25.

(f) *Mahant Rachu v. Mahant Raghunath* (1917) 2 Pat. L. J. 398.

O. 41, r. 23. lower Court to be disposed of on the merits. It does not matter that evidence has been recorded on *all the issues* (g). But where the first Court has decided a suit on the merits of the whole case, as where the suit is decided on all the evidence and on all the issues, the appellate Court cannot remand the case under this rule (h). Where the first Court heard the entire suit, and found all issues in favour of the plaintiff except one, namely, whether the suit was maintainable having regard to the provisions of O. 21, r. 92, and dismissed the suit on the finding that the suit was not maintainable, it was held by the Patna High Court that the suit was disposed of on a preliminary point within the meaning of this rule (i). This decision is in conflict with the decisions referred to above, and, it is submitted, is not good law. To pass a decree in favour of the plaintiff on the strength of a plan put in by the plaintiff in a suit for possession of land is not a decision of the suit on a *preliminary* point, and no remand can be made in such a case under this rule (j).

No order of remand can be made under this rule unless the lower Court has disposed of the *whole* suit upon a preliminary point. This rule authorises a remand only where the entire suit, and not only a portion of it, has been disposed of by the Court below on a preliminary point (k). Assuming that the entire suit is decided on a preliminary point, it is further necessary, before an order of remand can be made under this rule, that the appellate Court should also find that the decision on the preliminary point is wrong. It is not a good ground, therefore, for making an order under this rule, to say that the preliminary issue, e.g., an issue of limitation, has been decided by the Court of first instance on a wrong view of the burden of proof, unless the appellate Court finds that the issue has been *wrongly decided* (l).

Inherent power of remand : Remand in case of error, omission or irregularity.—No order of remand can be made under the present rule except when the suit has been disposed of on a *preliminary* point. There are, however, cases in which suits have not been disposed of on a *preliminary* point, and yet the Courts have claimed the power to remand the case professing to do so in the exercise of their *inherent* power [see s. 151]. These are cases in which the lower Court has committed any error, omission or irregularity, by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit, and the party complaining of such error, omission or irregularity has been materially prejudiced thereby. Thus if a suit is defective for misjoinder of plaintiffs and causes of action, the proper course is to return the plaint to the plaintiff for amendment, and not to dismiss the suit (see notes to O. 2, r. 3, p. 368 above). If the lower Court dismisses the suit instead of returning the plaint for amendment, the appellate Court may set aside the decree, and remand the suit with a direction to the lower Court to return the plaint to the plaintiff for amendment and to proceed with the suit after the plaint is amended (m). Similarly where a suit is brought in the name of a wrong person as plaintiff, the appellate Court may direct the plaint to be amended and remand the case for re-trial (n). Where time was granted to the plaintiff to produce his evidence, but neither he nor his pleader appeared on the day to which the hearing was adjourned, and the lower Court instead of proceeding to dispose of the suit under O. 17, r. 3, dismissed the suit for default under O. 17, r. 2, it was held

- (g) *Mata Din v. Jamna Das* (1905) 27 All. 691 ;
Meghan Dube v. Pran Singh (1908) 30 All.
 63 ; *Kamta v. Parbhu* (1916) 39 All. 165.
 (h) *Rameshwar Singh v. Sheodin* (1890) 12 All.
 510 ; *Malikarjuna v. Pathanani* (1896) 19
 Mad. 479.
 (i) *Bheda v. Shaikh Manowar* (1919) 4 Pat. L. J.
 645.
 (j) *Palani v. Rangadoss* (1909) 32 Mad. 83.
 (k) *Banwari v. Samman* (1889) 11 All. 488
Mafrajba v. Maganlal (1895) 19 Bom.

- 303 *Kanchan v. Batj Nath* (1892) 19 Cal.
 338.
 (l) *Habib-ullah v. Lalla Prasad* (1912) 34 All.
 612.
 (m) *Salima Bibi v. Shaikh Muhammad* (1896) 18
 All. 131 ; *Rajit Ram v. Katesar Nath* (1896)
 18 All. 396.
 (n) *Habib Baksh v. Baldeo Prasad* (1901) 23
 All. 167 ; *Jadab v. Anath* (1909) 37 Cal.
 171.

that the appellate Court had power to remand the case to be disposed of in the manner **O. 41, r. 23**, prescribed by O. 17, r. 3 (o). A case may also be remanded where the decision of the lower Court is given without taking the defendant's evidence (p).

Sections 562 and 566 of the Code of 1882 [now rr. 23 and 25 of this Order] were the only sections that provided for a remand. The cases cited in the preceding paragraph did not fall under either of those sections. Moreover, the Code of 1882 contained a section, being s. 564 which prohibited the appellate Court from remanding a case except as provided by s. 562. That section was found in its working to be embarrassing, and to get over the difficulty presented by cases of the kind cited in the preceding paragraph, the Courts resorted to their *inherent* jurisdiction. That section has been omitted in this Code on the ground that it was unduly restrictive. The absolute prohibition of s. 564 having been removed, the Court, it is said, is free under s. 151 to make an order of remand though the case may not fall either under this rule or rule 25 (q). It has accordingly been held that as under the old Code, so under the new Code, an order of remand can be made though the suit was not disposed of on a point which can be called a preliminary point within the meaning of this rule, provided such an order is necessary for the ends of justice (r). In *Nabin Chandra v. Prankrishna* (s), however, Stephen and Mullick, JJ., expressed the opinion that if the appellate Court had at all any inherent power to remand, that power was taken away by s. 107 read with O. 41, rr. 23 and 25, and that under s. 107 an appellate Court can only remand a case "subject to such limitations as may be prescribed," that is, prescribed by rules 23 and 25 of O. 41. The view so expressed ignores entirely the specific provisions of s. 151 of the Code. In *Mani Mohan v. Ramtaran* (t), Jenkins, C.J., after observing that the combined effect of s. 107 and O. 41, r. 23, was to limit the power of remand to the position described in O. 41, r. 23, said: "And this is the general rule except under special conditions which have no application in the circumstances of this case." The view taken by Stephen and Mullick, JJ., was dissented from by a Full Bench of the Calcutta High Court in *Ghuznavi v. The Allahabad Bank, Ltd.* (u), where it was held that the powers of the appellate Court as regards remand are not restricted to the case specified in O. 41, r. 23, but that the Court, by reason of its inherent jurisdiction recognized and preserved in the Code [s. 151] may order a remand in cases other than the case specified in O. 41, r. 23, if it be necessary for the ends of justice. It has thus been held that an appellate Court may direct a plaint to be amended by adding parties and remand the whole case to the Court below (v). The High Court of Patna has followed the Full Bench ruling in *Ghuznavi's* case (w). See notes to r. 33 below, "Remand."

Remand in appeal from ex parte decree.—See notes to s. 96 under the head "Appeal from a decree *ex parte*," p. 246 above.

Remand in appeal from an order refusing to set aside an ex parte decree.—In an appeal from an order refusing to set aside an *ex parte* decree the only case which can be remanded is the application under O. 9, r. 13, and not the original suit. A obtains a decree *ex parte* against B. B applies under O. 9, r. 13, for an order to set aside the decree on the ground that he was prevented by sufficient cause from appearing at the hearing, but the application is refused. B appeals from the order rejecting the

(o) *Badam v. Nathu* (1908) 25 All. 194.
(p) *Perumbra v. Subrahmanian* (1899) 23 Mad. 445.
(q) See Report of Select Committee, 12th February 1908; *Narottam v. Mohanlal* (1912) 37 Bom. 289, 298.
(r) *Jambulayya v. Rajamma* (1912) 38 Mad. 492; *Zohra Bibi v. Zobeda* (1910) 12 Cal. C. J. 868.

(s) (1913) 41 Cal. 108.
(t) (1915) 43 Cal. 148.
(u) (1917) 44 Cal. 929. See also *Brij Indar Singh v. Kanshi Ram* (1917) 44 I. A. 218, 226, 45 Cal. 94, 107.
(v) *Uzir Ali v. Savai* (1916) 43 Cal. 938.
(w) *Raghunandan v. Jadunandan* (1918) 3 Pat. L. J. 253.

- O. 41, r. 23. application [O. 43, r. 1, cl. (d)]. If the order is reversed by the appellate Court, the proper course for that Court is to remand the application to the lower Court to dispose of that application with due regard to the conditions of O. 9, r. 13, but not to remand the original suit for re-trial (x).

Appeal.—An appeal lies from an order remanding a case, where an appeal would lie from the decree of the appellate Court [O. 43, r. 1, cl. (u)]. This means that the order of remand is appealable only in cases in which the decree, which would have been passed by the appellate Court had that Court instead of remanding the case under this rule decided the whole case and passed a decree, is appealable (y). If no appeal is preferred from the order of remand, the party aggrieved by the order cannot afterwards dispute its correctness in an appeal from the final decree; see s. 105, sub-s. (2), and notes thereto. But though an appeal lies from an order of remand, it must be preferred according to the Calcutta High Court *before* the final disposal of the remanded suit, otherwise it cannot be entertained. The reason given is that the right of appeal given by s. 104 and O. 43 from orders specified therein ceases with the disposal of the suit (z). On the other hand it has been held by the High Court of Allahabad, that the appeal may be preferred even after the decision of the remanded suit, provided it is within the period of limitation. The Allahabad Court proceeds on the ground that there is no provision in the Code imposing any such restriction on the right of appeal (a). The period of limitation for an appeal from an order of remand is 90 days from the date of the order [Limitation Act, art. 156].

Though an appeal lies under rule 1 of Order 43 from an order of remand, no appeal will lie from the order when the order is itself made in an appeal preferred under any other clause of that rule. Thus if an appeal is preferred under O. 43, r. 1, cl. (a), from an order under O. 7, r. 10, or under O. 43, r. 1, cl. (j), from an order under O. 21, r. 92, or under O. 43, r. 1, cl. (q), from an order under O. 38, r. 6, or under any other clause of Order 43, r. 1, and the appellate Court allows the appeal and makes an order of remand, no appeal will lie from the order of remand under O. 43, r. 1, cl. (u). The reason is that cl. (u) of r. 1 of O. 43, is subject to s. 104, sub-s. (2), which provides that no appeal shall lie from any order passed in appeal [it may be an order of remand] under that section (b).

Powers of High Court in appeals from orders of remand.—In an appeal from an order of remand preferred under O. 43, r. 1, cl. (u), the High Court is not confined to the question whether the order satisfies the requirements of the present rule, but may also determine the correctness of the lower appellate Court's decision on the "preliminary point" on which the Court of first instance disposed of the case. Thus if the Court of first instance dismisses a suit as barred by limitation and the appellate Court reverses the decree and remands the case under this rule, and an appeal is preferred to the High Court from the order of remand, the High Court has the power to determine whether the point of limitation was correctly decided by the lower appellate Court (c).

Letters Patent appeal.—An order of remand made by a single Judge of the High Court in second appeal is a "judgment" within the meaning of cl. 15 of the Letters Patent, and is appealable as such (d).

(z) *Radha Kishan v. Collector of Jaunpur* (1901) 23 All. 221, 28 I. A. 28.

(y) *Faiz Ahmad v. Badar Din* (1911) Punj. Rec. no. 50, p. 191; *Sawar Singh v. Mothu* (1914) Punj. Rec. no. 85, p. 299; *Malap Kaur v. Hakim Singh* (1915) Punj. Rec. no. 8, p. 58; *Waryam Singh v. Harnam Singh* (1918) Punj. Rec. no. 109, p. 354.

(x) *Madhu Sudan v. Kamini Kanta* (1905) 32 Cal. 1023.

(a) *Uman Kunwari v. Jarbandhan* (1908) 30 All. 479.

(b) *Naubat Singh v. Baldeo Singh* (1911) 33 All. 479; *Mathura v. Nobin Chandra* (1897) 24 Cal. 774; *Jhanday Lal v. Sarman Lal* (1899) 21 All. 291; *Chhubu Arjan v. Harcharan Das* (1912) P. R. no. 119, p. 400.

(c) *Badam v. Imrat* (1881) 8 All. 675; *Bhav v. Bapaji* (1890) 4 Bom. 14; *Abraham v. Abraham* (1890) 17 Cal. 168; *Deokishan v. Bansi* (1886) 8 All. 472. See also *Chinnasami v. Karuppa* (1898) 21 Mad. 234.

(d) *Gopinath v. Moheshwar* (1908) 35 Cal. 1090.

Improper order of remand.—Under the Code of 1882 an order under s. 562 was appealable, and a party might impeach the order of remand on appeal from the final decree. When no appeal was preferred from the order of remand, but the order was impeached on appeal from the final decree, and the Court found that the order was improperly made, the question arose as to whether the order should be treated as illegal or merely irregular. It was held by the High Court of Allahabad that if a remand was ordered in a case in which it ought not to have been ordered, both the order of remand and all the proceedings subsequent thereto are void and illegal (e). On the other hand, it was held by the Calcutta High Court that the remand order and the subsequent proceedings are not in such a case illegal, but merely irregular, and the subsequent proceedings should not be set aside unless the remand had substantially affected the decision of the remanded suit on the merits and the party complaining of the irregularity was materially prejudiced thereby (f) [see s. 99]. The Madras High Court held that though an order of remand made in contravention of the provisions of s. 562 is illegal, yet the error may be cured by the consent of parties or by waiver (g). The whole difficulty has been got over in the present Code by enacting that a party who does not appeal from an order of remand in the first instance cannot afterwards dispute the correctness of the order on appeal from the final decree: see s. 105, sub-s. (2).

O. 41,
rr. 23-25.

Remand of case by consent for trial on issues not raised in appeal.—The effect of an appeal is to re-open the decree of the lower Court, and it is competent to the appellate Court on the agreement of parties to remand the case to the lower Court for trial on issues not raised in the memorandum of appeal (h).

24. [S. 565.] Where the evidence upon the record is sufficient to enable the appellate Court to pronounce judgment, the appellate Court may, after re-settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate Court proceeds.

Where evidence on record sufficient, appellate Court may determine case finally.

Scope of the rule.—The scope of this rule is limited to cases in which the evidence upon the record is sufficient to enable the appellate Court to determine the suit (i).

This rule does not enable an appellate Court to declare a right in favour of one of the parties, where no issue has been framed on the point, and the right has not been set up in the lower Court (j).

Second appeal.—See s. 103 and notes thereto.

25. [S. 566.] Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate

Where appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

(e) *Rameshwar v. Sheodan* (1890) 12 All. 510.
(f) *Mohesh Chandra v. Jamiruddin* (1901) 28 Cal. 324; followed in *Nabin Chandra v. Prankrishna* (1913) 41 Cal. 108.
(g) *Manager of the Court of Wards v. Ramasami* (1905) 28 Mad. 487. See also *Baikuntha*

Nath v. Nawab Salimulla (1908) 12 C. W. N. 590.
(h) *Natesa v. Venkatarama* (1907) 30 Mad. 510.
(i) *Bandi v. Madalapalli* (1880) 3 Mad. 98.
(j) *Official Trustees v. Krishna* (1886) 12 Cal. 289, 12 I. A. 166.

O. 41, Court may, if necessary, frame issues, and refer the same for
rr. 25, 26. trial to the Court from whose decree the appeal is preferred,
and in such case shall direct such Court to take the additional
evidence required ;

and such Court shall proceed to try such issues, and shall
return the evidence to the appellate Court, together with its
findings thereon and the reasons therefor.

The words " and the reasons therefor " in paragraph 2 are new.

Scope of the rule.—This rule refers to cases in which the evidence upon the
record is *not sufficient* to enable the appellate Court to determine the suit.

"May, if necessary, frame issues."—In framing issues under this rule the
appellate Court should have regard to the provisions of O. 14, r. 3, which indicate the
materials from which issues are to be framed. See notes to O. 14, rr. 1 to 5.

**Power of Court to which issues are referred for trial under this
rule.**—The Court to which issues are referred for trial under this rule has no power
to try and decide the case, but to try the issues only. It should then return the evidence
to the appellate Court together with its findings thereon and the reasons therefor (*k*).
Nor has it the power to make an order of reference under schedule II, para. 3, of the
Code (*l*).

Court by which issues should be tried.—Where issues are referred for
trial under this rule, they are triable only by the Court which was originally seized
of the case, and by no other Court (*m*).

New issue raised before High Court.—" Even if it be competent to
the High Court [in second appeal] to remit a case for rehearing on an issue not raised in
the pleadings nor even suggested in the Courts below, this ought only to be done in excep-
tional cases for good cause shown and on payment of all costs thrown away " (*n*).

Appeal.—No appeal lies under the Code from an order referring issues for trial
under this rule (*o*). Nor does an appeal lie under the Letters Patent (*p*).

26. [S. 567.] (1) Such evidence and findings shall
form part of the record in the suit ; and
either party may, within a time to be
fixed by the appellate Court, present a
memorandum of objections to any finding.

Findings and evidence
to be put on record. Objec-
tions to finding.

(2) After the expiration of the period so fixed for pre-
senting such memorandum the appellate
Court shall proceed to determine the
appeal.

Determination of appeal.

(k) *Doulat v. Bissessar* (1874) 22 W. R. 207; *Habib v. Baldeo* (1901) 23 All. 167, 171.

(l) *Nand Ram v. Fakir Chand* (1886) 7 All. 528.

(m) *Ali Sher Khan v. Ahmed* (1907) 29 All. 660;
Lahore Bank, Limited v. Lakhi Ram (1913)
Punj. Rec. no. 105, p. 392 [no power
to delegate].

(n) *Ram Chandra v. Secretary of State for India*
(1916) 43 I. A. 172, 178, 43 Cal. 1104, 1116

(o) *Kali Kristo v. Ram Chunder* (1881) 9 C. L. R.
461.

(p) *Bara Estate, Ltd. v. Anup Chandra* (1917) 2
Pat. L. J. 663.

Where no memorandum of objection is filed.—This rule provides that **O. 41, r.26** either party may file a memorandum of objections to the findings by the lower Court on the issues referred to it by the appellate Court. It is not to be supposed, however, that if no objections are filed by either party, the appellate Court is absolved from hearing the appeal (*q*). Sub-r. (2) clearly indicates that even if no objections are filed, the appellate Court “shall proceed to determine the appeal.” That is to say, even if no objections are filed to the findings, the appellate Court is bound to examine the correctness of the findings, and to state in its judgment the reasons (r. 31) for which it either accepts or rejects the findings (*r*). It should not accept the findings blindly without examining the evidence on which they are based (*s*). See notes to r. 31, “Shall state the reasons for the decision.”

Where the appellate Court has heard arguments on some of the issues and has expressed its views thereon and remitted other issues under r. 25, it is not bound, on the return of findings, to hear the case *de novo*, but may confine counsel to argument upon the findings (*t*).

The appellate Court shall proceed to determine the appeal.—When an appellate Court has made an order referring issues for trial under r. 25, the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal to another Court (*u*).

Where order referring issues was unnecessary.—In the case of an unnecessary remand under r. 25, it is competent to the Judge before whom the appeal subsequently comes to disregard the findings on the order of remand (*v*).

Second appeal.—The provisions of this and the preceding rule apply so far as may be, by virtue of O. 42, to second appeals. Hence the High Court may in second appeal refer issues of *fact* for trial to the lower appellate Court, but when the finding and evidence upon such issues are returned to the High Court, the finding is conclusive, and it cannot be challenged *upon the evidence* before the High Court as in first appeal. The reason is that a second appeal is not allowed on questions of *fact*. The only grounds on which a second appeal is allowed are those mentioned in s. 100, and these relate to errors of law or usage having the force of law or a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case on the merits. The objections to the findings must therefore be restricted to the limits within which the original pleas in second appeal are confined (*w*).

Sending back case for a revised finding.—An appellate Court has no power to send back a case to the lower Court to submit a *revised* finding on the facts, and evidence already recorded. Such a course is not warranted by any one of the rules 23 to 26 of this Order (*x*). But if it does so, it is a mere irregularity within the meaning of s. 99, and if the appellate Court, on the revised finding being returned to it, itself considers the evidence on which it is based, the decree will not be set aside in appeal (*y*).

(*q*) *Subbaya v. Rami* (1899) 22 Mad. 344.

(*r*) *Kunhi v. Kutti* (1897) 20 Mad. 496.

(*s*) *Akbari v. Wilayat Ali* (1880) 2 All. 908; *Umed Ali v. Salima Bibi* (1884) 6 All. 388; *Mumtaz Begam v. Fateh Husain* (1884) 6 All. 391; *Bhagwan v. Kesur* (1898) 17 Bom. 428; *Ramchandra v. Sono* (1895) 19 Bom. 551.

(*t*) *Lachman v. Jamna* (1888) 10 All. 162.

(*u*) *Udit Narain v. Jhanda* (1898) 15 All. 315; *Kumarasami v. Subbanga* (1900) 23 Mad.

314.

(*v*) *Mubarak v. Bihari* (1894) 16 All. 306.

(*w*) *Bai Kishen v. Jagoda Kuar* (1885) 7 All. 765. See also *Gopal Singh v. Jhakri Rai* (1886) 12 Cal. 37; *Beni Prasad v. Nand Lal* (1897) 24 Cal. 98, both cases under r. 2. below.

(*x*) *Venkata v. Anantha Chariar* (1893) 16 Mad. 299 (P. C.)

(*y*) *Mallikarjuna v. Pathaneni* (1896) 19 Mad. 479.

O. 41, r. 27.

27. [S. 568.] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. But if—

Production of additional evidence in appellate Court.

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason for its admission.

When additional evidence may be admitted.—Under this rule “the admissibility of additional evidence is made to depend, not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted, or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause” (2). Additional evidence under this rule should not be taken until the appellate Court has examined the evidence on the record, and has after such examination come to the conclusion that the evidence as it stands is inherently defective. Until this is done, the appellate Court has no power to admit additional evidence, not even if the evidence offered be the evidence of new matter discovered after the Court of first instance had pronounced its judgment. As observed by their Lordships of the Privy Council in *Kessowji Issur v. G. I. P. Ry.* (a), “the legitimate occasion for [the application of the present rule] is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it.” It must, however, be noted that where additional evidence is taken by the High Court with the assent of both sides, it is not open to either party to complain of it (b).

The power given under this rule should be exercised very sparingly by the Courts, and great caution should be exercised in admitting new evidence (c). Additional evidence must not be allowed to enable a plaintiff to make out a fresh case in appeal. If cases were remanded for the purpose of allowing parties to make out a new case or to improve their case by calling further evidence, there would be no end to litigation (d). An appellant who has ample opportunity of giving evidence in the lower Court, and elects not to do so, but rests his case on the evidence as it stood, ought not to be allowed to give

(2) *In the goods of Premchand* (1894) 21 Cal. 484, 486.

(a) (1907) 31 Bom. 381, 34 I.A. 115; *Krishnamma v. Narasimha* (1908) 31 Mad. 114; *Garden Reach Sg. & Wg. Co. v. Secretary of State* (1914) 42 Cal. 675.

(b) *Jagannath v. Hanuman* (1909) 36 Cal. 833,

36 I.A. 221.

(c) *Sreemanchunder v. Gopalchunder* (1866) 11 M. 1. A. 28, 7 W. R. 10; *Ram Pershad v. Rajunder* (1866) 6 W. R. 262.

(d) *Hurpurshad v. Shoo Dyal* (1876) 26 W. R. 55 3 I. A. 259.

evidence which he could have given below (e). Similarly, the appellate Court should not admit a document tendered by a party, if, having the opportunity of tendering it in the Court below, he omitted to do so (f). Nor should it allow additional evidence to prove the genuineness of a document held by the lower Court to be a fabrication (g).

Where the lower Court has refused to admit evidence.—An appellate Court should not reverse the decree of the first Court without allowing the decree-holder to give evidence which he offered in the first Court, and which that Court declined to take (h).

Where the appellate Court requires any document to be produced.—The appellate Court has no power under this rule to require a document to be produced unless it is required to enable it to pronounce judgment. Where judgment could be pronounced in the absence of the document, the appellate Court should not allow the document to be produced (i). The word “requires” means nothing more than “needs” or “finds needful” (j).

Where the appellate Court requires a witness to be examined.—An appellate Court should not under cl. (b) of this rule allow to be produced before it additional evidence which impeaches the testimony of a witness called in the Court below, without that witness also being called and being given an opportunity to contradict or explain the additional evidence so given; otherwise no witness, whatever his standing would be safe from adverse judicial comment (k). Where a witness was examined and cross-examined in the Court of first instance, and there was no gap in the evidence or new matter about which it was necessary to examine him, and the appellate Judge merely cross-examined him on his previous evidence on the chance of getting to the bottom of the matter, it was held that the examination of the witness by the Court under those circumstances was not warranted by the provisions of this rule (l).

“Or for any other substantial cause.”—The “cause” referred to here need not be *ejusdem generis* with the causes stated in the earlier part of the rule (m). The expression “any other substantial cause” confers a wide discretion on the appellate Court to admit additional evidence *when the ends of justice require it* (n). It has accordingly been held that the discovery after the filing of the appeal of fresh evidence not known to and available to the appellant after due diligence during the pendency of the proceedings in the first Court is a “substantial cause” within the meaning of this rule justifying the admission of such evidence in appeal (o).

Recording of reason for admission of additional evidence.—The provision requiring an appellate Court to record its reason for admitting additional evidence is merely directory, and not imperative. Hence the omission to record the reason would not render the evidence inadmissible (p).

Second appeal.—Except in the case provided in s. 103 the High Court is precluded in second appeal, by virtue of the provisions of s. 100, from entering into questions of fact. Hence where the Court of first appeal has admitted additional evidence under this

(e) *Ramdas v. Official Liquidator* (1887) 9 All. 366.

(f) *Zahrah v. Bhugwan* (1871) 18 W. R. 211; *Narendra Nath v. Radha Charan* (1918) 46 Cal. 119, 128.

(g) *Nadkar Chand v. Chunder* (1888) 15 Cal. 765.

(h) *Arjun v. Shanker* (1898) 22 Bom. 253; *Appa v. Vithoba* (1869) 6 B. H. C. A. C. 88; *Pabitra Kunwar v. The Maharajah of Benares* (1908) 30 All. 367.

(i) *Kaika v. Tulei* (1916) 1 Pat. L. J. 435.

(j) *Kessowji Issur v. G. I. P. Ry.* (1907) 31 Bom.

381, 34 I. A. 115.

(k) *Jagrani v. Kuar Durga* (1913) 41 I. A. 76, 36 All. 93.

(l) *Muhammad v. Mahmud-un-Nissa* (1916) 38 All. 191, 193-194.

(m) *Andiappa v. Muthukumara* (1912) 36 Mad. 477, 479-480.

(n) *Ambuja v. Appadurai* (1912) 38 Mad. 414.

(o) *Venkalachella v. Ranga* (1915) 28 Mad. L. J. 334.

(p) *Gopal v. Jhakri* (1886) 12 Cal. 37.

O. 41,
rr. 27-30.

rule, the hearing in the Court of second appeal will not for that reason be treated as a first appeal so as to entitle the parties to go into questions of fact (*q*).

No appeal lies from a *refusal* by the lower appellate Court to admit fresh evidence under this rule (*r*). Hence if the lower appellate Court refuses to admit a document as additional evidence in appeal under this rule, the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower appellate Court (*s*).

Appeal to Privy Council.—The rejection of an application under this rule does not give a right of appeal to the Privy Council (*t*).

28. [s. 569.] Wherever additional evidence is allowed to be produced, the appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the appellate Court.

Mode of taking additional evidence.

It need hardly be stated that where the additional evidence taken by the Court consists of documents, they should be exhibited in the case (*u*).

29. [s. 570.] Where additional evidence is directed or allowed to be taken, the appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

Points to be defined and recorded.

Judgment in Appeal.

30. [s. 571.] The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders.

Judgment when and where pronounced.

After hearing the parties or their pleaders.—This rule authorizes the Court to pronounce judgment after hearing the parties or their pleaders. Hence a judgment pronounced without hearing the parties or their representatives, if they are dead, is unauthorized by the Code. Thus where an appellate Court heard and decided an appeal without being aware of the death of the appellant, the decree was held to be a nullity (*v*). See notes to s. 47, case (4), p. 109.

(*q*) *Bent Pershad v. Nand Lal* (1897) 24 Cal. 98;
Gopal v. Jhakri (1886) 12 Cal. 37.
(*r*) *Premchand, in the goods of* (1894) 21 Cal. 484;
Ram Piari v. Kallu (1901); 23 All. 121
Durga Prasad v. Jai Narain (1911) 38 All. 379.

(*s*) *Vaithinatha v. Kuppu* (1919) 42 Mad. 737 [F. B.]
(*t*) *Premchand, in the goods of* (1894) 21 Cal. 484.
(*u*) *Daji v. Sakharam* (1914) 38 Bom. 665.
(*v*) *Janardhan v. Ramchandra* (1902) 26 Bom. 317.

Contents, date and signature of judgment.

31. [S. 574.] The judgment of the appellate Court shall be in writing and shall state—

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reasons for the decision ; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Shall state the reasons for the decision.—The judgment of the appellate Court should state the *reasons* for the decision. The reason of the rule has been stated to be to afford the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise, if they see fit, and are so advised, the right of second appeal conferred by s. 100. If an appellate Court could dispose of appeals coming before it in a judgment which does not state the reasons for the decisions, the right of second appeal might altogether be neutralized (*w*). The reason for the decision should be stated not only when the decree of the first Court is varied or set aside, but also when it is confirmed (*x*). If this rule is not observed, the proper form of the order to be made by the High Court in second appeal is to set aside the decree of the lower appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law (*y*). This course was adopted where the judgment was “the appeal dismissed with costs” (*z*), and in another case where the judgment was “appeal rejected under s. 551 [now O. 41, r. 11] of the Civil Procedure Code” (*a*). Where the decree of the first Court is confirmed in appeal, the Judge of the appellate Court should state *his own reasons* of the case, and should not confine himself to approving of the reasons of the Court of first instance (*b*). The reason is that the judgment should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised *his own discrimination* in deciding them. Thus where the judgment was—“To deal with the grounds of appeal would be simply to repeat the judgment of the District Munsif. I concur with the decision the District Munsif has given on each point. The judgment of the lower Court is confirmed for the reasons therein set forth, and this appeal is dismissed with costs,” the judgment was set aside (*c*). In the last mentioned case the Court observed : “Such a general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law.” The same was held where the judgment was “there is no

(*w*) *Aasan-ullah v. Hafiz* (1884) 10 Cal. 933, 935.
 (*x*) *Bomi Deka v. Brojo Nath* (1898) 25 Cal. 97 ;
Bahu Madhav v. Venkatesh (1892) 16 Bom.
 540.
 (*y*) *Sarvona Pillai v. Sesha Reddi* (1908) 31 Mad.
 489.

(*z*) *Srikant v. Huri Dass* (1882) 11 C. L. R. 131.
 (*a*) *Rami Deka v. Brojo Nath* (1898) 25 Cal. 97.
 (*b*) *Rohimoni v. Zamiruddin* (1881) 10 C. L. R.
 597 ; *Kirami v. Subahat* (1884) 8 Bom. 28.
 (*c*) *Sitarama v. Surya* (1899) 22 Mad. 12 ; *Sohawan*
v. Babu Nand (1887) 9 All. 26.

O. 41, rr. 31,32. *satisfactory evidence that plaintiff was ever in possession of the land in dispute," and the evidence was not discussed in the judgment (d).*

If the reasons for the decision are not stated by the appellate Court *as fully as they ought to have been*, but the High Court is satisfied upon the judgment that the Judge of the lower Court had read the evidence and meant to find upon that evidence as a whole, the decree of the lower Court will not be interfered with in second appeal. The proper course to be followed in such a case is to require the Judge, if still holding office, to supplement his judgment by giving in greater detail the reasons on which it is based (e).

Shall state the points for determination.—The object of the legislature in making it incumbent by this rule on the appellate Court to raise *points* for determination is to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions of the latter (f). The exact questions which arise in the appeal and require determination must be stated in the judgment. It is not sufficient to state, "the point to be determined on appeal is whether or not the decision is consistent with the merits of the case." A proposition so roundly worded is no "point" at all (g).

Form of order.—Where there has been a failure by the first appellate Court to comply with the requirements of this rule, the proper form of the order to be made by the second appellate Court is to set aside the decree and remand the case to the first appellate Court for disposal according to law. If the Judge of the Court to which the case is remanded is the Judge who heard the appeal in the first instance, he need not re-hear the appeal unless he is of opinion that he cannot properly dispose of the remanded case without a re-hearing. But where the Judge of the Court to which the case is remanded is not the Judge who heard the appeal in the first instance, a re-hearing is always necessary in order that there may be a compliance with the order of the second appellate Court that the case be disposed of according to law (h). See notes above, "Shall state the reasons for the decision."

High Court.—Where a suit was decided by a District Court, and the decree was confirmed in appeal by the High Court, and the High Court did not state in its judgment the reasons for its decision, it was said by Edge, C.J., on an application for leave to appeal to the Privy Council on the ground that the requirements of this rule were not complied with, that the present rule was not intended to apply to cases where the High Court, after hearing the judgment of the lower Court and arguments thereon, comes to the conclusion that both the judgment and the reasons given by the Court below for its decision are completely satisfactory (i). And the opinion has been expressed by Mahmood, J., that this rule does not apply at all to judgments of High Courts in second appeal (j). See s. 122.

Appeal to Privy Council.—Non-compliance with the requirements of this rule is not a ground of appeal to the Privy Council (k).

32. [s. 577.] The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the

What judgment may direct.

(d) *Ningappa v. Shivappa* (1895) 19 Bom. 323.

(e) *Biswanath v. Baidyanath* (1886) 12 Cal. 199, 202-203.

(f) *Mhasu Bhauji v. Davalat* (1905) 7 Bom. L. R. 174.

(g) *Sohawan v. Babu Nand* (1887) 9 All. 26, 30-31.

(h) *Saravana Pillai v. Sesha Reddi* (1908) 31 Mad. 469.

(i) *Sundar Bibi v. Bisheshar Nath* (1887) 9 All. 93.

(j) *Sohawan v. Babu Nand* (1887) 9 All. 26, 30-31. See also *Tarsadug v. Kashi Ram* (1903) 25 All. 109, 30 L. A. 35.

(k) *Sundar Bibi v. Bisheshar Nath* (1887) 9 All. 93.

form which the decree in appeal shall take, or as to the order to be made in appeal, the appellate Court may pass a decree or make an order accordingly. O. 41,
rr. 32, 33.

33. [*New.*] The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Illustration.

A claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X*. *X* appeals, and *A* and *Y* are respondents. The appellate Court decides in favour of *X*. It has power to pass a decree against *Y*.

Cases to which rule applies—This rule is new. It is taken for the most part from O. 58, r. 4, of the Rules of the Supreme Court of Judicature in England. The object of the rule is to empower the appellate Court to do complete justice between the parties. The illustration to the rule indicates a type of case for which provision is intended to be made. The following are further instances :—

(1) *A* sues *B* and *C* for contribution. A decree is passed against *B*, but as against *C* the suit is dismissed. *B* appeals making *A* alone respondent to the appeal. *A* does not appeal from the decree dismissing the suit as against *C*. If the appellate Court is of opinion that *C* is liable, and not *B*, it may under r. 20 direct that *C* be added as a respondent as being a person "interested in the result of the appeal," and may under the present rule alter the decree so as to make *C* liable, though there was no appeal preferred by *A* from the dismissal of the suit against *C*. This is in accordance with the Calcutta rulings under the Code of 1882 (*l*). According to the Allahabad rulings under that Code *C* could neither be added as a respondent, nor even if he were joined as a respondent from the first could any decree be passed against him, no appeal having been preferred against him (*m*). The Allahabad ruling that *C* could not be added as a respondent (under r. 20) was followed by the Madras High Court (*n*). The present rule gives effect to the Calcutta rulings and supersedes the Allahabad and Madras rulings.

(2) A suit is brought on behalf of the public for (1) a declaration that the public are entitled to use certain locks on a certain river without payment of tolls, and (2) a declaration that the defendant is under an obligation to keep the locks in repair. A decree is passed for the plaintiff awarding the relief as to the use of the locks without

(*l*) *Upendra Lal v. Girindra Nath* (1898) 25 Cal. 565; *Hudson v. Basdeo* (1899) 28 Cal. 109; *Rup Jan Bibee v. Abdul Kadir* (1904) 31 Cal. 643.
(*m*) *Atma Ram v. Balkishan* (1883) 5 All. 266; *Farran Ali v. Bismillah Begum* (1905) 27

All. 23; *Lohre v. Deo Hans* (1908) 30 All. 48; *Nizamuddin v. Abdul Aziz* (1909) 31 All. 521.
(*n*) *Subra Manian v. Veerabadran* (1908) 31 Mad. 442.

O. 41, rr. 33, 34. payment of tolls, but declaring that the defendant is under no obligation to repair the locks. The defendant appeals. The plaintiff neither files a cross-appeal nor objections. The appellate Court finds that the public are not entitled to use the locks without payment of tolls to the defendant. At the same time it finds that the defendant is under an obligation to keep the locks in repair. The appellate Court has power, while declaring by its decree that the public are liable to pay tolls, also to declare that the defendant is liable to keep the locks in repair, notwithstanding that no appeal or objection was taken to that part of the decree by the plaintiff (o).

The appellate Court has power under this rule to vary the decree of the lower Court, though the variation may benefit a defendant who has not appealed from the decree (p). Similarly it has power to make an order for extension of time for making an award in a matter governed by the Indian Arbitration Act, 1899 (q).

Cases to which rule does not apply.—*A* sues *B* to recover rent, Rs. 295. *A* decree is passed in favour of *A* for Rs. 95. *A* appeals against the disallowance of the balance of the amount claimed. *B* neither files a cross-appeal nor objections against the decree. The appellate Court finds that nothing is due to *A* from *B*. It has been held by the High Court of Allahabad that the appellate Court has no power to dismiss *A*'s claim *in toto*. If *B* was aggrieved by the decree against him for Rs. 95, he ought to have appealed or filed objections (r).

Such other decree as the case may require.—The power of the appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the date of its judgment; it may pass such decree as is in accordance with any later enactment which came into operation subsequent to such date (s).

Remand.—*A* sues *B* for three sums of money, *X*, *Y* and *Z*. *A*'s claim is allowed as to items *X* and *Y*, but disallowed as to item *Z*. *A* appeals from the decree as to item *Z*. *B* appeals from the decree as to items *X* and *Y*. The appellate Court dismisses *A*'s appeal, and allows *B*'s appeal as to item *X* only with the result that item *Y* is decreed in *A*'s favour. *A* then appeals to the High Court as to items *X* and *Z*. The High Court has power under this rule to remand the whole case for determination on the merits. The effect of such an order is to empower the lower Court to reopen the case even as to item *Y* which was decided by the lower appellate Court in favour of *A* and from which decision *B* had not preferred an appeal to the High Court (t).

34. [s. 576.] Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

Dissent to be recorded.

(o) *Attorney General v. Simpson* [1901] 2 Ch. 671.
(p) *Tricomas v. Gopinath* (1917) 44 I.A. 65, 71, 44 Cal. 759, 769 [no reference was made in the judgment to the present rule].
(q) *Tejpal v. Nathmull & Co.* (1919) 46 Cal. 1059.

(r) *Rangam Lal v. Jhandu* (1911) 34 All. 32.
(s) *Govinda v. Dandast* (1910) 20 M. L. J. 528; *Kanakayya v. Janardhan* (1913) 36 Mad. 439, 444 [F. B.]; *Muthuswami v. Kalyani* (1916) 40 Mad. 818, 822.
(t) *Sarada Sundari v. Gangahari* (1918) 46 Cal. 738.

Decree in Appeal.

35. [s. 579.] (1) The decree of the appellate Court shall bear date the day on which the judgment was pronounced. O. 41,
rr. 35-37.

Date and contents of decree.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it ;

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

Judge dissenting from judgment need not sign decree.

Costs.—Where a decree is confirmed in appeal upon grounds wholly different from those relied on in the lower Court, the proper course is to dismiss the appeal without costs (u).

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their appellate jurisdiction [O. 49, r. 3].

Form.—For form of decree in appeal, see App. G, form no. 9.

36. [s. 580.] Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the appellate Court and at their expense.

Copies of judgment and decree to be furnished to parties.

37. [s. 581.] A copy of the judgment and of the decree, certified by the appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the register of civil suits.

Certified copy of decree to be sent to Court whose decree appealed from.

O. 42, r. 1.

ORDER XLII.

Appeals from Appellate Decrees.

Procedure.

1. [S. 587.] The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

See s. 108, cl. (a).

Rules relating to first appeals to apply, so far as may be, to second appeals.—We shall note here only those rules relating to first appeals as to the applicability of which to second appeals there have been reported decisions. Rr. 1 and 2 of Order 41, which require a memorandum of appeal in first appeals, have been held to apply to second appeals (*v*). R. 22, which relates to cross-objections, has been held to apply to second appeals (*w*). Rr. 25 and 26, which empower the Court of first appeal to frame and refer issues for trial to the lower Court and to determine the appeal after return of findings on such issues, apply to second appeals to the extent indicated in the notes to r. 26 under the head "Second appeal." Rr. 27 and 28, which relate to additional evidence in first appeal, apply to second appeals to the extent mentioned in the notes to r. 27, under the head "Second appeal." As to the applicability to second appeals of r. 31, which relates to the contents of judgment of the first appellate Court, see notes to that rule under the head "High Court."

Inherent power of High Court to remand in second appeal.—Where the Court of first instance declined to record oral evidence tendered by the plaintiff on the ground that the documentary evidence produced by him was sufficient, and the decree in favour of the plaintiff was reversed in appeal, but the appellate Court declined to allow the plaintiff-respondent to produce oral evidence before it, it was held by the High Court in second appeal, that though there was no provision in the Code strictly applicable to the case, the High Court was warranted *ex debito justitiæ* in setting aside the proceedings of both the Courts below and in directing the first Court to re-try the case (*x*). See notes to O. 33, "Remand."

ORDER XLIII.

Appeals from Orders.

O. 43, r. 1.

Appeal from orders.

1. [S. 588.] An appeal shall lie from the following orders under the provisions of section 104, namely :—

- (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court ;
- (b) an order under rule 10 of Order VIII pronouncing judgment against a party ;
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;

(v) *Ahmad Ali v. Wari Hussain* (1893) 15 All. 128, 127. | (w) *Kausalia v. Gulab Kuar* (1899) 21 All. 297. | (x) *Durga Dihal v. Anoraji* (1895) 17 All. 29.

- (d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ;
- (e) an order under rule 4 of Order X pronouncing judgment against a party ;
- (f) an order under rule 23 of Order XI ;
- (g) an order under rule 10 of Order XVI for the attachment of property ;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party ;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement ;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale ;
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ;
- (l) an order under rule 10 of Order XXII giving or refusing to give leave ;
- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction ;
- (n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (o) an order under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage-money ;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV ;
- (q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII ;
- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX ;
- (s) an order under rule 1 or rule 4 of Order XL ;

O. 43,
rr. 1, 2.

- (t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal ;
- (u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the appellate Court ;
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV ;
- (w) an order under rule 4 of Order XLVII granting an application for review.

Section 104.—This rule forms part of s. 104 [see s. 104, sub-s. (1), cl. (i)]. The result is that no second appeal lies from an order passed in an appeal preferred under this rule (y).

Clause (a): order returning plaint to be presented to the proper Court.—Where an order is made by the first Court of appeal returning a *plaint* under O. 7, r. 10, by virtue of the powers conferred on it by s. 107, the order is appealable under this clause, and an appeal will lie to the High Court under s. 106 (z). But no appeal lies from an order of an appellate Court returning a *memorandum of appeal* to be presented to the proper Court. The terms of cl. (a) of this rule do not cover such a case nor can the reading of O. 7, r. 10, with s. 107 justify the interpolation of the words “*memorandum of appeal*” after the word “*plaint*” in cl. (a) of the present rule (a).

Other clauses.—These have already been considered in their proper place.

2. [s 590.] The rules of Order XLI shall apply, so far as may be, to appeals from orders.

Procedure.

See s. 108, cl. (b).

ORDER XLIV.

Pauper Appeals.

- O 44, r. 1. 1. [s. 592.] Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper,

Who may appeal as
pauper.

(y) *Naubat Singh v. Baldeo Singh* (1911) 33 All. 479 [O. 43, r. 1, cl. (a)].
(z) See O. 7, r. 10, notes “*Appeal*.”
(a) *Raghunath v. Shamo Koori* (1904) 81 Cal. 844 ;

Nazar Hussain v. Keert Mal (1890) 12 All. 581 ; *Nur-ud-Din v. Pran Kishan* (1918) 40 All. 659.

subject, in all matters including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable :

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

Procedure on appli-
cation for admission
of appeal.

Alterations in the rule.—The words “in all matters including the presentation of such application” in the first paragraph are new. See notes below under those words.

“In all matters including the presentation of such application.”

—The present rule provides that the provisions relating to *suits* by paupers shall apply so far as may be to *appeals* by paupers. Therefore the application referred to in this rule for leave to *appeal* as a pauper must be *presented by the applicant in person* just as an application for leave to *sue* as a pauper [see O. 33, r. 3]. This is now made clear by the addition of the words “in all matters including the *presentation* of such application.” In the absence of these words in the old section it was held by the Madras High Court that the rule as to the *presentation* of a pauper's petition (now contained in O. 33, r. 3) did not apply to pauper appeals (b). The Madras decision is no longer law.

“Subject to the provision relating to suits by paupers.”—*A* sues *B* to recover certain properties as the heir of her deceased husband. The suit is dismissed. *A* applies for leave to appeal as a pauper. It is found on inquiry that *A* had before instituting the suit entered into an agreement falling within the terms of O. 33, r. 5 (d), which would have disentitled *A* to sue as a pauper. The appellate Court should under these circumstances refuse leave to *A* to appeal as a pauper (c).

Application and memorandum of appeal.—This rule requires two separate documents to be presented,—a memorandum of appeal, and an application for leave to appeal as a pauper. When the Judge disposes of the pauper application, he does not thereby necessarily dispose of the appeal. He may still treat it as an existing appeal if the appellant desires to pay the full court-fees on the appeal and to continue it as an ordinary appeal. The Judge is under no legal obligation to dismiss the appeal when he refuses the appellant leave to appeal as a pauper (d). Following this reasoning, it has been held by the High Court of Madras that where an application for leave to sue as a pauper is rejected owing to the memorandum of appeal which accompanied it being unstamped, the rejection of the application does not carry with it the rejection of the memorandum of appeal. The result is that if the pauper applies for time to pay the court-fee, and time is granted to him [s. 149], and the court-fee is paid within the time fixed by the Court, the appeal must be held to be in time, though the court-fee may have been paid after the expiration of the period of limitation prescribed for filing the appeal (e).

Proviso to the rule.—The proviso is a necessary safeguard introduced by the legislature for the benefit of litigants who find themselves opposed by paupers. To

(b) *Mallik v. Somappa* (1903) 26 Mad. 389.
(c) *Hanifa Bai v. Haji Siddick* (1907) 30 Mad. 547.
(d) *Bai Ful v. Desai Manorbhai* (1898) 22 Bom.

849, pp. 856-857; *Muhammad v. Rahat Ali* (1918) 40 All. 381.
(e) *Nallavadiya v. Subramania* (1917) 40 Mad 687.

O. 44, provide a safeguard against the proviso being overlooked, the Judge admitting a pauper
rr. 1, 2. appeal should express and record briefly the reasons on which the leave proceeds (f).

Appeal.—No appeal lies under the Code from an order refusing leave to appeal as a pauper. It was held in a Madras case that no appeal lies from such an order under cl. 15 of the Letters Patent (g), but that decision has been dissented from by a Full Bench of the same High Court in a recent case (h). There is an Allahabad case in which it was held that no appeal lies under the Letters Patent from an order refusing leave to appeal as a pauper (i). That decision, however, proceeded on grounds no longer tenable, and it cannot, therefore, be treated as a precedent. See notes to s. 104, "Letters Patent Appeal," p. 264 above.

Limitation.—The period of limitation for leave to appeal as a pauper is 30 days from the date of the decree appealed from (j). See Limitation Act, 1908, sch. I, art. 170.

Form.—For form of application to appeal *in forma pauperis*, see App. G, form no. 10. For form of notice of appeal *in forma pauperis*, see App. G, form no. 11.

2. [S. 593.] The inquiry into the pauperism of the
 Inquiry into pauperism. applicant may be made either by the
 appellate Court or under the orders of
 the appellate Court by the Court from whose decision the
 appeal is preferred ;

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the appellate Court sees cause to direct such inquiry.

ORDER XLV.

Appeals to the King in Council.

O. 45, **1. [S. 594.]** In this Order, unless there is something
rr. 1, 2. repugnant in the subject or context, the
 "Decree" defined. expression "decree" shall include a final
 order.

When appeals lie to King in Council.—See ss. 109 and 110.

2. [S. 598.] Whoever desires to appeal to His Majes-
 Application to Court whose
 decree complained of. ty in Council shall apply by petition to the
 Court whose decree is complained of.

In forma pauperis.—When a person applies for leave to appeal to His Majesty in Council *in forma pauperis*, he must present an application for that purpose to the High Court, and a separate application to His Majesty in Council (k).

(f) *Sakubai v. Ganpat* (1904) 28 Bom. 451.

(g) *Appasami v. Somasundara* (1908) 26 Mad. 437.

(h) *Tuljaram v. Alagappa* (1910) 35 Mad. 1, 9, 17.

(i) *Banno v. Mehdi Husain* (1889) 11 All. 875.

(j) See *Mahadev v. Lakshman* (1895) 19 Bom. 48.

(k) *Munni Ram v. Sheo Churn* (1846) 4 M. I. A. 114.

Power of High Court to grant leave to appeal to His Majesty in Council in forma pauperis.—It has recently been held by the High Courts of Calcutta (l), Patna (m), and Madras (n), that O. 44, r. 1, does not apply to appeals to His Majesty in Council, and that the High Court has no power to grant leave to appeal *in forma pauperis* to His Majesty in Council. The point arose in an earlier Calcutta case, but it was not decided (o). In a still earlier case it was said that the usual security for costs must be given (p).

O. 45,
rr. 2, 3.

Limitation.—See notes to s. 109 above.

3. [S. 600.] (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

Certificate as to value or fitness.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

Alteration in the rule.—In sub-rule (2) the word “shall” has been substituted for the word “may.”

Certificate.—The certificate of leave to appeal, and not the order for such certificate, is the document which the Judicial Committee are bound to consider and act upon in determining whether leave to appeal has been properly granted or not; and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, they ought to hold that leave has not properly been given (q). The assent of the respondent to the issue of a certificate under this rule cannot give effect to it in the absence of the conditions under which alone it could be issued (r).

Certificate as to fitness.—Where a case fulfils the requirements of s. 110, the petitioner is entitled to a certificate *as of right* in the ordinary course of procedure otherwise, that is, where a case does not fulfil the requirements of s. 110, as where the matter is under the appealable value or is not measurable by money, the granting of the certificate is entirely in the discretion of the Court (s). In the former case, the High Court should certify the sufficiency of the amount for appeal to the Privy Council, and should also certify, when the decision of the lower Court is affirmed, that the appeal involves a question of law. In the latter case, it is quite enough if the certificate states that the case is a fit one for appeal to His Majesty in Council (t). In a recent case their Lordships of the Privy Council laid down a rule to be followed in future in Indian cases, that where a party applies to the Committee for *special leave* to appeal, the matter being under the appealable value or not measurable by money, he should first have applied to the Court

(l) *Jagadanand v. Rajendra* (1912) 17 Cal. L. J. 881.

(m) *Ramkishan Lal v. Manna Kumari* (1918) 3 Pat. L. J. 179.

(n) *Amba v. Srinivasa* (1918) 42 Mad. 32.

(o) *Thompson v. Calcutta Tramways Co.* (1894) 21 Cal. 523 at p. 525.

(p) *Gour Surn Dass, In re* (1878) 19 W. R. 305.

(q) *Radha Krishn Das v. Rai Krishn Chand*

(1901) 23 All. 415, 28 I. A. 182.

(r) *Banarsi Prasad v. Kashi Krishna* (1901) 23 All. 227, 28 I. A. 11.

(s) *Banarsi Prasad v. Kashi Krishna* (1901) 23 All. 227, 231, 28 I. A. 11.

(t) *Webb v. Macpherson* (1904) 31 Cal. 57, 30 I. A. 238; *Amar Chandra v. Shosh Bhusan* (1904) 31 Cal. 305.

O. 45,
rr. 3, 4.

below for a certificate under this rule and s. 109, cl. (c), that the case is otherwise a fit one for appeal to His Majesty in Council, and observed that unless this was done, special leave to appeal would not be granted by the Committee except in special cases (u). See notes to s. 109 under the head "Certificate as to fitness," p. 270, and notes to s. 110 under sub-head "Where the matter is under the appealable value or is not capable of valuation," p. 276.

Procedure.—If the petitioner does not prosecute his petition, it may be struck off for non-prosecution (v).

Appeal.—An order granting a certificate that the case is a fit one for appeal to the Privy Council is not a "judgment" within the meaning of cl. 15 of the Letters Patent. Hence no appeal lies from such an order (w). Nor does an appeal lie under that clause from an order refusing an application for leave to the Privy Council where the refusal is based on the ground that the case did not fulfil the requirements of s. 110 above (x).

Form.—For form of notice under sub-r. (2), see App. G, form no. 12.

4. [New.] For the purposes of pecuniary valuation suits involving substantially the same questions for determination and decided by the same judgment may be consolidated: but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.

Consolidation of suits.

Consolidation of suits.—This rule is new. In the absence of any such rule in the Code of 1882, it was held by the High Court of Allahabad that suits involving substantially the same questions for determination could be consolidated for the purpose of reaching the pecuniary limit necessary for an appeal, if the property affected by the suits was the same, notwithstanding that the suits were decided by separate judgments (y). According to the Calcutta decisions, however, such consolidation was not permissible unless the suits, besides involving the same question for determination, were decided by the same judgment (z). The present rule gives effect to the Calcutta rulings. It need hardly be observed that suits that could be consolidated for the purposes of pecuniary valuation must be suits actually instituted and not merely suits *in gremio futuri* (a).

Inherent power to consolidate cases.—This rule provides for consolidation of cases "for the purposes of pecuniary valuation." The High Court of Patna has held that the High Court has inherent powers to permit consolidation of cases on ground other than those specified in this rule. Accordingly where two appeals to His Majesty in Council were in substance one, the two were ordered to be consolidated and tried together, the Court observing that "in the interest of justice and to save unnecessary expense the appeals ought to be consolidated (b).

(u) *Mott Chand v. Ganga Prasad* (1902) 24 All. 174, 29 I. A. 40.

(v) *Mooraajee v. Visramjee* (1886) 12 Cal. 658.

(w) *Lutf Ali v. Asgur Reza* (1890) 17 Cal. 455.

(x) *Manly v. Patterson* (1881) 7 Cal. 339.

(y) *Kasaja Muhammad, In the matter of* (1896) 18 All. 196.

(z) *Royal Insurance Company v. Akhoy Coomar*

(1901) 5 Cal. W. N. 41; *Mohammad v. Mootechand* (1866) 5 W. R. 34; *Byjnath v. Graham* (1885) 11 Cal. 740.

(a) *Hamuman Prasad v. Bhagwati* (1902) 24 All. 236; *Abdul Karim v. Allah Baksh* (1913) P. R. no. 90, p. 320.

(b) *Chaudry Har Prasad v. Brij Kishor Das* (1918) 8 Pat. L. J. 446.

O. 45,
rr. 5-7.

5. [New.] In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

Remission of dispute to Court of first instance.

Dispute as to value of subject-matter.—This rule is new. It gives legislative recognition to the practice followed under the Code of 1882 in cases where there was a dispute as to the value of the subject-matter of the suit. This practice is referred to in the undermentioned Calcutta case (c) where it was held that a plaintiff in a suit for damages cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure. A claims Rs. 10,000 as damages for an alleged defamation. The suit is dismissed on the ground that the libel was privileged, and the decision is affirmed in appeal. A applies for leave to appeal to the Privy Council. The mere fact that A claimed Rs. 10,000 as damages is not sufficient proof that the amount of the matter in dispute is Rs. 10,000. Hence if the other party disputes the correctness of the amount A must show that the amount of the matter in dispute is Rs. 10,000. When there is a contest as to the true value of the matter in dispute it has been the invariable practice—a practice sanctioned by the Judicial Committee—to ascertain by evidence and enquiry what the true value is. But where an inquiry has already been made at the trial of the suit by the Court of first instance as to the value of the subject-matter of the suit, and the finding as to the value has been acquiesced in by the applicant, the High Court may not direct any fresh inquiry under this rule (d). Where a reference is made under this rule to the Court of first instance, the inquiry should be held by that Court: the Court of first instance has no power to remit the investigation to some other officer (e).

Effect of refusal of certificate.

6. [S. 601.] Where such certificate is refused, the petition shall be dismissed.

Costs.—Where the petition is made to the High Court and it is dismissed with costs, the proper Court to execute the order is the lower Court (f).

Appeal.—An appeal lies from an order made by any Court other than a High Court refusing the grant of a certificate under this rule [O. 43, r. 1, cl. (v)].

7. [S. 602.] (1) Where the certificate is granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

Security and deposit required on grant of certificate.

(c) *Rat Amrita Nath v. Abhay Charan* (1905) 9 C. W. N. 370. | (e) *Hansman v. Bahuji* (1916) 43 Cal. 225.
(d) *Anant v. Ramchandra* (1918) 42 Bom. 609. | (f) *Jogendra v. Wazir-unissa* (1907) 34 Cal. 880.

- O. 45 r. 7. (a) furnish security for the costs of the respondent, and
- (b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—
- (1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being ;
 - (2) papers which the parties agree to exclude;
 - (3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included ; and
 - (4) such other documents as the High Court may direct to be excluded.

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in sub-rule (1), deposit the amount required to defray the expense of printing such copy.

Date of the decree.—This means the date on which the decree is pronounced, not that on which it is signed (g).

Extension of time.—It has been held by the Judicial Committee of the Privy Council that the High Court may extend the time allowed for giving the security and making the deposit provided there are “ cogent reasons ” for doing so (h). According to the Madras High Court the “ cogent reasons ” must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so not owing to the absence and difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence (i). On the other hand, it has been held by the Chief Court of the Punjab that poverty is a cogent reason for extending the time if the amount required is large and the applicant has deposited a substantial portion of the amount within the time originally allowed (j).

Security in case of consolidated appeal.—Where two or more appeals are consolidated for purposes of pecuniary valuation, the security required by this rule is the whole security which the appellants together have to furnish and not only a

(g) *Harendra v. Hari Das* (1909) 14 Cal. W. N. 420. Cf. O. 20, r. 7.

(h) *Burjore v. Bhagana* (1888) 11 I. A. 7, 10, 10 Cal. 557; *Fazal-un-Nissa v. Mulo* (1884)

6 All. 280.

(i) *Rangasami v. Mahalakshamma* (1890) 14 Mad. 891.

(j) *Bagga v. Salihon* (1910) Punj. Rec. no. 44, p. 188.

portion thereof. Therefore, if two or more appeals are consolidated, and some sets of appellants furnish the security required from them, but others do not, the consolidated appeal cannot be admitted under r. 8 below (*k*). O. 45,
rr. 7-10.

Appeal.—No appeal lies under cl. 15 of the Charter from an order refusing to extend the time for furnishing security for costs and directing the appeal to be struck off (*l*).

8. [S. 603.] Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—
Admission of appeal and procedure thereon.

- (a) declare the appeal admitted,
- (b) give notice thereof to the respondent,
- (c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and
- (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

“Such Security.”—See notes to r. 7 above, “Security in case of consolidated appeal.”

Form.—For form of notice under cl. (b) of this rule, see App. G, form no. 10.

9. [S. 604.] At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.
Revocation of acceptance of security.

10. [S. 605.] Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,
Power to order further security or payment.

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

(*k*) *Bibi Nabi v. Rai Baijnath* (1919) 4 Pat. L. J. 198. | (*l*) *Kishan Pershad v. Tistuckdhari* (1890) 18 Cal. 182.

O. 45,
rr. 11-13.

Effect of failure to comply
with order.

11. [S. 606.] Where the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime, execution of the decree appealed from shall not be stayed.

E. 2.

12. [S. 607.] When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

Refund of balance deposit:

13. [S. 608.] (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

Powers of Court pending
appeal.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

- (a) impound any moveable property in dispute or any part thereof, or
- (b) allow the decree appealed from to be executed taking such security from the respondent as, the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or
- (c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or
- (d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal as it thinks fit, by the appointment of a receiver or otherwise.

Alterations in the rule :—

O. 45, r. 13.

1. The words "admitting the appeal" which occurred in the first paragraph of the old section after the word "Court" have been omitted. Those words gave rise to a conflict of decisions on the question whether the Court had power under the old section to stay the execution of the decree appealed from after a petition had been presented for leave to appeal but before the appeal was admitted. It was held by the High Court of Bombay that the Court had the power (m). On other hand, it was held by the High Court of Calcutta that the Court had no such power, the decision being based on the ground that the words "the Court admitting the appeal" indicated that no stay could be granted until the appeal was admitted (n). The words "admitting the appeal" have been omitted to make it clear that the power conferred by this rule may be exercised at any time after the presenting of the petition, and even before the grant of a certificate for the admission of the appeal.

Another result of the omission of the words "admitting the appeal" after the word "Court" is to invest the High Court with power to stay execution, notwithstanding that an appeal has been admitted by special leave of His Majesty in Council (o). Under the Code of 1882 it was held that since the powers conferred by the corresponding s. 608 could only be exercised by the Court admitting the appeal, the High Court had no power to stay execution where the appeal was admitted by special leave of His Majesty in Council (p).

2. The words "by the appointment of a receiver or otherwise" at the end of cl. (d) are new.

"The Court."—The "Court" referred to in this rule and r. 14 is the High Court (q).

Stay of execution before grant of certificate.—See notes above, "Alterations in the rule," No. 1.

Stay of execution in view of an application for special leave to appeal.—The High Court has an inherent power to make an order for stay of execution in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (r).

Security after execution.—The Court has power to require security to be given under this rule even after the decree has been executed wholly or in part (s). It has also the power to stay further execution after the decree has been partially executed (t).

Stay of execution where appeal admitted by special leave.—See notes above "Alterations in the rule," No. 1, second paragraph.

Appointment of receiver where appeal admitted by special leave.—The High Court has power to appoint a receiver under cl. (d) notwithstanding that the appeal was admitted by special leave of His Majesty in Council (u).

(m) *Dams Janbai v. Sale Mahomed* (1895) 19 Bom. 10.

(n) *Jarao Kumari v. Gopi Chandra* (1900) 5 C.W.N. 562.

(o) *Nityamoni Dasi v. Madhu Sudan* (1911) 38 Cal. 335, 38 I. A. 74.

(p) *Moheshchandra v. Satrugan* (1900) 27 Cal. 1, 26 I. A. 281.

(q) *Ram Bahadur v. Radha Krishen* (1917) 3 Pat. L. J. 40.

(r) *Nanda Kishore v. Ram Golum* (1912) 40 Cal. 955.

(s) *Jariutool Butool v. Hoosinee Begum* (1886) 10 M. I. A. 196; *Inder Kumari v. Jaipal Kumari* (1887) 14 Cal. 290, 295, 14 I. A. 1; *Narayanan v. Arunachellam* (1896) 19 Mad. 140, 142.

(t) *Ashanulla v. Karoonamoyi* (1879) 4 C. L. R. 125.

(u) *Raja Wazir v. Rani Jagadamba* (1919) 4 Pat. L. J. 482.

O. 45,
rr. 13, 14.

Practice.—Applications of the character mentioned in this rule ought always to be made in the first instance, at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the peculiar case, and has knowledge of details which the Judicial Committee cannot possess on an interlocutory application (v). If the application is refused by the High Court, and the Judicial Committee is of opinion that the application ought to have been granted, it may grant a stay of execution. But more than this it will not do; for instance, it will not appoint a receiver of the property under attachment nor take the security referred to in cls. (b) and (c) of sub-rule (2). In such cases, the Judicial Committee will grant leave to the applicant to apply to the High Court with an intimation of its opinion. The High Court is bound to take notice of such order, it being an order of His Majesty the King in Council, and to govern itself accordingly (w).

Appeal.—No appeal lies under cl. 15 of the Letters Patent from an order refusing to stay execution pending appeal to the Privy Council (x).

14. [S. 609.] (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

Increase of security found
inadequate.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security :

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

“The Court.”—See notes under the same head to r. 13 above.

(v) *Vasudeva v. Shadagopa* (1906) 29 Mad. 379, 33 I. A. 132.

(w) *Jariulool Bulool v. Hoosinee Begum* (1865) 10 M. I. A. 196, 202 (where the application was made by the appellant after execution of the decree requiring the respondent to give security and the Court thought it had no power to demand security after execution of the decree); *Chatrapati Singh v. Dwarkanath* (1895) 22 Cal. 1, 21 I. A. 170 (where the application was made by the

respondent for a stay of execution, and the Judges of the High Court had differed in opinion as to the propriety of staying execution); *Vasudeva v. Shadagopa* (1906) 29 Mad. 379, 33 I. A. 132 (where the application was made by the respondent for a stay of execution, and the High Court granted a stay for three months only believing it had no power to grant a stay until the disposal of the appeal to the Privy Council

(x) *Mohabir Prosad v. Adhikari* (1894) 21 473.

15. [s. 610.] (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed to the Court from which the appeal to His Majesty was preferred.

Procedure to enforce orders of King in Council.

O.45, r. 15.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

Alterations in the rule.—Paragraphs 3 and 4 of the old section which related to the enforcement of the liability of a surety for the costs of the respondents have been omitted in view of the general rule now laid down in s. 145.

Jurisdiction of Patna High Court.—The Patna High Court has no jurisdiction to execute an order of His Majesty in Council passed in an appeal from a decree of the Calcutta High Court on appeal from a subordinate Court in Behar. The application for execution of such an order should be made to the Calcutta High Court (y).

“Whoever desires to obtain execution.”—It may be that where a decree has been passed in favour of a number of persons *jointly*, an application under this rule by one or more of them would be sufficient to entitle all of them to apply for execution in the Court below. But it is not so where several persons are by a decree declared entitled to *separate specific shares*, say of an *ijmali share*, in which case each person obtains by the decree a right to a separate share. In such a case no single plaintiff is entitled to execute the decree on behalf of all the plaintiffs, from which it follows that an application under sub-r. (1) by some of the plaintiffs does not entitle all of them to apply under sub-r. (2) for execution to the Court to which the order of His Majesty in Council is sent for execution under that sub-rule (z).

(y) *Lalji v. Baijnath* (1917) 2 Pat. L. J. 684.
(z) *Maharaja Ravenshaw v. Rai Baijnath* (1917)

2 Pat. L. J. 496.

O. 45, r. 15. Functions of High Court under this rule.—The act of the High Court in receiving and filing orders of His Majesty in Council under this rule is a purely ministerial function. The High Court, therefore, has no power, under this rule to discuss the effect of the order of His Majesty in Council on an application to file the order. If the order is impeached as erroneous, the proper course for the party aggrieved by the order is to apply to His Majesty in Council to make the necessary alteration or modification in the order (a).

“Execution.”—The word “execution” includes restitution as described in s. 144. A person, therefore, who desires to obtain execution, though it be by way of restitution, must apply in the first instance to the Court indicated by this rule (b).

Application for execution of order of His Majesty in Council by assignee of order.—Where an order of His Majesty in Council is transmitted by the High Court for execution under sub-r. (2) to the Court which passed the first decree appealed from, the latter Court is not in the position of a Court to which a decree is transferred for execution, and it is not therefore precluded from entertaining an application for execution of the order by an assignee of the order (c). See O. 21, r. 16, and notes thereto, “Application for execution by a transferee should be made to the Court which passed the decree,” p. 562 above.

Enforcement of liability of surety.—A obtains a decree against B in a High Court for possession of certain immoveable property. B appeals to the Privy Council, and C stands surety for A's costs of the appeal [r. 7, sub-r. 1, cl. (a)]. If the appeal is dismissed with costs, A may proceed against C for costs by an application for execution [s. 145].

Suppose now that in the case put above A applies for execution of the decree, and that possession of the property is delivered to him on D standing surety for re-delivery of the property to B, and for the payment of mesne profits in the event of B's appeal being successful [r. 13, sub-r. (2), cl. (b)]. Suppose further that the Privy Council allows B's appeal, and reverses the decree of the High Court. If A fails to re-deliver the property or to pay the mesne profits to B, B may proceed against D by an application for execution [s. 145] (d).

Restitution.—A obtains a decree against B for possession of certain immoveable property. Possession of the property is delivered to him in execution. The decree is then set aside in appeal to the Privy Council. Pending the appeal to the Privy Council the property is sold in execution of a decree obtained by C against A, and it is purchased by P. B is entitled on reversal of the decree by the Privy Council to restitution of the property as against P, the latter being a “representative” of A within the meaning of s. 47 (e). See notes to s. 144 under the head “Against whom restitution may be claimed,” p. 313 above.

Mesne profits.—Where a party is dispossessed of land in pursuance of a decree of the High Court, and the decree is reversed in appeal to the Privy Council, he is entitled not only to restoration of the land, but to mesne profits during the period of dispossession, though the order of His Majesty in Council may be silent as to such profits (f). See s. 144.

(a) *Prem Lal v. Sumbhoonath* (1895) 22 Cal. 960, 971-972.

(b) *Damodar Das v. Birj Lal* (1915) 37 All. 567.

(c) *Krishna Bhoopathi v. Raja of Vizianagaram* (1914) 38 Mad. 832.

(d) *Arunachellam v. Arunachellam* (1892) 15 Mad.

203, is no longer law.

(e) *Garudhuj Prasad v. Baiju Mal* (1906) 13 All. 387.

(f) *Arunachellam v. Arunachellam* (1892) 15 Mad. 203.

Rate of exchange.—The Courts have differed on the question whether the words “for the time being” refer to the rate of exchange at the date of the passing of the order or to that current when the amount is realised. The former view is held by the Calcutta High Court (g), the latter by the Allahabad High Court (h).

Interest on costs.—Where interest on costs is not allowed in the order of His Majesty in Council, such interest cannot be given by any Court in this country (i).

Letters Patent appeal.—An appeal lies under cl. 15 of the Letters Patent from an order of a single Judge of a High Court *refusing* to transmit for execution the order of His Majesty in Council as provided by sub-rule (2) of this rule (j).

Limitation.—An application for execution under this rule is governed by Act 183 of the Limitation Act, 1908 (k).

Dismissal of appeal for want of prosecution.—Where an appeal is preferred to the Privy Council from the decree of a High Court, but the appeal is *dismissed for want of prosecution*, the order of His Majesty in Council does not amount to a decree at all for purposes of limitation or for any other purpose. Such an order *does not deal judicially* with the matter of the suit, but merely recognizes authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he is in the same position as if he had not appealed at all (l).

16. [S. 611.] The orders made by the Court which executes the order of His Majesty in Council¹, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Appeal from order relating to execution.

Appeal.—See notes to r. 15 above, “Letters Patent appeal.”

ORDER XLVI.

Reference.

1. [S. 617.] Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a

Reference of question to High Court.

(g) *Dakhina v. Saroda* (1896) 23 Cal. 357; *Mahomed v. Gajraj* (1898) 25 Cal. 283.

(h) *Param Sukh v. Ram Dayal* (1896) 3 All. 650.

(i) *Dakhina v. Saroda* (1896) 23 Cal. 357; *Forester v. Secretary of State* (1878) 4 I. A. 187, 3 Cal. 161.

(j) *Hurriah Chunder v. Kali Sunderi* (1882) 9 Cal. 482, 10 I. A. 4, in appeal from *Kali Sunderi Dabia, in re* (1881) 6 Cal. 594. See

also *Lalanand v. Lucknimpu* (1870) 5 Beng. L.R. 605, 608, 13 M. I. A. 490.

(k) See *Tribikram v. Badri* (1916) 1 Pat. L. J. 385; *Chatterpat Singh v. Saita* (1917) 20 C. W. N. 889.

(l) *Abdul Majid v. Jawahir Lal* (1914) 36 All. 350 [P. C.]; *Batuk Nath v. Munni De* (1914) 36 All. 284, 41 I. A. 104

O. 46, r. 1. statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

Alterations in the rule.—

1. The words "is not subject to appeal" have been substituted for the word "final," as the expression "final decree" is now used in this Code in contradistinction to a "preliminary decree."
2. The words, "or the construction of a document, which construction may affect the merits," which occurred in the old section after the words "having the force of law," have been omitted, as they are sufficiently covered by the power to refer any question of law.

Hearing of a suit or appeal.—A reference can be made to the High Court under this rule only in a *suit* or an *appeal in a suit*, and not in every matter before the court in which a point arises on which the Court entertains reasonable doubt (*m*). Thus where a pleader was fined Rs. 25 by a Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee, and on appeal the District Judge referred the matter to the High Court under this rule, it was held that no reference could properly be made under this rule as there was no *suit* or *appeal in a suit* (*n*). Nor can any reference be made in a proceeding other than a *suit* or an *appeal in a suit* even by virtue of the provisions of s. 141 above (*o*). See note to s. 141, "The procedure provided in this Code" p. 309 above.

Decree not subject to appeal.—This rule does not authorize a reference to the High Court except in a suit or appeal in which the decree is not subject to appeal. Therefore no reference can be made to the High Court in a matter in which an appeal lies, for in appealable cases a remedy to correct possible error is provided by the appeal. It is only when a decree is not subject to appeal that a reference can be made under this rule (*p*). In *Ramphul v. Durga* (*q*), a Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, returned the plaint to be presented to the proper Court. On appeal, the District Judge referred the matter to the High Court. The High Court held that the order of the Munsif returning the plaint being an appealable order [O. 43, r. 1, cl. (a)], the High Court had no jurisdiction to entertain the reference. On the same ground it is held that there could be no reference under this rule in a matter of probate, and that an order made by a District Judge on an application for probate being appealable, it cannot be referred for the opinion of the High Court under this rule though, when referred the High Court may deal with the case as a Court of concurrent jurisdiction under s. 264 of the Indian Succession Act (*r*).

Jurisdiction.—A Judge who has no jurisdiction to hear a suit or an appeal has no jurisdiction to make a reference before or at the hearing of such suit or appeal (*a*).

Reasonable doubt.—A reference under this rule can only be made when a Judge entertains a reasonable doubt on a question of law or usage having the force of law. A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided

(*m*) *Mahammad v. Ahmadbhai* (1901) 25 Bom. 327.

(*n*) *Yashvant v. De Souza* (1888) 12 Bom. 78.

(*o*) *Damodara v. Kittappa* (1911) 36 Mad. 16.

(*p*) *Rangit v. Bhatji* (1887) 11 Bom. 57; *Krishna v. Ramkumar* (1880) 7 C. L. R. 144; *Secretary of State v. Fazal* (1891) 18 Cal. 234; *Oriental Loan Assn., Ltd., v. Hatch* (1893)

17 Bom. 735; *Mahant v. Chudasama* (1888) 12 Bom. 30; *Niaz Ali v. Muhammad* (1916) Punj. Rec. no. 180, p. 407.

(*q*) (1885) 7 All. 815.

(*r*) *Monohur Mookerjee in the matter of* (1880) 5 Cal. 758.

(*a*) *Ganga Singh v. Kausht Ram* (1913) Punj. Rec. No. 61, p. 233.

by the rulings of the High Court to which he is subordinate, unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council (t).

O. 16,
rr. 1-5.

Reference by Presidency Small Cause Court.—See Presidency Small Cause Court Act, 1882, s. 69.

2. [S. 618.] The Court may either stay the proceedings or proceed in the case notwithstanding such reference and may pass a decree or make an order contingent upon the decision of the High Court on the point referred ;

Court may pass decree contingent upon decision of High Court.

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

3. [S. 619.] The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made ; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

Judgment of High Court to be transmitted, and case disposed of accordingly.

"Such Court shall proceed to dispose of the case in conformity with the decision of the High Court."—In *Yule & Co. v. Mahomed Hossein (u)* the Calcutta Small Cause Court passed a decree for the plaintiffs contingent on the opinion of the High Court. The High Court held that upon the case presented by the plaintiffs they could not recover. The judgment of the High Court was transmitted to the Small Cause Court, and the Small Cause Court Judge, instead of entering judgment for the defendants, allowed the suit to be withdrawn by the plaintiffs with liberty to them to bring a fresh suit [O. 23, r. 1]. Upon a petition for revision it was held by the High Court that the Small Cause Court was bound on receipt of the decision of the High Court 'to dispose of the case in conformity with that decision,' and to enter judgment for the defendants, and that the order allowing the plaintiffs to withdraw from the suit was illegal.

4. [S. 620.] The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

Costs of reference to High Court.

5. [S. 621.] Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

Power to alter, &c., decree of Court making reference.

(t) *Bhanajit v. De Brito* (1906) 30 Bom. 22; *Fuldingham v. Dunn* (1914) Punj. Rec. no. 8; (u) p. 22. (1897) 24 Cal. 129.

O. 46,
rr. 6, 7.

6. [S. 646A.] (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

Power to refer to High Court questions as to jurisdiction in small causes.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

At any time before judgment.—A reference under this rule can only be made before judgment (v).

7. [S. 646-B] (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

Provincial Small Cause Courts' Act 9 of 1887, sec. 16.—Section 16 of the Provincial Small Cause Courts' Act runs as follows: "Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes *shall not be tried* by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

"If required by a party shall."—It has been held by the High Courts **O. 46, r. 7.** of Madras and Calcutta that a District Court is bound to make a reference under this rule if one of the parties requires it to do so (w). On the other hand, it has been held by the Allahabad High Court that the word "shall" is not mandatory, but merely directory, and that a District Court should not make a reference under this rule, unless it is satisfied that a Court subordinate thereto has erroneously held upon the point of Jurisdiction in regard to the particular suit before it (x).

Statement of reasons.—Where a reference is made to the High Court under this rule, the District Court which makes the reference should state its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous (y).

Powers of High Court under this rule.—There is a conflict of decisions as to the powers of the High Court under this rule as will be seen from the cases considered below :—

Illustration.

A suit cognizable by a Small Cause Court is tried by a District Munsif on the original side without objection to his jurisdiction, and a decree is passed for the plaintiff. The defendant appeals to the District Court, making no reference to the question of jurisdiction in his grounds of appeal. The District Court reverses the decree passed by the Munsif. The plaintiff applies to the High Court under s. 115 for a revision of the decision of the District Court. It is clear that the suit being one of a nature cognizable by a Small Cause Court, the District Munsif had no jurisdiction to entertain it under his ordinary jurisdiction having regard to the provisions of section 16 of the Provincial Small Cause Courts' Act set forth above. Nor had the District Court jurisdiction to entertain an appeal from the decree in such a suit. What order should the High Court make, assuming, of course, that the suit was one of a nature cognisable by a Small Cause Court and which of the following courses should it adopt ?—

- (1) Should the High Court set aside the decrees of both the Courts below and return the plaint for presentation to the proper Court ?
- (2) Or has it power to consider the case on the merits and to decline to interfere in the matter even though in strict law the suit should have been tried under a different procedure ?
- (3) Or should it not set aside at least the decree of the District Court as having been made without jurisdiction, and then dispose of the case on its merits leaving the decree passed by the Munsif to stand or not as may in its discretion appear best ?

The first course was adopted by White, C.J., in a Madras case where the learned Judge observed that there was no alternative but to adopt that course (z).

The second course was adopted by the High Court of Calcutta in the undermentioned cases (a), where the Court declined to interfere on the ground that they had a complete discretion in the matter.

(w) *Simson v. McMaster* (1890) 13 Mad. 344;
Suresh Chunder v. Kristo Rangini (1894)
 21 Cal. 249, 251.
 (x) *Madan Gopal v. Bhagwan Dass* (1889) 11
 All. 304.

(y) *Chhotu v. Jawahir* (1906) 28 All. 293.
 (z) *Ramasamy v. Orr* (1902) 26 Mad. 178.
 (a) *Suresh Chunder v. Kristo Rangini* (1894) 21
 Cal. 249 [case of second appeal]; *Parmesh-
 wari v. Jagat* (1914) 19 C. W. N. 900.

O. 46, r. 7. The third course was adopted in a recent case by a Full Bench of the Madras High Court (b). The Full Bench held, dissenting from the Calcutta decision cited above, and overruling an earlier Madras case (c) in which the Calcutta decision was followed, that the decree of the District Judge should be set aside as having been passed without jurisdiction. That decree was accordingly set aside, and the decree passed by the Munsif was restored. The same course was adopted in a Bombay case (d).

As regards the Allahabad High Court, it declined to interfere in one case on the ground that the present rule did not apply unless there was an *erroneous holding* as to jurisdiction, and that there could be no "holding" at all if no objection to jurisdiction was taken by either party in the Courts below (e). In a later case, it followed the Full Bench ruling of the Madras Court, and set aside the decree of the District Court and restored the decree passed by the Munsif (f).

ORDER XLVII.

O. 47, r. 1. Application for review of judgment.

1. [s. 623.] (1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
 (b) by a decree or order from which no appeal is allowed, or
 (c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellants, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.

(b) *Kollipara v. Kankipati* (1908) 33 Mad. 323.
 (c) *Parameswaram v. Vishnu* (1898) 27 Mad. 478.

(d) *Shankarbhai v. Soomabhai* (1900) 25 Bom. 417.
 (e) *Ram Lal v. Kabul Singh* (1908) 25 All. 185.
 (f) *Abdul Majid v. Bedyadhar* (1916) 39 All. 101.

In what cases a party may apply for a review.—A party aggrieved by a **O. 47, r. 1** decree or a decision specified in clause (a), (b) or (c) of sub-rule (1) [see s. 114] may apply for a review in any of the following cases :—

- I on the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made; *or*
- II on account of some mistake or error apparent on the face of the record; *or*
- III for any other sufficient reason.

Order on application.—Where a party aggrieved by a decree applies for a review, the application may either be granted or rejected (r. 4 below).

If the application is rejected the case ends there, and the parties are relegated to the old decree. The order rejecting the application is final, and no appeal lies therefrom (r. 7), but the party aggrieved may appeal from the old decree.

If the application is admitted, the case is re-heard, and it may result in a *repetition* of the decree or in some *variation* of it. In *either* case, the whole matter having been re-opened, there is a *fresh* decree (g).

1. Discovery of new and important matter or evidence.—When a review is sought on the ground of the discovery of new evidence, the evidence must be (1) relevant and (2) of such a character that if it had been given in the suit it might possibly have altered the judgment (h). As stated by Lord Loreburn, L.C., in *Brown v. Dean* (i), “it [new evidence] must at least be such as is presumably to be believed, and if believed would be conclusive.” It is not only the discovery of new and important *evidence* that entitles a party to apply for a review, but the discovery of any new and important *matter* which was not within the knowledge of the party when the decree was made. *A* sues *B* to recover a sum of money alleged to be due under a certain agreement, and obtained a decree. *B* appealed to the Privy Council. Pending the appeal *A* brought another suit against *B* to recover another sum of money alleged to have become due under the *same* agreement, and obtained a decree on the *strength of the former decree*. Their Lordships of the Privy Council reversed the first decree. *B* then applied for a review of the second decree, and the application was allowed on the ground that in the circumstances of the case the Privy Council decision was “new and important *matter*” on which to apply for a review of the second decree (j). This decision stands on the special facts of the case. In *Amrit Lal v. Madho Das* (k), it was held that where a decree is based upon a decision of a Divisional Bench of the High Court, and that decision is subsequently overruled by the Full Bench, the reversal is no ground for a review of the decree. Nor is the production of a new ruling or authority, which if brought to the notice of the Judge at the first hearing might have altered the judgment, “new and important matter” within the meaning of this rule (l).

It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgment. The provision relating to review contemplates grounds which would *alter or cancel the decree*. Thus if a suit is dismissed on two grounds, namely, (1) that no notice of suit was given, and (2) that the plaintiff was illegitimate,

(g) *Vadial v. Fulchand* (1906) 30 Bom. 56.
 (h) *Appa Rao, In re* (1887) 10 Mad. 78, 77, 13 I. A. 155; *Nandalal v. Panchaman* (1917) 45 Cal. 60, 67-68.
 (i) [1910] A. C. at p. 874.
 (j) *Waghela v. Mastudin* (1889) 13 Bom. 330;

Waman v. Hari (1906) 31 Bom. 128; *Ram Lal v. Kalka Prasad* (1911) 33 All. 696.
 (k) (1884) 6 All. 292.
 (l) *Ellen v. Basheer* (1876) 1 Cal. 184; *Abdul Sadiq v. Abdul Aziz* (1899) 21 All. 152, 158.

O. 47, r. 1. and the plaintiff applies for a review on the ground of discovery of new evidence on the question of legitimacy, it is a good ground for rejecting the application that even if the Court held on the reception of new evidence that the plaintiff was legitimate, it would not lead to the modification or setting aside of the original decree, the absence of notice being fatal to the suit (*m*).

II. Mistake or error apparent on the face of the record. A review may be granted, whether on any ground urged at the original hearing of the suit or not whenever the Court considers that it is necessary to correct an *evident* error or omission (*n*). Thus a review was granted where an error on a point of law was apparent on the face of the judgment (*o*). Similarly a review was granted when the provisions of the second paragraph of s. 575 [now s. 98, sub-s. (2)] were wrongly applied (*p*). See s. 152.

III. "For any other sufficient reason."—These words mean that the reason must be one sufficient to the Court to which the application for review is made, and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record (*q*). Thus in *Ghansham v. Lal Singh* (*r*), a reference to the Full Bench was disposed of in the absence of the respondent. The respondent proved that his absence at the hearing was due to the fact that the notice of reference was not served upon him. It was held that this constituted a "sufficient reason" for granting a review. In *Sulleman v. The New Oriental Bank Corporation, Ltd.* (*s*), a review was granted on the ground that the question that had cropped up at the hearing was one of great general commercial importance. In *Gopal v. Solomon* (*t*), all the parties, counsel on both sides, and the Judge, were at the trial of the suit under a misapprehension as to the contents of a document. It was held that this was a "sufficient reason" for granting a review. In *Patna* case, where an auction-purchaser applied for an order for delivery of possession and the order was made, it was held that it was sufficient ground for reviewing the order that the application was on the face of it barred by limitation (*u*). But a party who not only had an opportunity of raising a question but who did raise it and on argument abandoned it, cannot under ordinary circumstances be allowed to agitate that question in review (*v*). Nor is it a sufficient reason for granting a review that if another opportunity was given to the applicant, he would satisfy the Court that its previous order was wrong (*w*).

The ground of review must be something which existed at the date of the decree and the rule does not authorize the review of a decree which was right when it was made, on the ground of the happening of some *subsequent event* (*x*).

Review granted on particular ground.—Where a review is granted on a particular ground, it is in the discretion of the Court to re-hear the whole case or only the particular point on which the review has been granted (*y*).

Where an appeal dismissed summarily under O. 41, r. 11, is admitted on an application for review, the appeal is not restricted to the single ground which was made the basis of the application for review (*z*).

- Mahabir v. Collector of Allahabad* (1914) 36 All. 277.
 (n) *Katu v. Vishram* (1877) 1 Bom. 543; *Chintamani v. Pyari* (1870) 6 B. L. R. 126. But see *Shoo Ratan v. Loppu Kuar* (1883) 5 All. 14.
 (o) *Sharup Chand v. Pat Dassie* (1887) 14 Cal. 627; *Jatra Mohun v. Aukhil Chandra* (1897) 24 Cal. 334, 336.
 (p) *Husaini Begum v. Collector of Musaffarnagar* (1889) 11 All. 176.
 (q) *Amir Hasan v. Ahmad Ali* (1887) 9 All. 36; *Reasut v. Hadjes Abdoolah* (1877) 2 Cal.

- 131, 3 I. A. 221.
 (r) (1887) 9 All. 61.
 (s) (1891) 15 Bom. 267.
 (t) (1886) 13 Cal. 62.
 (u) *Dhanindar Das v. Bakshi* (1918) 3 Pat. L. J. 571.
 (v) *Sabapathi v. Subraya* (1878) 2 Mad. 58.
 (w) *Binda Prasad v. Raghubir* (1915) 37 All. 440.
 (x) *Kotagiri Venkata v. Vallanki Venkatarama* (1901) 24 Mad. 1, 27 I. A. 197.
 (y) *Hurbans v. Thakoor Purshad* (1888) 9 Cal. 209.
 (z) *Janaki Nath v. Prabhasini* (1915) 43 Cal. 178 185.

"Order."—An order under O. 33, r. 7, refusing leave to sue as a pauper, is open **O. 47, r. 1.** to review under this rule (a). And so is an order rejecting an application for leave to appeal to His Majesty in Council (b). But an order under s. 39 (h) of the Guardians and Wards Act, 1890, is not open to review (c).

Where an appeal has been preferred before application for review.—After an appeal has been preferred from a decree, no application can be made for a review of that decree. This clearly appears from cl. (a) of sub-r. (1). An appeal is not the less "preferred" within the meaning of this rule though it may be dismissed summarily under O. 41, r. 11. Hence a party against whom a decree has been passed is precluded, after dismissal of his appeal under O. 41, r. 11, from applying for a review (d). But if the appeal is withdrawn, it is as though no appeal had been "preferred," and hence it is open to the party to apply for a review (e). See notes to O. 41, r. 27, under the head "Or for any other substantial cause."

Filing of appeal pending application for review.—Where an application for review has been presented by a party to the suit, and an appeal is afterwards preferred from the same decree, whether by the same party or by the other party to the suit, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application (f). But that power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded with (g). On the other hand, if the application for review is granted, and a new decree is passed, the appeal cannot be heard and it must be dismissed, for the decree appealed from is superseded by the new decree (h).

No review allowed on a question of fact after decision of second appeal.—The High Court cannot in second appeal allow an application for a review of judgment on the ground of discovery of *new evidence*, after the appeal is disposed of by that Court. The reason is that the High Court is bound in second appeal by the *findings of fact* of the lower appellate Court. But if the application is made *before* the disposal of the appeal, it may be a ground for allowing the appellant to withdraw the appeal to enable him to apply to the lower appellate Court for a review of its judgment on the ground of discovery of new evidence (i).

Application to set aside order made by another judge.—One Judge of a High Court cannot set aside an order made by another Judge of that Court even though the order be wrong. The remedy lies in review on the grounds mentioned in this rule (j).

Review of judgment passed in appeal preferred under cl. 15 of the Letters Patent.—It is competent to the High Court to review judgments passed in appeals preferred under cl. 15 of the Letters Patent. The words "decree or order" include a "judgment" (k).

- (a) *Adarji v. Manekji* (1880) 4 Bom. 414.
 (b) *Nand Kishore v. Ram Gulam* (1912) 39 Cal. 1037.
 (c) *Ralla v. Manglan* (1912) Punj. Rec. No. 116, p. 400.
 (d) *Ramappa v. Bharna* (1906) 30 Bom. 625.
 (e) *Pandu v. Devji* (1883) 7 Bom. 287.
 (f) *Chenna Reddi v. Peddaobai Reddi* (1909) 32 Mad. 416 [F. B.]; *Narayan v. Lazmibat* (1914) 38 Bom. 416; *Pyari Mohan v. Kalu Khan* (1917) 44 Cal. 1011.
 (g) *Pyari Mohan v. Kalu Khan* (1917) 44 Cal. 1011, 1015-1016. *Quære* as to cases coming under O. 47, r. 1 (2)?
 (h) *Kanhaiya Lal v. Baldeo Prasad* (1906) 28 All.

- 240; *Brijbasi Lal v. Salig Ram* (1912) 48 All. 282; *Pyari Mohan v. Kalu Khan* (1917) 44 Cal. 1011; *Basheshar Nath v. Ram Kishen Das* (1919) Punj. Rec. No. 140, p. 361; *Malava Ram v. Madan Gopal* (1919) Punj. Rec. No. 166, p. 443.
 (i) *Nand Kishore, in the matter of the petition of* (1909) 32 All. 71; *Raru Kutti v. Mamas* (1895) 18 Mad. 480; *Panchanan v. Radhanath* (1870) 4 B. L. R. A. C. 213; *Rajani v. Kali* (1914) 41 Cal. 809.
 (j) *Basanta Kumar v. Kusum Kumari* (1917) 44 Cal. 28.
 (k) *Venkata Subbarayudu v. Sri Rajah Krishna* (1915) 40 Mad. 651.

O. 47,
rr. 2, 3.

2. [S. 624.] An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

To whom applications for review may be made.

To whom application for review may be made.—This is s. 624 recast with proviso (c) to s. 628 superadded to it. The alteration of language does not involve any alteration of law.

Rule 1, sub-r. (1), provides that the application for review of a decree or order should be made to the Court which passed the decree or order sought to be reviewed. Reading rule 1 with the present rule, we have the following result :—

I. Where a decree is passed by a *High Court Judge*, the application for review of the decree may be made to that Judge or to his successor in office, whatever be the ground on which the review is sought.

II. (1) Where a decree is passed by a *Judge other than a High Court Judge*, the application for review of the decree may be made to the Judge who delivered the judgment or to his successor in office, provided the review is sought on the ground of—

- (a) the discovery of new and important matter or evidence, or
- (b) some clerical or arithmetical mistake or error apparent on the face of the decree.

(2) Where a decree is passed by a *Judge other than a High Court Judge*, and the review is sought, not upon the grounds mentioned above, but upon other grounds, the application shall be made to the very Judge who passed the decree; it cannot be made to his successor in office (i). Thus if a review is sought of a decree passed by a Judge other than a High Court Judge on the ground of a supposed error of judgment (m), or if a review is sought of an order made by such a Judge on the ground that the order was made in the absence of the applicant and without giving him notice of the hearing (n), the application for review shall be made only to the Judge who passed the decree or made the order. Such an application, however, may be disposed of by the successor of the Judge who passed the decree, provided that the Judge who passed the decree has ordered notice to issue under rule 4, sub-rule (2), proviso (a). It is not necessary that the application should also be disposed of by the Judge who passed the decree (o).

Rule 5 provides for the hearing of applications for review.

3. [S. 625.] The provisions as to the form of preferring appeals shall apply, *mutatis mutandis* to applications for review.

Form of applications for review.

(i) *Sarangapani v. Narayanasami* 1885) 8 Mad. 567; *Moheshur Singh v. Bengal Government* (1859) 7 M. I. A. 304. (m) *Behari Lall v. Mungolanath* (1880) 5 Cal. 110. (n) *Khema v. Dhanit* (1890) 14 Bom. 101. (o) *Ganpat v. Jivan* (1891) 15 Bom. 608.

4. [S. 626.] (1) Where it appears to the Court that O. 47, r. 4. there is not sufficient ground for a review, it shall reject the application.

Application where rejected.

- (2) Where the Court is of opinion that the application for review should be granted, it shall grant the same :

Application where granted.

Provided that—

- (a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for : and
- (b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

Alterations in the rule.—The words “and the Judge shall record with his order his reasons for such opinion,” which occurred in the old section after the words “it shall grant the same” in sub-r. (2), have been omitted. Those words were construed by the Privy Council as being no more than a direction to the Judge how to act when he had decided to grant the application (p).

“No such application shall be granted without previous notice to the opposite party.”—The expression “opposite party” means the party interested to support the order sought to be vacated or modified upon the application for review. Where an appeal is summarily dismissed under O. 41, r. 11, the order of dismissal may be set aside on an *ex parte* application for review without notice to the respondent. The respondent in such a case cannot be said to be “the opposite party” within the meaning of cl. (a) of this rule (q).

“Strict proof.”—As to the meaning of the words “strict proof” in sub-r. (2), cl. (b), see notes to r. 7 below, “Sub-rule (1), cl. (b) : application in contravention of provisions of rule (4).”

Form.—As to form of notice required by sub-r. 2 (a) see App. G., form No. 14.

Second application for review.—See notes under the same head to r. 7 below.

Appeal.—It is provided in general terms by O. 43, r. 1, cl. (w), that an appeal lies from an order under this rule granting an application for review. Cl. (w), however, is to be read with and subject to rule 7 below (r). See notes to r. 7, under the head “Appeal.”

(p) *Shankar Baksh v. Bulwant Singh* (1900) 27 Cal. 333, 27 I. A. 79.

(q) *Janaki Nath v. Prabharini* (1915) 48 Cal. 178, dissenting from *Abdul Hakim v. Hem Chandra* (1914) 42 Cal. 433.

(r) *Hari Charan v. Baran Khan* (1914) 41 Cal. 746; *Ahid v. Mohendra Lal* (1915) 42 Cal. 830; *Nandalal v. Panchanan* (1917) 45 Cal. 80, 78; *Sundar Mall v. Upendra Nath* (1919) 1 Pat. L. J. 198.

O. 47,
rr. 5-7.

5. [S. 627.] Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

Application for review in
Court consisting of two or
more Judges.

6. [S. 628.] (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

Application where reject-
ed.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

7. [S. 629.] (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

Order of rejection not
appealable. Objections to
order granting application.

- (a) in contravention of the provisions of rule 2,
- (b) in contravention of the provisions of rule 4, or
- (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless O. 47, r. 7. notice of the application has been served on the opposite party.

Alterations in the rule :—

1. The words "shall not be appealable" have been substituted for the word "final." This is merely a verbal alteration.
2. The words "the Court shall order it to be restored" in sub-r. (2) have been substituted for the words "the Court may order it to be restored."
3. The last paragraph of the old section has been transferred to r. 9.

Appeal :—

(i) *Order "rejecting" application for review.*—No appeal lies under the Code from an order rejecting an application for review. Nor does an appeal lie from such an order under cl. 15 of the Letters Patent, for the said clause is controlled by the express provisions of this rule which says that such an order "shall not be appealable," and even if it is not so controlled, an order rejecting an application for review is not a "judgment" within the meaning of that clause (s). Nor is the order open to revision under s. 115 of the Code for even if it is wrong, it is no more than an erroneous exercise of discretion (t). But where there is no exercise of discretion at all, as where the Court rejects the application, not after considering whether there are sufficient grounds for a review [r. 4, sub-r 1], but on the erroneous view that it has no jurisdiction to entertain the application, the order is open to revision, for it is a case of failure to exercise a jurisdiction vested in the Court by law (u).

(ii) *Order "granting" application for review.*—An appeal lies from an order admitting an application for review; O. 43, r. 1, cl. (w). It is clear, however, from sub-r. (1) that an appeal from such an order can lie only in the three cases mentioned therein, for otherwise the provisions of sub-r. (1), so far as they relate to appeal, would be quite superfluous (v). In cases other than those specified in the rule, no appeal can lie either under this rule or under cl. 15 of the Letters Patent (w). Thus if an appeal is preferred from an order admitting an application for review on the ground that the alleged "sufficient reason" for which the application was admitted did not constitute "sufficient reason" within the meaning of r. 1 of this Order, the appeal should not be entertained (x). If the appeal is entertained, the order of the appellate Court may be set aside in revision under s. 115 on the ground of "material irregularity" (y).

(iii) *Second appeal from order passed in appeal under this rule.*—No second appeal lies from an order passed in appeal from an order granting an application for review. This is now sufficiently clear from the provisions of O. 43, r. 1, cl. (w), read with s. 104, sub-s. (2). A applies for a review, and the application is granted. B appeals from the order granting the application. Whether the appellate Court confirms or sets aside the order of the lower Court, no second appeal lies to the High Court from the order of the appellate Court (z).

(s) *Achaya v. Ratnavelu* (1886) 9 Mad. 253.
 (t) *Ram Lal v. Ratan Lal* (1904) 26 All. 572.
 (u) *Akbar Khan v. Muhammad Ali Khan* (1909) 31 All. 610.
 (v) *Hari Charan v. Baran Khan* (1914) 41 Cal. 746.
 (w) *Bombay and Persia Steam Navigation Co. v. Zuari* (1888) 12 Bom. 171; *Munni Ram v. Bishen Perkash* (1897) 24 Cal. 878; *Daryai Bibi v. Badri Prasad* (1896) 18 All. 44; *Aubhoy Churn v. Shamant* (1889) 16 Cal. 788.

(x) *Ali Akbar v. Khurshed Ali* (1905) 27 All. 695; *Yusaf v. Naza* (1913) Punj. Rec. No. 11, p. 45.
 (y) *Abdul Sadiq v. Abdul Aziz* (1899) 21 All. 152.
 (z) See *Than Singh v. Chundun Singh* (1885) 11 Cal. 298; *Gopal Das v. Alaf Khan* (1889) 11 All. 383; *Papayya v. Chelamayya* (1889) 12 Mad. 125; *Kanti Chunder v. Satigram* (1897) 24 Cal. 319. See also *Bala v. Bhiva* (1889) 13 Bom. 496.

O. 47,
rr. 7-8.

Sub-rule (1), cl. (b): application in contravention of the provision of rule (4).—It is provided by r. 4 above that no application for review should be granted on the ground of discovery of new matter without *strict proof* of the allegation as to such discovery. The words “strict proof” mean proof *according to the formalities of law*. Where an order therefore is made granting a review on proof of discovery of new matter according to the formalities of law, no appeal lies from the order on the ground that the evidence adduced in proof of the allegation as to discovery of new matter was *not sufficient* to prove the allegation. The words “strict proof” do not refer to *sufficiency of proof* in securing the conviction of the judicial mind on the fact in dispute (a).

Grounds of objection in appeal.—An order granting an application for review can only be objected to upon the three grounds specified in the rule and no other, whether the objection is taken by an appeal from the order (b) or in an appeal from the final decree passed in the suit (c).

Second application for review.—Though no appeal lies from an order rejecting an application for review, it does not preclude a second application for review on grounds *different* from those taken in the first application (d).

Where application for review is time-barred.—The period for an application for review of judgment by a Provincial Court of Small Causes is 15 days from the date of the decree, by the High Court in the exercise of its original jurisdiction 20 days, and by other Courts 90 days [Limitation Act, 1908, arts. 161, 162, 173]. But the Court may admit the application after the period of limitation, if the applicant satisfies the Court that he had sufficient cause for not making the application, within the prescribed period [Limitation Act, 1908, s. 5]. Where a second application for review is made after the period of limitation, the mere fact that the second application was not made because the first was pending does not constitute “sufficient cause” for admitting the second (e). If an application for review is admitted after the period of limitation on the ground that the applicant has shown sufficient cause, the order granting the application may be appealed from as provided by cl. (c) of sub-r. (1), and the order may be set aside in appeal if the appellate Court holds that there was not sufficient cause for admitting the application after the period of limitation (f).

Review granted without jurisdiction.—If a review is granted in a case where the Court has no *jurisdiction* to grant it, it is not clear whether an appeal lies from the order granting the review. But the order being one made without jurisdiction, it comes within the purview of s. 115, and is therefore open to revision (g).

8. [s. 630.] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the rehearing as it thinks fit.

Registry of application granted, and order for re-hearing.

- (a) *Abid v. Mohendra* (1915) 42 Cal. 890; *Bai Nemabhu v. Bai Nematullabhu* (1918) 42 Bom. 295.
(b) *Khurshed v. Rahmatullah* (1917) 40 All. 68.
(c) *Baroda Churn v. Gobind Proshad* (1895) 22 Cal. 984.
(d) *Gobinda Ram v. Bholanath* (1888) 15 Cal. 432;

- (e) *Pallia v. Mathura* (1916) 38 All. 280.
(f) *Vaman v. Malbart* (1902) 26 Bom. 485.
(g) *Madho Das v. Rukman* (1880) 2 All. 287.
Ramunadhan v. Narayanan (1904) 27 Mad. 602, 607; *Chunilal v. Sonibai* (1897) 21 Bom. 329.

9. [S. 629 last para.] No application to review an order O. 47, r. 9. made on an application for a review or a decree or order passed or made on a review shall be entertained.
- Bar of certain applications.

ORDER XLVIII.

Miscellaneous.

1. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.
- Process to be served at expense of party issuing.
- O. 48, rr. 1-3.
- (2) The Court fee chargeable for such service shall be paid within a time to be fixed before the process is issued.
- Costs of service.
2. [S. 94.] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.
- Orders and notices how served.
3. [S. 644.] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.
- Use of forms in appendices.

ORDER XLIX.

Chartered High Courts.

1. [S. 630.] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.
- Who may serve processes of High Court.
- O. 49, r. 1.

O. 49,
rr. 2, 3.

2. [New.] Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

Saving in respect of Chartered High Courts.

3. [Cf. s. 638.] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original Civil jurisdiction, namely :—

Application of rules.

(1) rule 10 and rule 11, clauses (b) and (c), of Order VII ;

(2) rule 3 of Order X ;

(3) rule 2 of Order XVI ;

(4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII ;

(5) rules 1 to 8 of Order XX ; and

(6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum) ;

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

Additional rule made by the Bombay High Court under s. 122.—
See Appendix III below.

ORDER L.

Provincial Small Cause Courts.

O. 50, r. 1.

1. [New.] The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts' Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—

Provincial Small Cause Courts.

(a) so much of this schedule as relates to —

- (i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits ;
 - (ii) the execution of decrees against immoveable property or the interest of a partner in partnership property ;
 - (iii) the settlement of issues ; and
- (b) the following rules and orders,—
- Order II, r. 1 (frame of suit) ;
 - Order X, r. 3 (record of examination of parties) ;
 - Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment ;
 - Order XVIII, rules 5 to 12 (evidence) ;
 - Orders XLI to XLV (appeals) ;
 - Order XLVII, rules 2, 3, 5, 6, 7 (review) ;
 - Order LI.

ORDER LI.

Presidency Small Cause Courts.

1. [New.] Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts' Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay. O. 51, r. 1

APPENDIX A.

PLEADINGS.

(1) TITLES OF SUITS.

IN THE COURT OF

<i>A. B. (add description and residence)</i>	..	..	..	..	..	<i>Plaintiff</i>
	<i>against</i>					
<i>C. D. (add description and residence)</i>	..	..	..	..	..	<i>Defendant</i>

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES.

The Secretary of State for India in Council.

The Advocate General of

The Collector of

The State of

The *A. B. Company, Limited*, having its registered office at
A. B., a public officer of the *C. D. Company*.

A. B. (add description and residence), on behalf of himself and all other creditors,
of *C. D. late of (add description and residence)*

A. B. (add description and residence), on behalf of himself and all other holders of
debentures issued by the
The Official Receiver

A. B., a minor (*add description and residence*), by *C. D.* [or by the Court of Wards],
his next friend.

A. B. (add description and residence), a person of unsound mind [or of weak mind]
by *C. D.*, his next friend.

A. B., a firm carrying on business in partnership at

A. B. (add description and residence), by his constituted attorney *C. D. (add description and residence)*.

A. B. (add description and residence), Shebait of Thakur

A. B. (add description and residence), executor of *C. D. deceased*.

A. B. (add description and residence), heir of *C. D. deceased*.

(3) PLAINTS.

No. 1.

MONEY LENT.

(Title)

A. B., the above-named plaintiff, states as follows):—

1. On the day of 19 , he lent the defendant
 rupees repayable on the day of

Forms of Pleadings.

2. The defendant has not paid the same, except rupees paid **App. A.**
on the day of 19 .
[If the plaintiff claims exemption from any law of limitation, say :—]
3. The plaintiff was a minor (or insane, from the day of
till the day of
4. *[Facts showing when the cause of action arose and that the Court has jurisdiction]*
5. The value of the subject-matter of the suit for the purpose of jurisdiction is
rupees and for the purpose of Court-fees is rupees.
6. The plaintiff claims rupees, with interest at per
cent. from the day of 19 .

No. 2.

MONEY OVERPAID.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff
agreed to buy and the defendant agreed to sell bars of silver
at annas per tola of fine silver.
2. The plaintiff procured the said bars to be assayed by *E. F.*, who was paid by
the defendant for such assay, and *E. F.* declared each of the bars to contain 1,500 tolas
of fine silver, and the plaintiff accordingly paid the defendant rupees.
3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the
plaintiff was ignorant when he made the payment.
4. The defendant has not repaid the sum so overpaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , *E. F.* sold and
delivered to the defendant [one hundred barrels of flour, or the goods mentioned in
the schedule hereto annexed, or sundry goods].

2. The defendant promised to pay rupees for the said
goods on delivery [or on the day of some day before
the plaint was filed].

3. He has not paid the same.

4. *E. F.* died on the day of 19 . By
his last will he appointed his brother, the plaintiff, his executor.

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff as executor of *E. F.* claims *[Relief claimed.]*

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , plaintiff sold
and delivered to the defendant [sundry articles of house-furniture], but no express
agreement was made as to the price.

2. The goods were reasonably worth rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

Forms of Pleadings.

App. A.

No. 5.

GOODS MADE AT DEFENDANT'S REQUEST AND NOT ACCEPTED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, E. F. agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that E. F. should pay for the goods on delivery _____ rupees.
2. The plaintiff made the goods, and on the _____ day of _____ 19____, offered to deliver them to E. F., and has ever since been ready and willing so to do.
3. E. F. has not accepted the goods or paid for them.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 6.

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION.]

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff put up at auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within [*ten days*] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.
2. The defendant purchased [*one crate of crockery*] at the auction at the price of _____ rupees.
3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after.
4. The defendant did not take away the goods purchased by him, nor pay for them within [*ten days*] after the sale, nor afterwards.
5. On the _____ day of _____ 19____, the plaintiff resold the [*crate of crockery*], on account of the defendant, by public auction, for _____ rupees.
6. The expenses attendant upon such re-sale amounted to _____ rupees.
7. The defendant has not paid the deficiency thus arising, amounting to _____ rupees.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 7.

SERVICES AT A REASONABLE RATE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Between the _____ day of _____ 19____, at _____, and the _____ day of _____ 19____, at _____, plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.
2. The services were reasonably worth _____ rupees.
3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 8.

SERVICES AND MATERIALS AT A REASONABLE COST.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, at _____, the plaintiff built a house [known as No. _____, in _____], and furnished the materials

Forms of Pleadings.

therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials. **App. A.**

2. The work done and materials supplied were reasonably worth rupees.
3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 9.

USE AND OCCUPATION.

(Title.)

A. B., the above-named plaintiff, executor of the will of X. Y., deceased, states as follows :—

1. That the defendant occupied the [house No. day of
Street], by permission of the said X. Y., from the day of
19 , until the day of
19 , and no agreement was made as to payment for the
use of the said premises.

2. That the use of the said premises for the said period was reasonably worth
• rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff as executor of X. Y. claims [Relief claimed].

No. 10.

ON AN AWARD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil, which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of E. F. and G. H., and the original document is annexed hereto.

2. On the day of 19 , the arbitrator awarded that the defendant should [pay the plaintiff rupees].

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 11.

ON A FOREIGN JUDGMENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , at in
the State [or Kingdom], of , the Court of
that State [or Kingdom] in a suit therein pending between the plaintiff and the defendant
duly adjudged that the defendant should pay to the plaintiff rupees
with interest from the said date.

2. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

App. A.

AGAINST SURETY FOR PAYMENT OF RENT.

A. B., the above-named plaintiff, states as follows) :—

2. The defendant agreed, in consideration of the letting of the premises to E. F. to guarantee the punctual payment of the rent.

3. The rent for the month of 19 , amounting to rupees, has not been paid.

[If, by the terms of the agreement, notice is required to be given to the surety, add :—]

4. On the _____ day of _____, 19____, the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A. B., the above-named plaintiff, states as follows):—

1. On the _____ day of _____, 19____, the plaintiff and defendant entered into an agreement and the original document is hereto annexed.

[Or, On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees.]

2. On the _____ day of _____, 19____, the plaintiff being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 14.

NOT DELIVERING GOODS SOLD.

(Title.)

A. B., the above-named plaintiff, states as follows) :—

1. On the _____ day of _____, 19____, the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the _____ day of _____, 19____, and that the plaintiff should pay therefor _____ rupees on delivery.

2. On the [said] day the plaintiff was ready and willing and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

Forms of Pleadings.

No. 15.
WRONGFUL DISMISSAL.

No. 15.

WRONGFUL DISMISSAL

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____, 19____, the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant or in the capacity of foreman, or as the case may be], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees (monthly).

2. On the _____ day of _____, 19____, the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the _____ day of _____, 19____, the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 16.
BREACH OF CONTRACT TO SERVE.
(*Title.*)

No. 16.

BREACH OF CONTRACT TO SERVE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____, 19____, the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of _____ rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the _____ day of _____, 19____, offered so to do].

3. The defendant (entered upon) the service of the plaintiff on the above-mentioned day, but afterwards, on the _____ day of _____, 19____, he refused to serve the plaintiff as aforesaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 17
AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.
(Title.)

No. 17

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____, 19____, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed [Or state the tenor of the contract.]

[2. The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner].

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 18.
ON A BOND FOR THE FIDELITY OF A CLERK.
(Title.)

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____, 19____, the plaintiff took E. F. into his employment as a clerk.

2. In consideration thereof on the _____ day of _____ 19____, the defendant agreed with the plaintiff that if E. F. should not faithfully perform his

Forms of Pleadings.

App. A. duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[*Or*, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[*Or*, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the day of 19, and the day of 19 *E. F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for, which sum he has not accounted to him, and the same still remains due and unpaid

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 19.

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19, the defendant, by a registered instrument, let to the plaintiff [the house No. , Street] for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain his suit.

3. On the day of during the said term, *E. F.*, who was the lawful owner of the said house, unlawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby (prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G. H.* and *I. F.* by such removal).

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 20.

ON AN AGREEMENT OF INDEMNITY

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19, the plaintiff and defendant, being partners in trade under the style of *A. B.* and *C. D.*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the day of 19, [a judgment was recovered against the plaintiff and defendant by *E. F.*, in the High Court of Judicature at upon a debt due from the firm to *E. F.*, and on the day of 19, the plaintiff paid rupees [in satisfaction of the same].

4. The defendant has not paid the same to the plaintiff.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

Forms of Pleadings.

App. A.

No. 21.

PROCURING PROPERTY BY FRAUD.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities],

2. The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees.

3. The said representations were false [or, *state the particular falsehoods*] and were then known by the defendant to be so.

4. The defendant has not paid for the goods [or, *if the goods were not delivered*]. The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that *E. F.*, was solvent and in good credit, and worth rupees over all his liabilities [or, that *E. F.* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. The plaintiff was thereby induced to sell to *E. F.* [rice] of the value of rupees [on months' credit.]

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [or, to deceive and injure the plaintiff.]

4. *E. F.* [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 23.

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. [The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in , and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.]

2. On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

Forms of Pleadings.

App. A.

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called _____, situate in _____

2. Ever since the _____ day of _____ 19____, the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to move his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of _____].

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, or on foot] at all times of the year.

3. On the _____ day of _____ 19____, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles or on foot, or in any manner] along the way [and has ever since wrongfully obstructed the same].

4. (State special damage if any.)

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 26.

OBSTRUCTING A HIGHWAY.

(Title.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from _____ to _____ so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 27.

DIVERTING A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the _____, the village of _____ district of _____

Forms of Pleadings.

. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill. **App. A.**

3. On the day of 19 , the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 28.

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid by wrongfully obstructing and diverting the said stream.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A. B., the above named plaintiff, states as follows:—

1. On the day of 19 , the defendant were common carriers of passengers by railway between and .

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at [or near the station of or between the station of and] collision occurred on the said railway, caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., and state the special damage if any as] and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

*[Or thus:—*2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing that the said engine and train were driven and struck against the plaintiff, whereby, etc., *as in para. 3.]*

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is a shoe-maker carrying on business at defendant is a merchant of .

The

Forms of Pleadings.

App. A. 2. On the day of 19 , the plaintiff was walking southwards along Chowringhee, in the city of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant drawn by two horses under the charge and control of the defendant's servants was negligently, suddenly, and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was ruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 31.

FOR MALICIOUS PROSECUTION. •

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant obtained a warrant of arrest from [a magistrate of the said city, or as the case may be] on a charge of , and the plaintiff was arrested thereon, and imprisoned for [days, or hours] and gave bail in the sum of rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal have ceased to do business with him ; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E. F., or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 32.

MOVEABLES WRONGFULLY DETAINED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods], the estimated value of which is rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

[As in paras. 4 and 5 of Form No. 1.]

Forms of Pleadings.

6. The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had ; App. A.

(2) rupees compensation for the detention thereof.

The Schedule.

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFERREE WITH NOTICE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant C. D. for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities].

2. The plaintiff was thereby induced to sell and deliver to C. D. [one hundred boxes of tea], the estimated value of which is rupees.

3. The said representations were false, and were then known by C. D. to be so [or at the time of making the said representations C. D. was insolvent, and knew himself to be so].

4. C. D. afterwards transferred the said goods to the defendant E. F. without consideration [or who had notice of the falsity of the representation].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

(1) delivery of the said goods or rupees in case delivery cannot be had ;

(2) rupees compensation for the detention thereof

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant situated at contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19 , the plaintiff paid the defendant rupees as part of the purchase money.

4 That the said piece of ground contained in fact only [five bighas].

[As in paras. 4 and 5 of Form No. 1.]

7. Plaintiff claims—

(1) rupees, with interest from the day of 19 ;

(2) that the said agreement be delivered up and cancelled.

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of [describe the property].

2. The defendant is in possession of the same under a lease from the plaintiff.

Forms of Pleadings.

App. A. 3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[Pecuniary compensation may also be claimed.]

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No. _____, _____ Street, Calcutta].

2. The defendant is, and at all the said times, was the absolute owner of [a plot of ground in the same street _____].

3. On the _____ day of _____ 19____, the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

4. In consequence the plaintiff has been compelled to abandon the said house and has been unable to rent the same.

[As in paras. 4 and 5 of Form No. 1.]

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The defendant has wrongly heaped up earth and stones on a public road known as _____ Street at _____ so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate-General [or of the Collector or other officer appointed in this behalf] to the institution of this suit.

[As in paras. 4 and 5 of Form No. 1.]

The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road:—

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

[As in Form No. 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

Forms of Pleadings.

App. A.

No. 39.

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION
AND FOR AN INJUNCTION.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff ~~is~~, and at all times hereinafter mentioned was, the owner of a portrait of his grand-father [which was executed by an eminent painter], and of which no duplicate exists [*or state any facts showing that the property is of a kind that cannot be replaced by money*].

2. On the _____ day of _____ 19____, he deposited the same for safe keeping with the defendant.

3. On the _____ day of _____ 19____, he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[As in paras. 4 and 5 of Form No. 1.]

8 The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 40.

INTERPLEADER.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Before the date of the claims hereinafter mentioned *G. H.* deposited with the plaintiff [*describe the property*] for [safe-keeping].

2. The defendant *C. D.* claims the same [under an alleged assignment thereof to him from *G. H.*].

3. The defendant *E. F.* also claims the same [under an order of *G. H.* transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

[As in paras. 4 and 5 of Form No. 1.]

9. The plaintiff claims—

(1) That the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property;

[(3) that some person be authorised to receive the said property pending such litigation.]

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

Forms of Pleadings.

App. A.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. *E. F.*, late of _____, was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of _____ [here insert nature of debt and security, if any].

2. *E. F.* died on or about the _____ day of _____, By his last will, dated the _____ day of _____, he appointed *C. D.* his executor [or revised his estate in trust, etc., or died intestate as the case may be].

3. The will was proved by *C. D.* [or letters of administration were granted, etc.]

4. The defendant has possessed himself of the moveable [and immoveable or the proceeds of the immoveable] property of *E. F.*, and has not paid the plaintiff his debt. [As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E. F.* deceased, and that the same may be administered under the decree of the Court:

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(Title.)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and commence paragraph 2] *E. F.*, late of _____, died on or about the _____ day of _____. By his last will, dated the _____ day of _____, he appointed *C. D.* his executor, and bequeathed to the plaintiff [here state the specific legacy].

For paragraph 4 substitute—

The defendant is in possession of the moveable property of *E. F.* and, amongst other things, of the said [here name the subject of the specific bequest].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [here name the subject of the specific bequest], or that, etc.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

(Title.)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and substitute for paragraph 2] *E. F.*, late of _____, died on or about the _____ day of _____. By his last will, dated the _____ day of _____, he appointed *C. D.* his executor, and bequeathed to the plaintiff a legacy of _____ rupees.

In paragraph 4 substitute "legacy" for "debt"

Another form.

(Title.)

E. F., the above-named plaintiff, states as follows :—

1. *A. B.* of *K.* in the _____ died on the _____ day of _____. By his last will, dated the _____ day of _____, he appointed the defendant and *M. N.* [who died in the testator's lifetime] his executors, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who

Forms of Pleadings.

App. A.

should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) to have the moveable and immoveable property of A. B. administered in this Court, and for that purpose to have all proper directions given and accounts taken;
- (2) such further or other relief as the nature of the case may require.

No. 44.

EXECUTION OF TRUSTS.

(Title.)

A. B., the above-named plaintiff, states as follows;—

1. He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of E. F. and G. H., the father and mother of the defendant [or an instrument of transfer of the estate and effects of E. F. for the benefit of C. D. the defendant, and the other creditors of E. F.]

2. A. B. has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the moveable and immoveable property transferred by the said instrument.

3. C. D. claims to be entitled to a beneficial interest under the instrument.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, or of part of the said immoveable property, or moveable, or the proceeds of the sale of, or of part of, the said moveable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of C. D., the defendant, and all other persons who may be interested in such administration, in the presence of C. D., and such other persons so interested as the Court may direct or that C. D. may show good cause to the contrary.

[N.B.—Where the suit is by a beneficiary, the plaint may be modelled, mutatis mutandis* on the plaint by a legatee.]

No. 45.

FORECLOSURE OR SALE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagee of lands belonging to the defendant.
2. The following are the particulars of the mortgage:—
 - (a) (date);
 - (b) (names of mortgagor and mortgagee);
 - (c) (sum secured);

Forms of Pleadings.**App. A.**

- (d) (rate of interest) ;
 (e) (property subject to mortgage) ;
 (f) (amount now due) ;
 (g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).
 (If the plaintiff is mortgagee in possession, add)
3. The plaintiff took possession of the mortgaged property on the _____ day of _____ and is ready to account as mortgagee in possession from that time.
6. The plaintiff claims—
 (1) payment, or in default [sale or] foreclosure [and possession] ;
 [Where Order 34, rule 6 applies.]
 (2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.
 2. The following are the particulars of the mortgage :—
 (a) (date) ;
 (b) (names of mortgagor and mortgagee) ;
 (c) (sum secured) ;
 (d) (rate of interest) ;
 (e) (property subject to mortgage) ;
 (f) (If the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).
 (If the defendant is mortgagee in possession, add)
3. The defendant has taken possession [or has received the rents] of the mortgaged property.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims to redeem the said property and to have the same re-conveyed to him [and to have possession thereof].

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement, dated the _____ day of _____ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff's certain immoveable property therein described and referred to, for the sum of _____ rupees.
 2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.
 3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

Forms of Pleadings.

App. A.

No. 48.

SPECIFIC PERFORMANCE (No. 2).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement.

2. On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the _____ day of _____ 19____, the plaintiff again demanded such transfer [or the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase money of the said property to the defendant.

• [As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

- (1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement];
- (2) rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He and *C. D.* the defendant, have been for _____ years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [Or the defendant has committed the following breaches of the partnership articles :—

- (1)
- (2)
- (3)

[As in paras. 4 and 5 of Form No. 1.]

5. The plaintiff claims—

- (1) dissolution of the partnership ;
- (2) that accounts be taken ;
- (3) that a receiver be appointed.

(N.B.—In suits for the winding-up of any partnership, omit the claim for dissolution and instead insert a paragraph stating the facts of the partnership having been dissolved.)

(4) WRITTEN STATEMENTS.

General defences.

Denial.

The defendant denies that (set out facts).

The defendant does not admit that (set out facts).

The defendant admits that _____ but says that _____

Forms of Pleadings.

App. A. Protest.

The defendant denies that he is a partner in the defendant firm of

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiffs as alleged or at all.

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

Limitation.

The suit is barred by article or article of the second schedule to the Indian Limitation Act, 1908.

Jurisdiction.

The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*).

On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

Insolvency.

The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.

Minority.

The defendant was a minor at the time of making the alleged contract.

Payment into Court.

The defendant as to the whole claim (*or as to Rs. part of the money claimed, or as the case may be*) has paid into Court Rs. and says that this sum is enough to satisfy the plaintiff's claim (*or the part aforesaid*).

Performance remitted.

The performance of the promise alleged was remitted on the (*date*).

Rescission.

The contract was rescinded by agreement between the plaintiff and defendant.

Res judicata.

The plaintiff's claim is barred by the decree in suit (*give the reference*).

Estoppel.

The plaintiff is estopped from denying the truth of (*insert statement as to which estopped is claimed*) because (*here state the facts relied on as creating the estoppel*).

Ground of defence subsequent
to institution of suit.

Since the institution of the suit, that is to say, on the day of (*set out facts*)

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.

Forms of Pleadings.

App. A.

3. The price was not Rs.

[or]

4. }
5. }
6. }

Except as to Rs.

, same as { 1.
2.
3.7. The defendant [or *A. B.*, the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to *C. D.* the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 2.

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.

2. The defendant made payment to the plaintiff on the day according to the condition of the bond.

3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3.

DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit.

2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :—

						Rs.
1907, January 25th	..	..	..	..	..	150
„ February 1st	..	..	..	..	..	50
					Total	200

2. As to the whole [or as to Rs. , part of the money claimed] the defendant made tender before suit of Rs. , and has paid the same into Court.

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable keepers, employed by the defendant to supply him with carriages and horses ; and the person under whose charge and control the said carriage was, was the servant of the said

2. The defendant does not admit that the said carriage was turned out of Middleton Street, either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.

Forms of Pleadings.

App. A.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts [or matters] complained of.

No. 7.

DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows :—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta :—
45 maunds at Rs. 2 per maund Rs.

No. 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author (*assignee, etc.*)
2. The book was not registered.
3. The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 10.

DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient (*or deny his other alleged prescriptive rights*).
2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.
3. The defendant denies that he or his servants pollute the water [*or do what is complained of*].

[*If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i.e., whether by prescription, grant or what.*]

4. The plaintiff has been guilty of aches, of which the following are particulars :—
1870. Plaintiff's mill began to work.
1871. Plaintiff came into possession.
1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., limitation as to past damage.*]

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*).
3. The suit is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.

Forms of Pleadings.

The following payments have been made, viz.:—

	Rs.	App. A.
(Insert date). _____	1,000	
(Insert date). _____	500	
5. The plaintiff took possession on the _____ of _____ and has received the rents ever since.		
6. The plaintiff released the debt on the _____ of _____		
7. The defendant transferred all his interest to A. B. by a document, dated _____		

No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.
2. The plaintiff transferred all interest in the property to A. B.
3. The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to A. B.
4. The defendant never took possession of the mortgaged property, or received the rents thereof.

(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.)

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. A. B. was not the agent of the defendant *(if alleged by plaintiff)*.
3. The plaintiff has not performed the following conditions—*(Conditions)*.
4. The defendants did not—*(alleged acts of part performance)*.
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reasons of the following matter—*(State why)*.
6. The agreement is uncertain in the following respects—*(State them)*.
7. *(or)* The plaintiff has been guilty of delay ;
8. *(or)* The plaintiff has been guilty of fraud *(or misrepresentation)*.
9. *(or)* The agreement is unfair.
10. *(or)* The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10) *(or as the case may be)*.
12. The agreement was rescinded under Conditions of Sale, No. 11 *(or by mutual agreement)*.

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. A. B.'s will contained a charge of debts ; he died insolvent ; he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs. _____, and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs. _____

Forms of Pleadings.

- App. A.** 2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.
3. The defendant made up his accounts, and sent a copy thereof to the plaintiff on the _____ day of _____ 19____, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.
4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15.

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [or of the Hindu Wills Act, 1870].
2. The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.
3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].
4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being [state the nature of the fraud].
5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [or of the contents of the residuary clause in the said will, as the case may be].
6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims :—

- (1) that the Court will pronounce against the said will and codicil propounded by the plaintiff :
- (2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

No. 16.

PARTICULARS. (O. 6, r. 5.)

(Title of suit.)

The following are the particulars of (here state the matters in respect of which particulars have been ordered) delivered pursuant to the order

Particulars.	of the	of
(Here set out the particulars ordered in paragraphs if necessary.)		

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

has instituted a suit against you for
you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the
day of 19 , at o'clock in the noon, to answer
the claim ; and as the day fixed for your appearance is appointed for the final disposal
of the suit, you must be prepared to produce on that day all the witnesses upon
whose evidence and all the documents upon which you intend to rely in support of your
defence.

Take notice that, in default of your appearance on the day before mentioned, the
suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord,
you can have a summons from this Court to compel the attendance
of any witness, and the production of any document that you have a
right to call upon the witness to produce, on applying to the Court and
on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together
with the costs of the suit, to avoid execution of the decree which may
be against your person or property, or both.

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES. (O. 5, rr. 1, 5.)

(Title.)

[Name, description and place of residence.]

WHEREAS

has instituted a suit against you for
you are hereby summoned to appear in the Court in person, or by a pleader duly
instructed, and able to answer all material questions relating to the suit, or who
shall be accompanied by some person able to answer all such questions, on the
day of 19 , at o'clock in the noon, to answer the claim ;
and you are directed to produce on that day all the documents upon which you intend
to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the
suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this
day of 19

Judge.

Forms of Process.

- App. B. NOTICE.**—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses.
2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree which may be against your person or property or both.

No. 3.

SUMMONS TO APPEAR IN PERSON. (O. 5, r. 3.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

has instituted a suit against you for

you are hereby summoned to appear in this Court in person on the

day of 19 , at o'clock in the noon
to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 4.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT. (O. 37, r. 2.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs. , balance of principal and interest due to him as the

of a of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs. for costs.

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

GIVEN under my hand and the seal of the Court, this
day of 19

Judge.

No. 5.

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS CO-PLAINTIFF. (O. 1, r. 10.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

instituted the above suit against

has
for

Forms of Process.

App. B.

and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved

Take notice that you should on or before _____ day of 19____, signify to this Court whether you consent to be so added.

GIVEN under my hand and the seal of the Court, this day of _____ 19____.

Judge.

No. 6.

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT.

(O. 22, r. 4.)

(Title.)

To WHEREAS the plaintiff _____ instituted a suit in this Court on the _____ day of _____ 19____, against the defendant _____ who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said deceased, and desiring that you be made the defendant in his stead :

You are hereby summoned to attend in this Court on the _____ day of _____ 19____, at _____ A.M. to defend the said suit, and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of _____ 19____.

Judge.

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT. (O. 5, r. 21.)

(Title.)

WHEREAS it is stated that

^{defendant}_{witness} _____ in the above suit is at present residing in _____ : It is ordered that a summons returnable on the _____ day of _____ 19____, be forwarded to the _____ Court of _____ for service on the said ^{defendant}_{witness} _____ with a duplicate of this proceeding.

The Court-fee of _____ chargeable in respect to the summons has been realized in this Court in stamps.

Dated _____ 19____.

Judge.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER. (O. 5, r. 24.)

(Title.)

To

The Superintendent of the Jail at _____

UNDER the provisions of Order V, rule 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant _____ a prisoner in jail. You are requested who is _____

Forms of Process.

App. B. to cause a copy of the said summons to be served upon the said defendant and to return the original to the Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC
SERVANT OR SOLDIER. (O. 5, r. 27, 28.)

(Title.)

To

UNDER the provisions of Order V, rule 27 (or 28, as the case may be), of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT. (O. 5, r. 23.)

(Title.)

Read proceeding from the

forwarding

for service on
of 19

in suit No.

of that Court.

Read Serving Officer's endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with a copy of this proceeding.

Judge.

Note.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

Alterations made in this Form by the High Court of Bombay.—See Appendix III below, rule 4.

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN
OF A SUMMONS OR NOTICE. (O. 5, r. 18.)

(Title.)

The Affidavit of

son of

I

make oath
affirm

and say as follows :—

(1) I am a process-server of this Court

(2) On the day of

19

I received a summons
notice issued by the Court of

of 19

day of

19

in Suit No. in the said Court, dated the for service on

(3) The said

was at the time

personally known to me, and I served the said summons
notice on him on the

Forms of Process.

App. B.

on the _____ day of _____ 19____ at about _____ o'clock
 noon at _____ by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$
 and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$

(a)

(b)

(a) Here state whether the persons served signed or refused to sign the process,
 and in whose presence.

(b) Signature of process-server.

or,

(3) The said _____ not being personally known to me
 accompanied to
 and pointed out to me a person whom he stated to be the said

_____, and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the _____ day of
 19____ at about _____ o'clock in the _____ noon at _____ by
 tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process,
 and in whose presence.

(b) Signature of process-server.

or,

(3) The said _____ and the house in which he ordinarily resides being
 personally known to me, I went to the said house in _____
 and there on the _____ day of _____ 19____, at
 about _____ o'clock in the _____ noon, I did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which process was served with special
 reference to Order 5, rules 15 and 17.

b) Signature of process-server.

or,

(3) One _____ accompanied me to _____
 and there pointed out to me _____ which he said was the house
 which _____ ordinarily resides. I did not find the said _____ there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with
 special reference to Order 5, rules 15 and 17.

(b) Signature of process-server.

or,

*If substituted service has been ordered, state fully and exactly the manner in which the
 summons was served with special reference to the terms of the order for substituted service.*

of $\frac{\text{Sworn}}{\text{Affirmed}}$ by the said _____ before me this _____ day
 19____

Empowered under section 139 of the Code
 of Civil Procedure to administer the oath to
 deponents.

**Alterations made in this Form by the Chief Court of the Punjab
 under Section 122—See Appendix V below.**

Forms of Process.**App. B.**

No. 12.

NOTICE TO DEFENDANT. (O. 9, r. 6.)

(Title.)

Name, description and place of residence.

To

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons.

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 13.

SUMMONS TO WITNESS. (O. 16, rr. 1, 5.)

(Title.)

To

WHEREAS your attendance is required to on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19 , at o'clock in the forenoon, and to bring with you [or to send to this Court]

A sum of Rs. , being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, r. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law; and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons: This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued

Forms of Process.

App. B.

requiring the attendance of the witness in this Court on the _____ day of _____
 19____, at _____ o'clock in the forenoon and from _____
 day to day until he shall have leave to depart; and if the witness fails to attend on the
 day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____
 19____.

Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, r. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the
 summons has been duly served upon the witness, and whereas it appears that the evidence
 of the witness is material and he has failed to attend in compliance with such summons:
 This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure,
 1908, issued, requiring the attendance of the witness in this Court on the
 day of _____ 19____, at _____ o'clock in the forenoon, and
 from day to day until he shall have leave to depart; and if the witness fails to attend on
 the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____
 19____.

Judge.

No. 16.

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS. (O. 16, r. 10.)

(Title.)

To

The Bailiff of the Court.

WHEREAS the witness

_____ cited
 by _____ has not, after the
 expiration of the period limited in the proclamation issued for his attendance, appeared
 in Court; You are hereby directed to hold under attachment
 property belonging to the said witness to the value of _____
 submit a return, accompanied with an inventory thereof, within _____ days.
 GIVEN under my hand and the seal of the Court, this _____ day of _____

19____.

Judge.

No. 17.

WARRANT OF ARREST OF WITNESS. (O. 16, r. 10.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____ has been duly served with a summons but has failed to
 attend [absconds and keeps out of the way for the purpose of avoiding service of a sum-
 mons]; You are hereby ordered to arrest and bring the said _____ before the Court.
 You are further ordered to return this warrant on or before the
 day of _____ 19____, with an endorsement certifying the day on and
 the manner in which it has been executed or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____
 Judge.

Forms of Process.**App. B.**

No. 18.

WARRANT OF COMMITTAL. (O. 16, r. 16.)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the abovenamed suit has made application to his Court that security be taken for the appearance of _____ to give evidence (or to produce a document), on the _____ day of _____ 19____; and whereas the Court has called upon the said _____ to furnish such security, which he has failed to do; This is to require you to receive the said _____ into your custody in the civil prison and to produce him before this Court at _____ on the said day and on such other day or days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____
Judge

WARRANT OF COMMITTAL. (O. 16, r. 18.)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS _____, whose attendance is required before this Court in the abovenamed case to give evidence (or to produce a document), has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (or defendant), the said _____ cannot give such evidence (or produce such document); and whereas the Court has called upon the said _____ to give security for his appearance on the _____ day of _____ 19____, at _____ which he has failed to do; This is to require you to receive the said _____ into your custody in the civil prison and produce him before this Court at _____ on the _____ day of _____ 19____.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____
Judge

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (O. 11, r. 1.)

In the Court of

Civil Suit No.

of

19

A. B. Plaintiff.
against

C. D., E. F. and G. H. Defendants.

Upon hearing and upon reading the affidavit of filed
the day of 19 ; It is ordered that the be at
liberty to deliver to the interrogatories in writing, and that the
said do answer the interrogatories as prescribed by Order XI, rule 8,
and that the costs of this application be

No. 2.

INTERROGATORIES. (O. 11, r. 4.)

(Title as in No. 1, *supra*.)

Interrogatories on behalf of the above-named [plaintiff or defendant C. D.] for the
examination of the above-named [defendants E. F. and G. H. or plaintiff].

1. Did not, etc.

2. Has not, etc.

etc.,

etc.,

etc.

[The defendant E. F. is required to answer the interrogatories numbered]

[The defendant G. H. is required to answer the interrogatories numbered .]

No. 3.

ANSWER TO INTERROGATORIES. (O. 11, r. 9.)

(Title as in No. 1, *supra*.)

The answer of the above-named defendant E. F. to the interrogatories for his exami-
nation by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say
as follows :—

1. { Enter answers to interrogatories in paragraphs numbered consecutively.

2. {

3. I object to answer the interrogatories numbered on the
ground that [state grounds of objection].

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 12.)

(Title as in No. 1, *supra*.)

Upon hearing
It is ordered that the do within days from the date of
this order, answer on affidavit stating which documents are or have been in his posses-
sion or power relating to the matter in question in this suit and that the costs of this
application be

Forms of Discovery.

App. C.

No. 5.

AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 13.)

(Title as in No. 1, *supra*.)I, the above-named defendant, *C. D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection.*]

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are.*]

5. According to the best of my knowledge, information and belief I have not now and never had, in my possession, custody or power or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account book of account, voucher, receipt letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said first and second schedules hereto.

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION. (O. 11, r. 14.)

(Title as in No. 1, *supra*.)

Upon hearing _____ and upon reading the affidavit of _____ filed
the day of _____ 19 ____; It is ordered that the _____ do, at all
seasonable times, on reasonable notice, produce at _____, situate
at _____, the following documents, namely _____ and that
the _____ be at liberty to inspect and peruse the documents
so produced, and to make notes of their contents. In the meantime it is ordered that
all further proceedings be stayed and that the costs of this application be

No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, r. 16.)

(Title as in No. 1, *supra*.)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*plaint or written statement or affidavit*] dated the _____ day of _____ 19 ____].
[*Describe documents required.*]

To Z., Pleader for the

X. Y., Pleader for the

No. 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, r. 17.)

(Title as in No. 1, *supra*.)

Take notice that you can inspect the documents mentioned in your notice of the
day of _____ 19 ____ [except the documents numbered _____]

Forms of Discovery.

App. C.

in that notice] at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the day of 19 , on the ground that [*state the ground*] :—

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, r. 3.)

(*Title as in No. 1, supra.*)

Take notice that the plaintiff [*or defendant*] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his pleader or agent, at
on between the hours of ; and the defendant [*or plaintiff*] is hereby required within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been ; that such as are specified as copies are true copies ; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., pleader [*or agent*] for plaintiff [*or defendant*].

To E. F., pleader [*or agent*] for defendant [*or plaintiff*].

[*Here describe the documents and specify as to each document whether it is original or a copy.*]

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, r. 5.)

(*Title as in No. 1, supra.*)

The defendant [*or plaintiff*] in this suit, for the purposes of this suit only defendant [*or plaintiff*] to admit for the purposes of this suit only the several facts respectively hereunder specified ; and the defendant [*or plaintiff*] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G. H., pleader [*or agent*] for plaintiff [*or defendant*].

To E. F., pleader [*or agent*] for defendant [*or plaintiff*].

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896.
5. That O. was never married.

No. II.

ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, r. 5.)

(*Title as in No. 1, supra.*)

The defendant [*or plaintiff*] in this suit, for the purposes of this suit only hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, savings all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit :

Forms of Discovery.

App. C. Provided that this admission is made for the purposes of this suit only and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission].

E. F., *pleader* [or *agent*] for defendant [or *plaintiff*].

To G. H. *pleader* [or *agent*] for plaintiff [or defendant].

Facts admitted.	Qualifications or limitations, if any, subject to which they are admitted.
1. That M. died on the 1st January, 1890	1.
2. That he died intestate	2.
3. That N. was his lawful son	3. But not that he was his only lawful son.
4. That O. died	4. But not that he died on the 1st April, 1896.
5. That O. was never married	5.

No. 12.

NOTICE TO PRODUCE (GENERAL FORM). (O. 12, r. 8.)

(Title as in No. 1, *supra*.)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly.

G. H., *pleader* [or *agent*] for plaintiff [or defendant].

To E. F., *pleader* [or *agent*] for defendant [or plaintiff].

APPENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT. (O. 20, IT. 6, 7.)

(Title.)

Claim for

This suit coming on this day for final disposal before in the
presence of for the plaintiff and of for the
defendant, it is ordered and decreed that and that the
sum of Rs. be paid by the to the
on account of the costs of this suit, with interest thereon at the rate of per
cent. per annum from this date to date of realization.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

Costs of Suit.

Plaintiff.				Defendant.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ..				Stamp for power ..			
2. Do. for power ..				Do. for petition ..			
3. Do. for exhibits..				Pleader's fee			
4. Pleader's fee on Rs.				Subsistence for wit- nesses			
5. Subsistence for witnesses.. ..				Service of process ..			
6. Commissioner's fee..				Commissioner's fee ..			
7. Service of process ..							
Total ..				Total ..			

No. 2.

SIMPLE MONEY DECREE. (Section 34.)

(Title.)

Claim for

This suit coming on this day for final disposal before in the
presence of for the plaintiff and of for the
defendant, it is ordered that the do pay to the the
sum of Rs. with interest thereon at the rate of per cent.
per annum from to the date of realization of the said sum and do also
pay Rs. , the costs of this suit with interest thereon at the rate
of per cent. per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge

Forms of Decrees.

App. D.

Costs of Suit.

Plaintiff.				Defendant.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ..				Stamp for power ..			
2. Do. for power ..				Do. for petition ..			
3. Do. for exhibit ..				Pleader's fee ..			
Pleader's fee on Rs. ..				Subsistence for witnesses ..			
Subsistence for witnesses ..				Service of process ..			
Commissioner's fee ..				Commissioner's fee ..			
Service of process ..							
Total ..				Total ..			

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE. (O. 34, r. 2.)

(Title.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs. ; and it is decreed as follows :—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add or by those under whom he claims.] [Where the plaintiff is in possession add and shall put the defendant in possession of the property.]

(2) That if such payment is not made on or before the said day of 19 the defendant shall be debarred from all right to redeem the property.

Schedule.

Description of the mortgaged property.

No. 4.

PRELIMINARY DECREE FOR SALE. (O. 34, r. 4.)

(Title.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. and that such amount shall carry interest at the rate of per cent. per annum until realization ; and it is decreed as follows :—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the

Forms of Decrees.

App. D.

plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add *or by those under whom he claims.*] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said _____ day of _____ 19____, the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent cost, and that the balance if any be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

Schedule.

Description of the mortgaged property.

No. 5.

PRELIMINARY DECREE FOR REDEMPTION. (O. 34, r. 7.)

(Title.)

This suit coming on this day, etc. ; It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of _____ 19____ is Rs. _____ and it is decreed as follows :—

(1) That if the plaintiff pays into Court the amount so declared due on or before the said _____ day of _____ 19____ the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him. [Where the defendant claims by derived title add *or by those under whom he claims.*] [Where the defendant is in possession add *and shall put the plaintiff in possession of the property.*]

(2) That if such payment is not made on or before the said _____ day of _____ 19____, the plaintiff shall be debarred from all rights to redeem the property. [If the mortgage is simple or usufructuary substitute *the property shall be sold.*]

Schedule.

Description of the mortgaged property.

No. 6.

DECREE FOR FORECLOSURE.—FIRST MORTGAGEE v. SECOND MORTGAGEE AND MORTGAGOR.—SUCCESSIVE PERIODS FOR REDEMPTION.

(Title.)

It is hereby declared that the amount due to the plaintiff on account of principal, interests and costs calculated up to the _____ day of _____ 19____

(a) is Rs. *x*, and that on the _____ day of _____ 19____

(b) there will be due to the plaintiff for interest the further sum of Rs. _____

making in all Rs. *y* ; and it is further declared that on the

day of _____ 19____ (b) there will be due to the first defendant on account of principal, interests and costs Rs. *z* ;

Forms of Decrees.

App. D. and it is decreed as follows:—

(1) That if the first defendant pays into Court the said sum of Rs. *x* on o before the said day of 19 (a) the plaintiff shall deliver up, etc. (as in Form No. 3).

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(3) That in case of such foreclosure and if the second defendant pays into Court the said sum of Rs. *y*, on or before the day of 19, the plaintiff shall deliver up, etc. (as in Form No. 3).

(4) That in default of the second defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(5) That in case the first defendant shall redeem the mortgaged property, if the second defendant pays into Court the said sums of Rs. *y* and Rs. *z* on or before the day of 19 (b) the first defendant shall deliver up, etc. (as in Form No. 3).

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property. [Where the second defendant is in possession add *and shall put the first defendant in possession of the property.*]

No. 7.

DECREE FOR SALE.—FIRST MORTGAGEE *v.* SECOND MORTGAGEE AND
MORTGAGOR.—ONE PERIOD FOR REDEMPTION.

(Title.)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19, is Rs. *x*, and that on the said day there will be due to the first defendant on account of principal, interest and costs Rs. *y*;

and it is decreed as follows:—

(1) That if the defendants or either of them pay into Court the said sum of Rs. *x* on or before the said day of 19, the plaintiff shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying there-out the expenses of the sale) be paid into Court to the credit of this suit, and applied, first in payment to the plaintiff of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court; secondly, in payment to the first defendant of the said sum of Rs. *y* and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(3) That in case the defendants or either of them shall pay the said sum of Rs. *x* as aforesaid he or they shall be at liberty to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

(4) That if the net proceeds of the sale are insufficient to pay the said sum of Rs. *x* and such subsequent interest and costs in full the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

(a) Insert a day within six months from the date of decree.

(b) Insert a day within three months from the date mentioned in (a)

Forms of Decrees.

App. D.

No. 8.

DECREE FOR SALE.—SECOND MORTGAGEE *v.* FIRST MORTGAGEE AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION.

(Title.)

[Insert declarations of the amounts due to the plaintiff Rs. *y* and to the first defendant Rs. *x* as in Form No. .]

And it is decreed as follows :—

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs. *x* on or before the said day of 19 , the first defendant shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19 , the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property ; and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the incumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied, first in payment to the first defendant of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court ; secondly, in payment to the plaintiff of the said sum of Rs. *y* and such subsequent interest and costs as aforesaid : and that the balance, if any, be paid to the second defendant.

(3) That if the plaintiff shall pay the said sum of Rs. *x* into Court on or before the day of 19 , the second defendant shall be at liberty to pay into Court the said sum and the sum of Rs. *y* on or before the day of 19 , and thereupon the plaintiff shall deliver up, etc. (as in Form No. 4).

(4) That if the plaintiff shall pay the said sum as aforesaid but the second defendant shall fail to pay the said sums as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Rs. *x* and Rs. *y* and such subsequent interest and costs as may be allowed by the Court, and that the balance, if any, be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the said sums, interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 9.

DECREE FOR SALE—SUB-MORTGAGEE *v.* MORTGAGEE AND MORTGAGOR, THE AMOUNT OF THE ORIGINAL MORTGAGE EXCEEDING THAT OF THE SUB-MORTGAGE.

(Title.)

[Insert declarations of the amounts due to the plaintiff Rs. *x* and to the first defendant Rs. *y* as in Form No. 7.]

And it is decreed as follows :—

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sums of Rs. *x* and Rs. *y* respectively on or before the day of 19 , and upon either of the said payments being made the plaintiff shall deliver up, etc. (as in Form No. 4), and thereupon the sum of Rs. *x* shall be paid to the plaintiff.

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc. (as in Form No. 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

Forms of Decrees.

App. D.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into Court and applied first in payment to the plaintiff of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant); secondly, in payment to the first defendant of the excess of Rs. *y* over Rs. *x* and such subsequent interest and costs as aforesaid: and that the balance, if any, be paid to the second defendant.

(4) In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold, and the net sale proceeds shall be applied in payment to the first defendant of the said sum of Rs. *y* and such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

No. 10.

FINAL DECREE FOR FORECLOSURE. (O. 34, r. 3.)

(Title.)

Upon reading the decree passed in the above suit on the
day of 19, and the application of the plaintiff dated the
day of 19 and after hearing
pleader for the plaintiff and pleader for the defendant, and
it appearing that the payment directed by the said decree has not been made:

It is hereby decreed as follows:—

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. [Where the defendant is in possession add *and shall put the plaintiff in possession of the said property.*]

Schedule.

Description of the mortgaged property.

No. 11.

DECREE AGAINST MORTGAGOR PERSONALLY. (O. 34, r. 6.)

(Title.)

Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19, and now in Court to the credit of this suit, amount to Rs. *y* and there is now due to the plaintiff the sum of Rs. *x* mentioned in the said decree together with the further sum of Rs.

interest thereon at the rate of 6 per cent. per annum from the

day of 19 to this day, and also the sum of Rs.

for his costs of this suit subsequent to the decree, making a balance due to the plaintiff of Rs. *z*; And whereas it appears to this Court that the defendant is personally liable for the said balance:

It is hereby decreed as follows:—

(1) That the said sum of Rs. *y* be paid out of Court to the plaintiff.

(2) That the defendant do pay to the plaintiff the said sum of Rs. *z* with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

Forms of Decrees.

App. D.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title.)

It is hereby declared that the _____, dated the _____ day of _____ 19____, does not truly express the intention of the parties to such
And it is decreed that the said _____ be rectified by

No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(Title.)

It is hereby declared that the _____, dated the _____ day of _____ 19____, and made between _____ and _____, is void as against the plaintiff and all other the creditors, if any, of the defendant.

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(Title.)

Let the defendant _____, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(Title.)

Let the defendant _____, his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title.)

Let the defendant _____, his agents, servants, and workmen, be perpetually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff, as a carriage-way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT.

(Title.)

It is ordered that the following accounts and inquiries be taken and made, that is to say :—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

Forms of Decrees.

App. D. *In suits by legatees—*

2. That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3. That an inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next-of-kin [*or one of the next-of kin*] of the intestate.

[After the first paragraph the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words. The form is continued as in a creditors suit.]

* 4 An account of the funeral and testamentary expenses.

5. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use

6. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court, all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the * shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be receiver in the suit (*or proceeding*) and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the * (and shall give security by bond for the due performance) of his duties to the amount of rupees).

10. And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

(a) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death;

(b) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof;

(c) an account, so far as possible, of what is due to the several incumbrancers and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G.H. shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the * shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the * to give the most useful publicity to such enquiries.

* Here insert name of proper officer.

Forms of Decrees.

App. D.

14. And it is ordered that the above inquiries and accounts be made and taken and that all other acts ordered to be done be completed, before the day of and that the * do certify the result of the inquiries, and the accounts and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

15. And, lastly, it is ordered that this suit [or proceeding] stand adjourned for [making final decree to the day of] Such party only of this decree is to be used as is applicable to the particular case.]

No. 18.

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LAGATEE.

(Title.)

1. It is ordered that the defendant do, on or before the day of , pay into Court the sum of Rs. the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs. for interest, at the rate of Rs. per cent. per annum, from the day of to the day of amounting together to the sum of Rs.

2. Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed be paid out of the said sum of Rs. order to be paid into Court as aforesaid as follows :—

(a) The costs of the plaintiff to Mr. , his attorney [or pleader] or and the costs of the defendant to Mr. , his attorney [or pleader.]

(b) And (if any debts are due) with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate of the * together with subsequent interest on such of the debts as bear interest, be paid ; and after making such payments let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE
WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE
PAYMENT OF LEGACIES.

(Title.)

1. It is declared that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff ;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy ;

3. And it is also ordered that the defendant do, within weeks after the date of the certificate of the * pay to the plaintiff the amount of what the * shall certify to be due for principal and interest ;

4. And it is ordered that the defendant do pay the plaintiff his costs of suits, the same to be taxed in case the parties differ.

* Here insert name of proper officer.

Forms of Decrees.

App. D.

No. 20.

FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT-OF-KIN.

(Title.)

1. Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed be paid by the defendant to the plaintiff out of the sum of Rs. the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E. F.*, the intestate, within one week after the taxation of the said costs by the said * and let the defendant return for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows :

- (a) Let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay one-third share of the said residue to the plaintiff's *A.B.*, and *C. D.*, his wife, in her right as the sister and one of the next-of-kin of the said *E. F.*, the intestate.
- (b) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said *E. F.*, the intestate.
- (c) And let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay the remaining one-third share of the said residue to *G.H.*, as the brother and the other next-of-kin of the said *E. F.*, the intestate.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP
AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is declared that the proportionate shares of the parties in the partnership are as follows :—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the day of , and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

And it is ordered that be the receiver of the partnership-estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership ;
3. An account of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the * may, on the application of any of the parties

* Here insert name of proper officer.

Forms of Decrees.

x a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale. **App. D.**

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of and that the * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND
THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. be applied as follows :—

1. In payment of the debts due by the partnership set forth in the certificate of the * amounting on the whole to Rs.

2. In payment of the costs of all parties in this suit, amounting to Rs.

[These Costs must be ascertained before the decree is drawn up.]

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

[Or, and that the remainder of the said sum of Rs. be paid to the said plaintiff [or defendant] in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

4. And that the defendant [or plaintiff] do on or before the day of pay to the plaintiff [or defendant] the sum of Rs. being the balance of the said sum of Rs. due to him which will then remain due.

No. 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS.

(Title.)

It is hereby decreed as follows :—

(1) That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

(2) That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

Or

(2) That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

(3) That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court the expiration of three years from the date of the decree].

* Here insert name of proper officer.

APPENDIX E. EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE
RECORDED AS CERTIFIED. (O. 21, r. 2.)

(Title.)

To

WHEREAS in execution of the decree in the above-named suit has
applied to this Court that the sum of Rs. recoverable under the
decree has been paid and should be recorded as certified, this is to give you notice
adjusted,
that you are to appear before this Court on the day of 19 ,
to show cause why the payment aforesaid should not be recorded as certified.
adjustment

GIVEN under my hand and the seal of the Court, this day of
19 . Judge.

No. 2.

PRECEPT. (Section 46.)

(Title.)

UPON hearing the decree-holder it is ordered that this precept be sent to the Court
of at under section 46 of the Code of Civil Pro-
cedure, 1908, with directions to attach the property specified in the annexed schedule and
to hold the same pending any application which may be made by the decree-holder
for execution of the decree.

Dated the day of Schedule. 19 .
Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT. (O. 21, r. 6.)

(Title.)

WHEREAS the decree-holder in the above suit has applied to this Court for a certifi-
cate to be sent to the Court of at
for execution of the decree in the above suit by the said Court, alleging that
the judgment-debtor resides or has property within the local limits of the jurisdiction
of the said Court, and it is deemed necessary and proper to send a certificate to the said
Court under Order XXI, rule 6, of the Code of Civil Procedure, 1908, it is

Ordered :

That a copy of this order be sent to with a copy of the decree
and of any order which may have been made for execution of the same and a certificate
of non-satisfaction.

Dated the day of 19 .
Judge.

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE. (O. 21, r. 6.)

(Title.)

Certified that no (1) satisfaction of the decree of this Court in Suit No.
of 19 , a copy of which is hereunto attached, has been obtained by execution within
the jurisdiction of this Court.

Dated the day of 19 .
Judge.

(1) If partial, strike out "no" and state to what extent.

Forms of Execution.

App. E.

No. 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT.

(O. 21, r. 6.)

(Title.)

Number of suit and the Court by which the decree was passed.	Names of parties.	Date of application for execution.	Number of the execution case.	Processes issued and dates of service thereof.	Costs of execution.	Amount realized.	How the case is disposed of.	Remarks.
1	2	3	4	5	6	7	8	9
		.			Rs. A. P.	Rs. A. P.		

Signature of Muharrir in charge.

Signature of Judge.

Forms of Execution.

App. E.

No. 6.

APPLICATION FOR EXECUTION OF DECREE. (O. 21, r. 11.)

In the Court of

I , decree-holder, hereby apply for execution of the decree herein below set forth :—

1	No. of suit.								
2	Names of parties.								
3	Date of decree.								
4	Whether any appeal preferred from decree.								
5	Payment or adjustment made, if any.								
6	Previous application, if any, with date and result.								
7	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree.								
8	Amount of costs, if any, awarded.								
9	Against whom to be executed.								
10	Mode in which the assistance of the Court is required.								
789 of 1897.									
A. B.—Plaintiff C. D.—Defendant								
October 11th, 1897.									
No.									
None.									
Rs. 72-4 recorded on application, dated the 4th March, 1899.									
Rs. 314-8-2 principal [interest at 6 per cent. per annum, from date of decree till payment].									
As awarded in the decree Subsequently incurred	<table border="0"> <tr> <td>Rs. s. p.</td> <td></td> </tr> <tr> <td>.. ..</td> <td>47 10 4</td> </tr> <tr> <td>.. ..</td> <td>8 2 0</td> </tr> <tr> <td>Total</td> <td>55 12 4</td> </tr> </table>	Rs. s. p.		47 10 4	8 2 0	Total	55 12 4
Rs. s. p.									
.. ..	47 10 4								
.. ..	8 2 0								
Total	55 12 4								
Against the defendant C. D.									
<p>[When attachment and sale of moveable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me. [When attachment and sale of immoveable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by the attachment and sale of defendant's immoveable property specified at the foot of this application and paid to me.</p>									

I
my knowledge and belief.

declare that what is stated herein is true to the best of

Dated the

Signed
day of

, Decree-holder

19

Forms of Execution.

App. E

[When attachment and sale of immoveable property is sought.]

Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of _____ value Rs. 40 and bounded as follows:—

East by G's house; west by H's house; south by the public road; north by private lane and J's house.

I _____ declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

*Signed**. Decree-holder.*

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE. (O. 21, r. 16.)

(Title.)

To

WHEREAS

has made application to this Court for execution of decree in Suit No. _____ of 19 _____ on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court _____ on the day of 19 _____, to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this _____ day of 19 _____
Judge.

No. 8.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION
OF A DECREE FOR MONEY. (O. 21, r. 30.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____ was ordered by decree of this Court passed on the

DECREE.				_____ day of _____
				19 _____, in Suit No. _____ of _____
				19 _____, to pay to the plaintiff the sum of Rs. _____ as noted in the margin; and whereas the said sum of Rs. _____ has not been paid;
Principal				These are to command you to attach the moveable property of the said _____ as set
Interest				forth in the schedule hereunto annexed, or which shall be pointed out to you by the said _____, and unless the said _____ shall pay to you the said
Costs				sum of Rs. _____ together with the costs
Costs of execution				of this attachment, to hold the same until further orders from this Court.
Further Interest				
Total				

You are further commanded to return this warrant on or before the day of 19 _____, with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of 19 _____
Schedule. Judge.

Forms of Execution.

App. E.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY ADJUDGED BY DECREE.
(O. 21, r. 31.)

(Title.)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court passed on the day of 19 , in Suit No. of 19 , to deliver to the plaintiff the moveable property (or a share in the moveable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered:

These are to command you to seize the said moveable property (or a share of the said moveable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this day of 19

Schedule.

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (O. 21, r. 34.)

(Title.)

To

TAKE notice that on the day of 19 , the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of , whereof a draft is hereunto annexed, of the immoveable property specified hereunder and that the day of 19 , is appointed for the hearing of the said application; and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of Property.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC. (O. 21, r. 35.)

(Title.)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of has been decreed to , the plaintiff in this suit; You are hereby directed to put the said in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of 19

*Schedule.**Judge.*

Forms of Execution.

App. E.

No. 12.

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE.

(O. 21, r. 37.)

(Title.)

To

WHEREAS _____ has made application to this Court for execution of decree in Suit No. _____ of 19 _____ by arrest and imprisonment of your person, you are hereby required to appear before this Court on the _____ day of _____ 19 _____, to show cause why you should not be committed to the civil prison, in execution of the said decree.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____

Judge.

No. 13.

WARRANT OF ARREST IN EXECUTION. (O. 21, r. 38.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____ Court in Suit No. _____ day of _____ 19 _____

Principal			
Interest			
Costs			
Execution			
Total			

_____ was adjudged by a decree of the _____ of 19 _____, dated the _____, to pay to the decree-holder the sum of Rs. _____ as noted in the margin and whereas the said sum of Rs. _____ has not been paid to the said decree-holder in satisfaction of the said decree, these are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs. _____ together with Rs. _____ for the costs of executing this process to bring the said defendant before the Court with all convenient speed: * You are further commanded to return this warrant on or before the _____ day of _____

19 _____, with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____

Judge.

No. 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL. (O. 21, r. 40.)

(Title.)

To

The Officer in charge of the Jail at _____

WHEREAS _____

who has been brought before this Court this _____ day of _____ 19 _____, under a warrant in execution of a decree which was made and pronounced by the said _____

Forms of Execution.

App. E. Court on the _____ day of _____ 19____, and by which decree it was ordered that the said _____ should pay ;
 And whereas the said _____ has not obeyed the decree, nor satisfied the Court that he is entitled to be discharged from custody ; you are hereby, in the name of the King-Emperor of India, commanded and required to take and receive the said _____ into the civil prison and keep him imprisoned therein for a period not exceeding _____ or until the said decree shall be fully satisfied, or the said _____ shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908 ; and the Court does hereby fix _____ annas per diem as the rate of the monthly allowance for the subsistence of the said _____ during his confinement under this warrant of committal.

GIVEN under my signature and the seal of this Court, this _____ day of _____ 19____.

Judge.

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE.

(Sections 58, 59.)

(Title.)

To

The Officer in charge of the Jail at _____
 UNDER orders passed this day, you are hereby directed to set free judgment-debtor now in your custody.

Dated _____

Judge.

No. 16.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF. (O. 21, r. 46.)

(Title.)

To

WHEREAS

has failed to satisfy a decree passed against _____ on the _____ day of _____ 19____, in Suit No. _____ of 19____, in favour of _____ for Rs. _____ ; It is ordered that the defendant be, and is hereby prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said _____, that is to say _____, to which the defendant is entitled, subject to any claim of the said _____, and the said _____ is hereby prohibited and restrained until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

Forms of Execution.

App. E.

No. 17.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS OR SECURED BY NEGOTIABLE INSTRUMENTS. (O. 21, r. 46.)

To

WHEREAS

has failed to satisfy a decree passed against _____ on the _____ day of _____ 19____, in Suit No. _____ of 19____, in favour of _____, for Rs. _____; It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, _____ and that you, the said _____, be, and you are hereby prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____ Judge.

No. 18.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION. (O. 21, r. 46.)
(Title.)

To

Defendant, and to _____ Corporation.

_____, Secretary of

WHEREAS

has failed to satisfy a decree passed against _____ on the _____ day of _____ 19____, in Suit No. _____ of 19____, in favour of _____, for Rs. _____: It is ordered that you, the defendant, be, and you are hereby prohibited and restrained until the further order of this Court, from making any transfer of _____ shares in the aforesaid Corporation, namely, _____, or from receiving payment of any dividends thereon; and you, _____, the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____ Judge.

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY. (O. 21, r. 48.)
(Title.)

To

WHEREAS

_____, judgment-debtor in the above-named case, is a (*describe office of judgment-debtor*) receiving his salary (or _____ allowances) at your hands; and whereas _____, decree-holder in the said case, has applied in this Court for the attachment of the salary (or allowances) of the said _____ to the extent of _____ due to him under the decree; You are hereby required to withhold the said sum of _____ from the salary of the said _____ in monthly instalments of _____ and to remit the said sum *r* monthly instalments) to this Court.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____ Judge.

Forms of Execution.

App. E.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT. (O. 21, r. 51.)

(Title.)

To

The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the _____ day of _____ 19____, for the attachment of _____ ;
 You are hereby directed to seize the said _____ and bring the same into Court.
 GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____ ;
 _____ Judge.

No. 21.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY
 SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF
 GOVERNMENT. (O. 21, r. 52.)

(Title.)

To

SIR,

The plaintiff having applied, under rule 22 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc.*), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,

Sir,

Your most obedient Servant,
 _____ Judge.

Dated _____ day of _____ 19____ .

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT.

(O. 21, r. 53.)

(Title.)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the _____ day of _____ 19____, by _____ in Suit No. _____ of 19____, in which he was _____ and _____ was has been attached by this Court on the application of _____ the _____ in the suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor.

I have the honour, etc.,
 _____ Judge.

Dated the _____ day of _____ 19____

Forms of Execution.

App. E.

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE.

(O. 21, r. 53.)

(Title.)

To

WHEREAS an application has been made in this Court by the decree-holder in the above suit for the attachment of a decree obtained by you on the day of 19 , in the Court of in Suit No. of 19 , in which was and was ; It is ordered that you, the said be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 24.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY.

(O. 21, r. 54.)

(Title.)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the day of 19 , in Suit No. of 19 , in favour of , for Rs. ; It is ordered that you, the said , be, and you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Schedule.**Judge.*

No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC., IN THE HANDS

OF A THIRD PARTY, (O. 21, r. 56.)

(Title.)

To

WHEREAS the following property has been attached in execution of a decree in Suit No. of 19 , passed on the day of 19 , in favour of for Rs. . It is ordered that the property so attached, consisting of Rs. in money and Rs. in currency-notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you, the said , to ,

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

App. E.

NOTICE TO ATTACHING CREDITOR. (O. 21, r. 58.)
(Title.)

To _____
 WHEREAS _____ has made application to this Court
 for the removal of attachment on _____ placed at your instance
 in execution of the decree _____ in Suit No. _____ of 19____,
 this is to give you notice to appear before this Court on _____, the
 _____ day of _____ 19____, either in person or by a
 pleader of the Court duly instructed to support your claim, as attaching creditor.
 GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE
FOR MONEY. (O. 21, r. 66.)
(Title.)

THESE are to command you to sell by auction, after giving * day's previous notice, by affixing the same in this Court-house, and after making due proclamation, the property attached under a warrant from this Court, dated the day of 19 , in execution of a decree in favour of in Suit No. of 19 , or so much of the said property as shall realize the sum of Rs. , being the of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the day of _____ 19____, with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

NOTICE OF THE DAY FIXED FOR SETTling A SALE PROCLAMATION.
(O. 21, r. 66.)
(Title.)

WHEREAS in the abovenamed suit
holder has applied for the sale of
hereby informed that the
day of
has been fixed for settling the terms of the proclamation of sale.

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

PROCLAMATION OF SALE. (O. 21, r. 66.)
(Title.)

Notice is hereby given that, under rule 64 of Order XXI of the Code of Civil Procedure, 1908, an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule in satisfaction of the claim of the decree-holder in the suit (1) mentioned in the margin, amounting with costs and interest up to date of sale to the sum of

Forms of Execution.

App. E.

The sale will be by public auction, and the property will be put up for sale in lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by _____ at the monthly sale commencing at _____ o'clock on the _____ at _____. In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorised agent. No bid by, or on behalf of, the judgment-creditors above-mentioned however, will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further

Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, misstatement or omission in this proclamation.
2. The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.
3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.
4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI.
5. In the case of moveable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be again put up and re-sold.
6. In the case of immoveable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent; on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.
7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.
8. In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this _____ day of _____

Forms of Execution.

App. E.

Schedule of Property.

Number of lot.	Description of property to be sold with the name of each owner where there are more judgment-debtors than one.	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any incumbrances to which the property is liable.	Claims, if any, which have been put forward to the property, and any other known particulars bearing on its nature and value.

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION
OF SALE. (O. 21, r. 66)
(Title.)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the day of 19 has been fixed for the sale of the said property copies of the proclamation of sale are by this warrant made over to you and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the day of
Schedule.

19
Judge.

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE
ON A RE-SALE OF PROPERTY BY REASON OF THE
PURCHASER'S DEFAULT. (O. 21, r. 71.)
(Title.)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of purchaser, there was a deficiency in the price of the said property amounting to Rs. and that the expenses attending such re-sale amounted to Rs. making a total of Rs. , which sum is recoverable from the defaulter.

Dated the day of

19
Officer holding the sale.

Forms of Execution.

App. E.

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY
SOLD IN EXECUTION. (O. 21, r. 79.)

(Title.)

To

WHEREAS

has become the purchaser at a public sale in execution of the decree in the above suit of _____ now in your possession, you are hereby prohibited from delivering possession of the said _____ to any person except the said _____

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____ .
Judge.

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION
TO ANY OTHER THAN THE PURCHASER. (O. 21, r. 79.)

(Title.)

To

and to

WHEREAS

become the purchaser at a public sale in execution of the decree in the above suit has of _____ being debts due from you to you

It is ordered that you _____ be, and you are hereby, prohibited from receiving, and you _____ from making payment of, the said debt to any person or persons except the said _____ .

GIVEN under my hand and the seal of the Court this _____ day of _____ 19 ____ .
Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN
EXECUTION (O. 21, r. 79.)

(Title.)

To

and _____, Secretary of _____ Corporation.

WHEREAS _____ has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is to say, of _____ standing in the name of you _____ ; It is ordered that you

be, and you are hereby prohibited from making any transfer of the said shares to any person except the said _____, the purchaser aforesaid, or from receiving any dividends thereon and you

Secretary of the said Corporation, from permitting any such transfer or making any such payment to any person except the said _____, the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____ .
Judge.

App. E.

**CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE,
LEASE OR SELL PROPERTY. (O. 21, r. 83.)**

WHEREAS in execution of the decree passed in the above suit an order was made on the _____ day of _____ 19____, for the sale of the undermentioned property of the judgment-debtor _____, and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof :

Description of Property.

No. 36.

(Title.)

WHEREAS the undermentioned property was sold on the _____ day of _____ 19____, in execution of the decree passed in the above-named suit, and whereas _____ the decree-holder [or judgment-debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale, namely, that

GIVEN under my hand and the seal of the Court, this day of 19

<i>Description of Property.</i>	<i>Judge.</i>
---------------------------------	---------------

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.
(O. 21, rr. 91, 92.)

To

WHEREAS _____, the purchaser of the undermen-
tioned property sold on the _____ day of _____ 19____, in
execution of the decree passed in the above-named suit, has applied to this Court to
set aside the sale of the said property on the ground that
the judgment-debtor, had no saleable interest therein :

Forms of Execution.

App. E.

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19

Description of Property.

Judge.

No. 38.

CERTIFICATE OF SALE OF LAND. (O. 21, r. 94.)

(Title.)

THIS is to certify that has been declared the purchaser at a sale by public auction on the day of 19 of in execution of decree in this suit, and that the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE
IN EXECUTION. (O. 21, r. 95.)

(Title.)

To

The Bailiff of the Court.

WHEREAS , has become the certified purchaser of

at a sale in execution of decree in Suit No. of 19 ;

You are hereby ordered to put the said , the certified purchaser, as aforesaid in possession of the same.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION
OF DECREE. (O. 21, r. 97.)

(Title.)

To

WHEREAS the decree holder in the above suit, has complained to this Court that you have resisted (or obstructed) the officer charged with the execution of the warrant for possession ;

You are hereby summoned to appear in this Court on the day of 19 , at A.M., to answer the said complaint.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Forms of Execution.**App. E.**

No. 41.

WARRANT OF COMMITTAL. (O. 21, r. 98.)

(Title.)

To

The Officer in Charge of the Jail at

WHEREAS the undermentioned property has been decreed to

, the plaintiff in this suit, and whereas the Court
 is satisfied that without any just cause resisted [*or obstructed*]
 and is still resisting [*or obstructing*] the said in
 obtaining possession of the property, and whereas the said
 has made application to this Court that the said
 be committed to the civil prison ;

You are hereby commanded and required to take and receive the said
 into the civil prison and to keep him imprisoned therein
 for the period of days.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND. (Section 72.)

(Title.)

To

Collector of

SIR,

In answer to your communication No. , dated
 representing that the sale in execution of the decree in this suit of
 land situate within your district is objectionable,
 I have the honour to inform you that you are authorized to make provision for the
 satisfaction of the said decree in the manner recommended by you.

I have the honour to be,
 Sir,
 Your obedient Servant,
Judge.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, r. 1.)

(Title.)

To

The Bailiff of the Court.

WHEREAS				, the plaintiff in the above suit, claims the sum of		
Rs.				as noted in the margin and has proved to the satisfaction of the Court that		
Principal	..	..	..			there is probable cause for
Interest	..	..	..			believing that the defendant
Costs	..	..	..
Total						is about to
						These are to command
						you to demand and receive from the said

the sum of Rs. as sufficient to satisfy the plaintiff's claim,
and unless the said sum of Rs. is forthwith delivered to you by or
on behalf of the said , to take the said
into custody, and to bring him before this Court in order
that he may show cause why he should not furnish security to the amount of Rs.
for his personal appearance before the Court, until such time as the said suit shall be
fully and finally disposed of, and until satisfaction of any decree that may be passed
against him in the suit

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE
JUDGMENT. (O. 38, r. 2.)

(Title.)

WHEREAS at the instance of , the plaintiff in the above suit,
the defendant, has been arrested and brought before
the Court; And whereas on the failure of the said defendant to show cause why he
should not furnish security for his appearance, the Court has ordered him to furnish
such security:

Therefore I have voluntarily become surety and do hereby
bind myself, my heirs and executors, to the said Court, that the said defendant shall
appear at any time when called upon while the suit is pending and until satisfaction
of any decree that may be passed against him in the said suit: and in default of such
appearance I bind myself, my heirs and executors, to pay to the said Court, at its order
any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19 .

Witnesses: (Signed)

- 1.
- 2.

Forms of Supplemental Proceedings.**App. F.**

No. 3.

**SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR
DISCHARGE. (O. 38, r. 3.)
(Title.)**

To

WHEREAS _____ who became surety on the
day of _____ 19 _____ for your appearance in the above suit has applied
to this Court to be discharged from his obligation.

You are hereby summoned to appear in this Court in person on the
day of _____ 19 _____, at _____ A.M., when the said application will be heard
and determined.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
Judge.

No. 4.

**ORDER FOR COMMITTAL. (O. 38, r. 4.)
(Title.)**

To

WHEREAS _____, plaintiff in this suit, has made application to the
Court that security be taken for the appearance of _____ the defend-
dant, to answer any judgment that may be passed against him in the suit; and whereas
the Court has called upon the defendant to furnish such security, or to offer a sufficient
deposit in lieu of security, which he has failed to do; It is ordered that the said defendant
be committed to the civil prison until the decision of the
suit; or, if judgment be pronounced against him, until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
Judge

No. 5.

**ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR
FULFILMENT OF DECREE. (O. 38, r. 5.)
(Title.)**

To

The Bailiff of the Court.

WHEREAS _____ has proved to the satisfaction of the
Court that the defendant in the above suit
These are to command you to call upon the said defendant
on or before the _____ day of _____ 19 _____
either to furnish security for the sum of Rupees _____ to produce
and place at the disposal of this Court when required

_____ or the value thereof, or such portion of the value as may be
sufficient to satisfy any decree that may be passed against him; or to appear and show
cause why he should not furnish security; and you are further ordered to attach the
said _____ and keep the same under safe and secure custody until
the further order of the Court; and you are further commanded to return this warrant
on or before the _____ day of _____ 19 _____
with an endorsement certifying the date on which and the manner in which it has been
executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____

Judge.

Forms of Supplemental Proceedings.

App. F.

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, r. 5.)

(Title.)

WHEREAS at the instance of _____, the plaintiff in the above suit
the defendant, has been directed by the Court to furnish
security in the sum of Rs. _____ to produce and place at the disposal of the
Court the property specified in the schedule hereunto annexed ;

Therefore I _____ have voluntarily become surety and do hereby
bind myself, my heirs and executors, to the said Court, that the said defendant shall
produce and place at the disposal of the Court, when required, the property specified
in the said schedule, or the value of the same, or such portion thereof as may be suffi-
cient to satisfy the decree ; and in default of his so doing, I bind myself, my heirs and
executors, to pay to the said Court, at its order, the said sum of Rs. _____ or
such sum not exceeding the said sum as the said Court may adjudge.

Schedule.

Witness my hand at _____ this _____ day of _____ 19 _____

Witnesses :

1.
2.

(Signed)

No. 7.

ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE TO FURNISH SECURITY.

(O. 38, r. 6.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____, the plaintiff in this suit, has applied to
the Court to call upon _____, the defendant, to furnish security to fulfil
any decree that may be passed against him in the suit, and whereas the Court has call-
ed upon the said _____ to furnish such security, which he has
failed to do ; These are to command you to attach
the property of the said _____ and keep the same under safe
and secure custody until the further order of the Court ; and you are further commanded
to return this warrant on or before the
day of _____ 19 _____, with an endorsement certifying the
date on which and the manner in which it has been executed, or the reason why it has
not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
Judge.

No. 8.

TEMPORARY INJUNCTIONS. (O. 39, r. 1.)

(Title.)

Upon motion made unto this Court by _____, Pleader of
[or Counsel for] the plaintiff A. B. and upon reading the petition of the said plaintiff
in this matter filed [this day] [or the plaint filed in this suit on the
day of _____, or the written statement of the said plaintiff
filed on the _____ day of _____]
and upon hearing the evidence of _____ and
_____ in support thereof [if after notice and defendant
not appearing ; add, and also the evidence of

Forms of Supplemental Proceedings.

App. F. as to service of notice of this motion upon the defendant *C. D.*] This Court doth order that an injunction be awarded to restrain the defendant *C. D.*, his servants, agents and workmen, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [*or in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned*] being No. 9, Oilmongers' Street, Hindupur, in the Taluk of _____, and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court.

Dated this _____

day of _____

19 _____

Judge.

[*Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus :—*]

restrain the defendants _____ day of _____ 19 _____, parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [*or bill of exchange*] in question, dated on or about the _____, etc., mentioned in the plaintiff's plaint [*or petition*] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[*In Copyright cases*] _____ to restrain the defendant *C. D.*, his servants, agents or workmen, from printing, publishing or vending a book, called _____, or any part thereof, until the, etc.

[*Where part only of a book is to be restrained*] _____ to restrain the defendant *C. D.*, his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [*or petition and evidence, etc.,*] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled _____ and also that part which is entitled _____ [*or which is contained in page _____ to page _____ both inclusive*] until _____, etc.

[*In Patent cases*] _____ to restrain the defendant *C. D.*, his agents, servants and workmen, from making or vending any perforated bricks [*or as the case may be*] upon the principle of the inventions in the plaintiff's plaint [*or petition, etc., or written statement, etc.*] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [*or as the case may be*] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc.

[*In cases of Trade marks*] _____ to restrain the defendant *C. D.*, his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [*or as the case may be*] described as or purporting to be blacking manufactured by the plaintiff *A. B.*, in bottles having affixed thereto such labels as in plaintiff's plaint or petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff *A. B.*, and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff *A. B.*, until the, etc.

[*To restrain a partner from in any way interfering in the business.*]

_____ to restrain the defendant *C. D.*, his servants and agents from entering into any contract, and from accepting, drawing endorsing or negotiating

Forms of Supplemental Proceedings.

App. F.

any bill of exchange, note or written security in the name of the partnership firm of *B. and D.*, and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership firm of *B. and D.*, or whereby the said partnership firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No. 9.

APPOINTMENT OF A RECEIVER. (O. 40, r. 1.).

(Title.)

To

WHEREAS _____ has been attached in execution of a decree passed in the above suit on the _____ day of _____ 19____ in favour of _____; You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Procedure, 1908, with full powers under the provision of that Order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on _____

You will be entitled to remuneration at the rate of _____ per cent.

upon your receipts under the authority of this appointment

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____,
Judge.

No. 10.

BOND TO BE GIVEN BY RECEIVER. (O. 40, r. 3.)

(Title.)

KNOW all men by these presents, that we _____ and _____ are jointly and severally bound to _____ of the Court of _____ in Rs. _____ to be paid to the said _____ or his successor in office for the time being. For which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs executors and administrators jointly and severally, by these presents.

Dated this _____ day of _____ 19____.

Whereas a plaint has been filed in this Court by _____ against _____ for the purpose of [here insert the object of suit].

And whereas the said _____ has been appointed, by order of the above mentioned Court, to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of _____ in the said plaint named :

Now the condition of this obligation is such, that if the above-bounden _____ shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property and in respect of the moveable property, of the said _____ at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of _____

Note.—If deposit of money is made the memorandum thereof should follow the terms of the condition of the bond.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL. (O. 41, r. 1.)

(Title.)

The Court at above-named appeals to the
from the decree of
in suit No. of 19 , dated the
day of 19 , and sets forth the following grounds
of objection to the decree appealed from, namely :—

No. 2.

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF
DECREE. (O. 41, r. 5.)

(Title.)

To

This security bond on stay of execution of decree executed by
witnesseth :—

That , the plaintiff in Suit No. of 19
having sued , the defendant, in this Court and decree having been passed
on the day of 19 , in favour of the plaintiff, and the
defendant having preferred an appeal from the said decree in the Court,
the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree, the defendant
has made an application praying for stay of execution and has been called upon to furnish
security. Accordingly I, of my own free will, stand security to the extent of Rs.
mortgaging the properties specified in the schedule hereunto annexed, and covenant
that if the decree of the first Court be confirmed or varied by the appellate Court the said
defendant shall duly act in accordance with the decree of the appellate Court and shall
pay whatever may be payable by him thereunder, and if he should fail therein
then any amount so payable shall be realized from the properties hereby mortgaged,
and if the proceeds of the sale of the said properties are insufficient to pay the
amount due, I and my legal representatives will be personally liable to pay the
balance. To this effect I execute this security bond this
day of 19 .

Schedule.

Witnessed by

(Signed)

1
2.

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O. 41, r. 6.)

(Title.)

To

This security bond on stay of execution of decree executed by
witnesseth :—

That the plaintiff in Suit No. of 19 , having
sued , the defendant, in this Court, and a decree having been passed on
the day of 19 , in favour of the plaintiff, and
the defendant having preferred an appeal from the said decree in the
Court the said appeal is still pending

Forms of Appeal.**App. G.**

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL.

(O. 41, r. 14.)

(Title.)

APPEAL from the _____ of the Court of _____ dated the
 To _____ day of _____ 19 ____.

Respondent,

TAKE notice that an appeal from the decree of _____ in this
 case has been presented by _____ and registered in this
 Court, and that the _____ day of _____ 19 ____ has been
 fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one
 by law authorized to act for you in this appeal, it will be heard and decided in your
 absence.

GIVEN under my hand and the seal of the Court, this _____ day of
 19 ____

Judge.

[NOTE.—If a stay of execution has been ordered, intimation should be given of the
 fact on this notice.]

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT
 JOINED BY THE COURT AS A RESPONDENT. (O. 41, r. 20.)

(Title.)

WHEREAS you were a party in Suit No. _____ of 19 ____, in the Court
 of _____, and whereas the _____ has
 preferred an appeal to this Court from the decree passed against him in the said suit
 and it appears to this Court that you are interested in the result of the said appeal :

This is to give you notice that this Court has directed you to be made a respon-
 dent in the said appeal and has adjourned the hearing thereof till the
 day of _____ 19 ____, at

A.M. If no appearance is made on your behalf on the said day
 and at the said hour, the appeal will be heard and decided in your absence.

GIVEN, under my hand and the seal of the Court, this _____ day of
 19 ____

Judge.

No. 8.

MEMORANDUM OF CROSS-OBJECTION. (O. 41, r. 22.)

(Title.)

WHEREAS the _____ has preferred an appeal to the
 Court at _____ from the decree of
 in Suit No. _____ of 19 ____, dated the
 day of _____ 19 ____ and whereas notice of the day fixed
 for hearing the appeal was served on the _____ on the
 day of _____ 19 ____, the _____ files this memorandum of cross-objec-
 tion under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and set forth the
 following grounds of objection to the decree appealed from, namely :—

APPENDIX G.—APPEAL, REFERENCE AND REVIEW. 955

Forms of Appeal

App. G.

No. 9.
DECREE IN APPEAL. (O. 41, r. 35.)
(Title.)

Appeal No. _____ of 19 _____ from the decree of the Court of _____
dated the _____ day of _____ 19 _____
Memorandum of Appeal.

Plaintiff.
Defendant.

The _____ above-named appeals to the _____ Court at _____
from the decree of _____ in the above suit, dated the _____
day of _____ 19 _____, for the following reasons, namely:—

This appeal coming on for hearing on the _____ day of _____
19 _____, before _____, in the presence of _____ for
the appellant and of _____ for the respondent, it is ordered:—

The costs of this appeal, as detailed below, amounting to Rs. _____, are to be
paid by _____. The costs of the original suit are to be paid by _____.

GIVEN under my hand this _____ day of _____ 19 _____
Judge.

Costs of Appeal.

Appellant.	Amount.			Respondent.	Amount.		
	Rs.	a.	p.		Rs.	a.	p.
1. Stamp for memorandum of appeal				Stamp for power			
2. Do. for power				Do. for petition			
3. Service of processes				Service of processes			
4. Pleader's fee on Rs.				Pleader's fee on Rs.			
Total				Total			

No. 10.

APPLICATION TO APPEAL IN FORMA PAUPERIS. (O. 44, r. 1.)

I _____ the _____ above-named,
present the accompanying memorandum of appeal from the decree in the above suit
and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immoveable property
belonging to me with the estimated value thereof.

Dated the _____ day of _____ 19 _____
(Signed)

Note.—Where the application is by the plaintiff he should state whether he applied
and was allowed to sue in the Court of first instance as a pauper.

No. 11.

NOTICE OF APPEAL IN FORMA PAUPERIS.

(Title.)

WHEREAS the above-named _____ has applied to be allowed to appeal as a
pauper from the decree in the above suit dated the _____ day of _____
19 _____ and whereas the _____ day of _____ 19 _____ has

Forms of Appeal.

App. G. been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore-mentioned date.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN
COUNCIL SHOULD NOT BE GRANTED. (O. 45, r. 3.)

(Title.)

To

TAKE notice that
has applied to this Court for a certificate that as regards amount or value and nature
the above case fulfils the requirements of Section 110 of the Code of Civil Procedure,
1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The day of 19 is fixed for you to show cause
why the Court should not grant the certificate asked for

GIVEN under my hand and the seal of the Court, this day of
19 .

Registrar.

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF THE APPEAL TO THE KING IN COUNCIL.
(O. 45, r. 8.)

(Title.)

To

WHEREAS , the
 in the above case, has furnished the security and made the deposit
required by Order XLV, rule 7, of the Code of Civil Procedure, 1908.

Take notice that the appeal of the said to His Majesty in Council
has been admitted on the day of 19 .

Given under my hand and the seal of the Court, this day of 19 . .
Registrar.

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED. (O. 47, r. 4.)
(Title.)

To

TAKE notice that has applied to this Court for a
review of its decree passed on the day of 19 in
the above case. The day of 19 is fixed
for you to show cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

APPENDIX H.

MISCELLANEOUS.

No. 1.

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED. (O. 14, r. 6.)

(Title.)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the _____ day of _____ 19____, and filed as Exhibit _____ in the said suit, is or is not beyond the statute of limitation (or state the point at issue whatever it may be):

We therefore severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue _____ will pay to the said _____

the sum of Rupees _____ (or such sum as the Court shall hold to be due thereon) and I, the said _____ will accept the said sum of Rupees _____ (or such sum as the Court shall hold to be due) in full satisfaction of my claim, on the bond aforesaid [or, that upon such finding I, the said _____ will do or abstain from doing, etc., etc.].

Plaintiff.

Defendant.

Witnesses.

1.

2.

Dated the _____ day of _____ 19____.

No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL.

(Section 24.)

In the Court of the District Judge of _____

No. _____ of 19____.

To

WHEREAS an application, dated the _____ day of _____ 19____, has been made to this Court by _____ the _____ in Suit No. _____ of 19____ now pending in the Court of the _____ at _____ in which _____ is plaintiff and _____ is defendant, for the transfer of the suit for trial to the Court of the _____ at _____ :-

You are hereby informed that the _____ day of _____ 19____ has been fixed for the hearing of the application when you will be heard if you desire to offer any objection to it.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____. Judge.

No. 3.

NOTICE OF PAYMENT INTO COURT. (O. 24, r. 2.)

(Title.)

Take notice that the defendant has paid into Court Rs. _____ and says that that sum is sufficient to satisfy the plaintiff's claim in full.

X Y, Pleader for the defendant.

To Z, Pleader for the plaintiff.

Forms—Miscellaneous.

App. H.

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

(Title.)

To

WHEREAS the above-named
has made application to this Court that
You are hereby warned to appear in this Court in person or by a pleader duly instructed
on the day of 19 , at o'clock
in the forenoon, to show cause against the application, failing wherein, the said
application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY PLAINTIFF. (O. 13, r. 1.)
DEFENDANT.

(Title.)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS
ABOUT TO LEAVE THE JURISDICTION. (O. 18, r. 16.)

(Title.)

To

plaintiff (or defendant).

WHEREAS in the above suit application has been made to the Court by
that the examination of , a witness
required by the said in the said suit, may be
taken immediately; and it has been shown to the Court's satisfaction that the said
witness is about to leave the Court's jurisdiction (or any other good and sufficient cause,
to be stated):

Take notice that the examination of the said witness will
be taken by the Court on the day of 19
Dated the day of 19
Judge.

Forms—Miscellaneous.

App H.

No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS. (O. 26, rr. 4, 18.)

(Title.)

To

WHEREAS the evidence of _____ if required by the _____
 in the above suit; and whereas _____; you are
 requested to take the evidence on interrogatories [or *viva voce*] of such witness

and you are hereby appointed Commissioner for that purpose.
 The evidence will be taken in the presence of the parties or their agents if in attendance,
 who will be at liberty to question the witness on the points specified; and you are further
 requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having
 jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____

Judge.

No. 8.

LETTER OF REQUEST. (O. 26, r. 5.)

(Title.)

(Heading:—To the President and Judges of, etc., etc., or as the case may be.)

WHEREAS a suit is now pending in the _____
 in which A. B. is plaintiff and C. D. is defendant; And in the said suit the plaintiff
 claims _____

(abstract of claims);

And whereas it has been represented to the said Court that it is necessary for the
 purpose of justice and for the due determination of the matters in dispute between the
 parties, that the following persons should be examined as witnesses upon oath touching

E. F., of _____

G. H., of _____

and

I. J., of _____

And it appearing that such witnesses are resident within the jurisdiction of your
 honourable Court;

Now I _____, as the _____ of the said Court, have the honour
 to request, and do hereby request, that for the reasons aforesaid and for the assistance
 of the said Court, you as the President and Judges of the said _____, or some
 one or more of you, will be pleased to summon the said witness (and such other witnesses
 as the agents of the said plaintiff and defendant shall humbly request you in writing
 so to summon) to attend at such time and place as you shall appoint before some one or
 more of you or such other person as according to the procedure of your Court is competent
 to take the examination of witnesses and that you will cause such witnesses to be ex-
 amined upon the interrogatories which accompany this letter of request (or *viva voce*)
 touching the said matters in question in the presence of the agents of the plaintiff, and
 defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the
 answers of the said witnesses to be reduced into writing, and all books, letters, papers
 and documents produced upon such examination to be duly marked for identification,
 and that you will be further pleased to authenticate such examination by the seal of
 your tribunal, or in such other way as is in accordance with your procedure, and to
 return the same together with such request in writing, if any, for the examination
 of other witnesses to the said Court.

Forms—Miscellaneous.**App. H.**

(*Note.*—If the request is directed to a Foreign Court, the words “through His Majesty’s Secretary of State for Foreign Affairs for transmission” should be inserted after the words “other witnesses” in the penultimate line of this form.)

No. 9.COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS.
(O. 26, rr. 9, 11.)

(Title.)

To

WHEREAS it is deemed requisite, for the purpose of this suit, that a commission should be issued; You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 10.

COMMISSION TO MAKE A PARTITION. (O. 26, r. 13.)

(Title.)

To

WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in; and according to the rights as declared in, the decree of this Court, dated the day of 19 ; Your are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorised to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, r. 3.)

(Title.)

*Minor Defendant.**Natural Guardian.*

To

WHEREAS an application has been presented on the part of the Plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you (1)

Forms—Miscellaneous.

App. H.

(1) Here insert the name of guardian. are hereby required
to take notice that unless within days from the service upon you of
this notice, an application is made to this Court for the appointment of you (1)
or of some friend of you, the minor, to act as guardian for the suit, the
Court will proceed to appoint some other person to act as a guardian to the minor for
the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE
OF PAUPERISM. (O. 33, r. 6.)

(Title.)

To

WHEREAS has
applied to this Court for permission to institute a suit against in forma pauperis
under Order XXXIII^e of the Code of Civil Procedure, 1908; and whereas the Court
sees no reason to reject the application; and whereas the
day of 19 , has been fixed for receiving such evidence as the
applicant may adduce in proof of his pauperism and for hearing any evidence which
may be adduced in disproof thereof:

Notice is hereby given to you under rule 6 of Order XXXIII that in case you
may wish to offer any evidence to disprove the pauperism of the applicant, you may
do so on appearing in this Court on the said day of
19 .

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. (Section 145.)

(Title.)

To

WHEREAS you did on become
liable as surety for the performance of any decree which might be passed against the
said defendant in the above suit; and whereas a decree was passed
on the day of 19 , against
the said defendant for the payment of , and whereas application
has been made for execution of the said decree against you:

Take notice that you are hereby required on or before the
day of 19 , to show cause why the said decree should not
be executed against you, and if no sufficient cause shall be within the time specified,
shown to the satisfaction of the Court, an order for its execution will be forthwith issued
in the terms of the said application.

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

Forms—Miscellaneous.

App. H.

No. 14.
REGISTER OF CIVIL SUITS. (O. 4, r. 2.)

Court of the _____ at _____
REGISTER OF CIVIL SUITS in the year 19 ____.

PLAINTIFF.		DEFENDANT.		CLAIM.		APPEARANCE.		JUDGMENT.			APPEAL.		EXECUTION.				RETURN OF EXECUTION.							
Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Particulars.	Amount or value.	When the cause of action accrued.	Day for parties to appear.	Plaintiff.	Defendant.	Date.	For whom.	For what, or amount.	Date of decision of appeal.	Judgment in appeal.	Date of application.	Date of order.	Against whom.	For what, and amount of money.	Amount of costs.	Amount paid into Court.	Arrested.	Minute of other Return than Payment or Arrest, and date of every Return.

NOTE.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only, as the case may be, need be entered in the register.

No. 15.
REGISTER OF APPEALS. (O. 41, r. 9.)
COURT (OR HIGH COURT) AT
REGISTER OF APPEALS FROM DECREES in the year 19

Date of memorandum.		No. of appeal.		APPELLANT			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.														
Name.		Description.		Place of residence.		Name.		Description.		Place of residence.		Of what Court.		No. of Original Suit.		Particulars.		Amount or Value.		Day for parties to appear.		Appellant.		Respondent.		Date.		Confirmed, reversed or varied.		For what or amount.	

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in Suits.

1. [S. 506.] (1) Where in any suit all the parties ~~interested~~ agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

Parties to suit may apply
or order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

Alterations in the rule:—

1. The word "interested" in clause (1) has been added after the word "parties".
See notes below under the head "All the parties interested must join in the application."
2. The words "in person, or by their respective pleaders specially authorized in writing in this behalf," which occurred in the old section after the word "apply" and before the words "to the Court," have been omitted.

Scope of the Schedule.—The present Schedule deals with arbitration under three heads (a):—

I. *Where a suit has been instituted* and all the parties interested agree to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court and they are governed by the provisions of paras. 1 to 16 of this Schedule. The first step is to apply to the Court for an order of reference under para. 1. If *all the parties interested* have joined in the application, an order of reference will be made under para. 3.

II. Where parties *without having recourse to litigation* agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case the parties to the agreement or any of them may apply to the Court under para. 17 to have the agreement filed in Court and to make an order of reference thereon. If an order of reference is made, all further proceedings will be under the supervision of the Court, and they will be governed by the provisions of paras. 3 to 16 so far as they are consistent with the agreement (para. 19). See paras. 17 to 19.

III. Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. In that case any person interested in the award may apply to the Court under para. 20 to have the award filed in Court. See paras. 20-21.

Arbitration.

All the parties interested must join in the application.—In order to give jurisdiction to the Court to make an order of reference under this and para. 3, it is necessary that *all the parties interested* must apply to the Court (b). If all the parties interested do not apply, and an order of reference is made, the order is illegal, and if an award is made on such reference, the award also is illegal (c). Thus where in a suit for partnership accounts brought by *A* against *B* and *C*, *A* and *B* alone applied to the Court to refer the matters in dispute to arbitration, and an order of reference was made, it was held, on an objection raised by *B* to the validity of the award, that *C* not having joined in the application, the order of reference as well as the award made in pursuance thereof were illegal (d).

Sch. II,
para. 1.

The word "interested" is new. It has been added to give effect to a recent Allahabad decision (e). It refers to the succeeding words "any matter in difference between them." A party to a suit who is not interested in a matter in difference between the other parties to the suit need not join in an application under this paragraph for an order of reference. *A* sues *B* and *C*, praying as against *B* for a declaration of his title to certain property and as against *C* for possession of the property. *A* and *B* alone apply to the Court to refer to arbitration the question as to the ownership of the property. The Court has jurisdiction to make an order of reference, though *C* has not joined in the application, for the question of ownership is not in issue between *A* and *C*. But *C* not being a party to the reference, the award is not binding upon him, though it is binding as between *A* and *B* (f).

It has been held by the High Court of Allahabad that a defendant who does not put in an appearance and does not contest the suit is not a "party" within the meaning of this paragraph. The mere fact, therefore, that such a defendant has not joined in the application for an order of reference will not invalidate an award (g). On the other hand, it has been held by the High Courts of Calcutta (h) and Madras (i), that the mere fact that the defendant has not put in an appearance and does not contest the suit is no ground for holding that he is not a party "interested" within the meaning of this paragraph. The latter view, it is submitted, is correct. A person, however, who is not a necessary party to a suit is not a party "interested" within the meaning of this para. (j). See O. 1, r. 10 (2).

"Apply."—This section requires that all the parties interested should not only agree to a reference, but that they should all *apply* to the Court for an order of reference. Therefore, if one of the parties interested agrees to a reference, but he changes his mind, subsequently and does not join in the application, the application for an order of reference should be refused (k).

Application shall be in writing.—The provision requiring the application to be in writing is directory only, and not imperative; hence an award is not invalid merely because the application for the order of reference was not made in writing (l). In

- (b) *Gulam Khan v. Muhammad Hassan* (1902) 29 Cal. 167, 29 I. A. 51.
- (c) *Joy Prokash v. Sheo Golam* (1885) 11 Cal. 87.
- (d) *Indur Subbarami v. Kandadai* (1903) 26 Mad. 47.
- (e) *Ptiam Mai v. Saqiq Ali* (1902) 24 All. 229.
- (f) *Bishoka v. Anunto* (1879) 4 C. L. R. 65; *Ptiam Mai v. Saqiq Ali* (1902) 24 All. 229.
- (g) *Ishardas v. Keshab Deo* (1910) 32 All. 657; *Ajudhia Prasad v. Badar-ul-Husain* (1917) 39 All. 489, 495, *contra Husain v. Mahbub* (1911) 8 All. L. J. 645; *Sabla v. Dharam* (1912) 85 All. 107.

- (h) *Girija v. Karai* (1918) 27 Cal. L. J. 939; *Seth Dooly Chand v. Mamuji* (1917) 25 Cal. L. J. 339.
- (i) *Potila v. Narasinga* (1919) 42 Mad. 632. *Contra Vaithianatha v. Vaithalinga* (1915) 18 Mad. L. T. 374.
- (j) *Sabla v. Dharam* (1912) 35 All. 107; *Ajudhia Prasad v. Badar-ul-Husain* (1917) 39 All. 489, 493.
- (k) *Miran Bakhsh v. Sher Muhammad* (1911) Punj Rec. no. 17, p. 39.
- (l) *Shama Sundaram v. Abdul Latif* (1900) 27 Cal. 81; *Abdul Hamid v. Riaz-ud-din* (1909) 30 All. 32.

Arbitration.

Sch. II, para. 1. a recent case before the Judicial Committee where the agreement was in writing, but it was not signed by one of the parties, it was held that para. 1 of this Schedule did not require that the writing should of necessity be signed (*m*). For form of application for an order of reference see the Appendix to this Schedule, form No. 1.

"Court."—Section 107 of the Code provides that an appellate Court shall have the same powers as a Court of original jurisdiction. It follows therefore that an appellate Court can act under this paragraph, and refer matters in dispute in the appeal to arbitration if all the parties interested agree to a reference (*n*). But a Court to which certain issues have been referred for trial under O. 41, r. 25, cannot act under this paragraph, as the duty of such Court is to *try* the issues as directed by the appellate Court and to return to the appellate Court its findings thereon together with the evidence (*o*). Similarly a Court dealing with petitions under the Provincial Insolvency Act, 1907, has no power to refer the proceedings to arbitrators to decide whether the petitioner should or should not be declared an insolvent (*p*).

Revocation of arbitrator's authority.—When a matter is referred to arbitration by an agreement between the parties *without the intervention of a Court of Justice*, the agreement to refer to arbitration cannot be revoked by any party without good cause and a mere arbitrary revocation will not be permitted by the Court (*q*). Where a claimant did not proceed with the reference for a period of nine months without any just cause, it was held that it amounted to a good cause sufficient to entitle the other party to revoke the submission (*r*). Similarly if the arbitrator is indebted to one of the parties at the time of the reference or becomes so indebted after the reference, and this fact is not disclosed to the other party, the non-disclosure is a sufficient cause for revoking the submission upon discovery of the fact (*s*).

But when a matter is referred to arbitration *by an order of the Court*, the Court alone can revoke the authority of the arbitrator, and that too in the cases specified in para. 5, 8 and 15. The Court has no power to revoke the authority of an arbitrator in any other case. Thus where after an order of reference was made under para. 3, the defendant applied to the Court for an order to revoke the authority of the arbitrator and to appoint a new arbitrator in his place on the ground that he had come to know of certain facts which showed that the arbitrator was not worthy of the confidence reposed in him, it was held that the Court had no power to make the order, as the case did not come either under para. 5, 8 or 15. It was further held that the objection raised by the defendant could only be considered *after* the award was made and filed in Court, and that too to the extent permitted by para. 15 (*t*). Note the words "or being otherwise invalid" in para. 15, cl. (*c*).

Where a party dies after application but before order of reference.—

The death of a party to an application made under this rule for a reference to arbitration before the order of reference is made does not operate as a revocation of the authority of the proposed arbitrator; therefore, if the right to sue survives, it is competent to the Court to make an order of reference after substitution of the representative of the deceased party (*u*).

(*m*) *Umed Singh v. Sobhag Mal* (1916) 43 I. A. 1 45 Cal. 290.

(*n*) *Dutta v. Khedu* (1911) 38 All. 645; *Suresh Chunder v. Ambica Churn* (1891) 18 Cal. 507.

(*o*) *Nand Ram v. Fakir Chand* (1885) 7 All. 523.

(*p*) *Ladha Singh v. Bhag Singh* (1916) Punj. Rec. no. 50, p. 143.

(*q*) *Pestonjee v. Manojee* (1868) 12 M. I. A. 112, 113; *Sultan Muhammad v. Sheo Prasad*

(1898) 20 All. 145; *Perumalla v. Perumalla* (1904) 27 Mad. 112; *Kunj Lall v. Banwari Lall* (1918) 4 Pat. L. J. 394, 399.

(*r*) *Coley v. Da Costa* (1890) 17 Cal. 200.

(*s*) *Mahomed v. Hakimian* (1902) 29 Cal. 278.

(*t*) *Hakimhai v. Shanker* (1886) 10 Bom. 881; *Chatarbhuj v. Raghubar* (1914) 36 All. 354.

(*u*) *Dutta v. Khedu* (1911) 38 All. 645.

Arbitration.

Withdrawal of suit after reference to arbitration.—See notes to O. 23, **Sch. 11,**
r. 1, under the head “Arbitration,” p. 681 above. **paras. 1-3**

Form.—For form of application for an order of reference see the Appendix to this schedule, form no. 1.

2. [S. 507, 1st para.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Appointment of arbitrator.

3. [S. 508.] (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

Order of reference.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit.

The word “making” has been substituted for the word “delivery.” In fact the word “delivery” was construed as meaning “making.” See notes below under the head “Making of award.”

Fixing of time for the making of award.—The present paragraph provides that the Court shall fix a reasonable time for the making of the award and specify such time in the order of reference. Paragraph 8 enables the Court from time to time to enlarge the period for the making of the award. Paragraph 15 provides that an award made after the expiration of the period allowed by the Court may be set aside by the Court. The provision contained in this paragraph requiring the Court to fix a reasonable time for the making of the award is not merely directory, but imperative. Hence this provision should be strictly followed. At the same time it has been held that if no time is fixed for delivery of the award in the order of reference, but the Court subsequently makes an order for enlarging the time (para. 8), and fixes in that order the time within which the award should be made, the omission to fix the time in the order of reference is not fatal to the award (*v*). See para. 15, cl. (1), sub-cl. (c) and notes thereto.

Making of award.—An award is said to be “made” when it is completed and signed by the arbitrators. Hence it is sufficient if the award is *made*, that is, completed and signed by the arbitrators, within the period limited under this paragraph; it is not necessary to the “making” of the award that it should actually reach the hands of the Court within such period. The validity of the award depends upon the *making* of it within the period allowed, and it is immaterial on what date it is actually delivered to the Court. Thus where the time fixed by the Court for the delivery of an award in a suit pending before it was 16th April, 1900, and the award was completed and signed on the 16th April, but did not reach the hands of the Court until the 17th of April, it was held that the award was within time (*w*).

(v) *Raja Har Narain v. Chaudhrai Bhugwant Kuar* (1891) 13 All. 300, 18 I. A. 55; *Lachman Das v. Abparkash* (1908) 30 All. 169.
(w) *Arumugam v. Arunachalam* (1899) 22 Mad. 22;

Umersey v. Shamji (1889) 13 Bom. 119; *Sita Ram v. Bhawan* (1904) 26 All. 105; *Asad-ul-Lah v. Muhammad* (1905) 27 All. 459.

Arbitration.

Sch. II, **Clause (2).**—Where a matter is referred to arbitration, the Court should not deal with it in the same suit except in the manner provided in this Schedule. Hence
paras. 3,4 the Court has no power to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, for there is no paragraph in this Schedule corresponding to O. 23, r. 1 (x). Nor can the Court revoke the authority of the arbitrator and appoint a new arbitrator except in the cases specified in paragraph 5 (y). Nor is it open to the Court to hear the suit on the merits, unless the arbitration has been superseded under para. 5, 8 or 15 (z). Similarly, the Court has no power to confirm an order passed by the arbitrators making payments of their fees a condition precedent to the hearing of the reference, there being no paragraph in this Schedule empowering the Court to make an order in that behalf (a). On the same principle where an award is once set aside, on the ground, e.g., that one of the parties to the reference had died before the termination of the arbitration proceedings, the Court has no power to send back the case to the arbitrators for decision (b).

Form.—For form of order of reference see form no. 2 to the Appendix to this Schedule.

4. [S. 509.] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

Where reference is to two or more, order to provide for difference of opinion.

- (a) by the appointment of an umpire ; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail ; or
- (c) by empowering the arbitrators to appoint an umpire ; or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

Decision of majority.—Where the order of reference did not provide that the decision of the majority of arbitrators should prevail, and two of the five arbitrators refused to act, it was held that an award by the remaining three who constituted the majority was not valid (c).

Empowering arbitrators to appoint an umpire.—The arbitrators have no power to appoint an umpire, unless they are authorized in that behalf (d).

(x) *Shoambar v. Deodat* (1887) 9 All. 168; *Debi Churn v. Bipra* (1902) 7 Cal. W. N. 186.
 (y) *Halimbhai v. Shanker* (1886) 10 Bom. 381.
 (z) *Jamna v. Nasib* (1902) 24 All. 312.
 (a) *Steel v. Roberts* (1881) 6 Cal. 809.

(b) *Pachkawri Ram v. Nand Rai* (1908) 30 All. 505.
 (c) *Gurupathappa v. Narasingappa* (1884) 7 Mad. 174.
 (d) *Smith v. Ludha* (1893) 17 Bom. 129.

Arbitration.

Delegation of duty by arbitrator.—An arbitrator cannot delegate his duties to a third person (e). But he may delegate to a third person the performance of acts of a ministerial character. Thus where an arbitrator employed his son to take some measurements instead of taking them himself, it was held that the award was not by that reason invalid (f). **Sch. II, paras. 4, 5.**

Power of Court to appoint arbitrator in certain cases.

5. [Ss. 507 (2), 510, 511.] (1) In any of the following cases, namely :—

- (a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or
- (b) where an arbitrator or umpire—
 - (i) dies, or
 - (ii) refuses or neglects to act or becomes incapable of acting, or
 - (iii) leaves British India in circumstances showing that he will probably not return at an early date, or
- (c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

Notice to appoint arbitrator.—Where an order of reference is made on the joint application of A and B, and the arbitrator refuses to act, and A serves B with notice to appoint a new arbitrator, the appointment of the new arbitrator must be made both by A and B, and not by B alone (g).

(e) *Jamna v. Narib* (1902) 24 All. 312.

(f) *Bula v. Municipal Committee of Lahore* (1902) 29 Cal. 854, 29 I. A. 168.

(g) *Chara Ram v. Sajan Mal* (1918) Punj. Rec. no. 112, p. 360.

Arbitration.

Sch. II. **Duty of Court under this paragraph.**—In the event of the happening of any of the events mentioned in this paragraph, the Court *must* adopt one of the two courses pointed out in the paragraph, namely, appoint a new arbitrator, or make an order superseding the arbitration. Thus where one of three arbitrators refused to act, and the Court neither appointed a new arbitrator nor made an order superseding the arbitration, it was held that the award made by the other two was invalid (*h*).

paras. 5-6.

Appointment of new arbitrator or umpire.—Under the Code of 1882, the Court had no power, on the happening of either of the events referred to in cl. (a) of this paragraph, to appoint a new arbitrator without the consent of all the parties to the reference; the reason being that the corresponding Section 507 of that Code contained the words "and [if] the parties desire that the nomination shall be made by the Court" (*i*). But the said words have been omitted in cl. (a), and the Court has power under this paragraph to appoint a new arbitrator without the consent of all the parties even in the cases mentioned in cl. (a). In cases covered by cl. (b), it is open to the Court to appoint only one new arbitrator in place of several old arbitrators (*j*). But the Court has no power to appoint an arbitrator or umpire under sub-para. (2) unless notice is given as required by sub-para. (1) and the party served with the notice has been given an opportunity of being heard (*k*).

The power of the Court to appoint a new arbitrator or umpire may be limited by agreement. *A* and *B* submitted to arbitration on the terms that the umpire should be selected from seven persons named. The umpire first selected refused to act, and the Court appointed a new umpire who was not one of the seven persons named. It was held that the umpire not being one of the seven named in the agreement, the award of the umpire was invalid (*l*).

If the arbitrator refuses to act.—If an arbitrator refuses to act, the Court cannot compel him to act. Thus where an arbitrator refused to act, and the Court, instead of accepting his refusal, directed him to proceed and make an award, it was held that the award was not valid. The finality of an award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are *willing* to settle the disputes between them (*m*). But an arbitrator has full power to retract his resignation before it is accepted. The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not divest him of the character of arbitrator (*n*).

Order superseding arbitration.—When once a matter is referred to arbitration by an order of the Court, the Court has no power to hear the suit on the merits, unless the arbitration has been superseded by an order under this paragraph (*o*) or under paragraph 8 or 15.

Form.—For form of order for appointment of new arbitrator see the Appendix to this Schedule, form No. 3.

6. [S. 512.] Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Powers of arbitrator or umpire appointed under paragraph 4 or 5.

(*h*) *Nand Ram v. Fakir Chand* (1885) 7 All. 523;
Thammiraju v. Bapiraju (1889) 12 Mad. 113.
 (*i*) See *Pugardin v. Moidina* (1883) 6 Mad. 414;
Bepin Behari v. Aunoda (1891) 18 Cal. 825.
 (*j*) *Rampersad v. Juggennath* (1880) 6 C. L. R. 1.

(*k*) *Abdul Ghani v. Din Dayal* (1919) 41 All. 578
 (*l*) *Barracho v. Souza* (1872) 7 Mad. H. O. 72.
 (*m*) *Shibcharan v. Ratiram* (1885) 7 All. 20.
 (*n*) *Har Narain v. Bhagwan Kuar* (1888) 10 All. 137.
 (*o*) *Jamna v. Nasib Ali* (1902) 24 All. 312.

Arbitration.

7. [S. 513.] (1) The Court shall issue the same process to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it. **Sch. II, paras. 7,8.**

Summoning witnesses and default.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

8. [S. 514.] Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period ; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

Extension of time for making award.

Alteration in the rule.—The words, “ either before or after expiration of the period fixed for the making of the award ” are new. They give effect to decisions under the old section (p).

Extension of time for making award.—If the time originally fixed for making an award has expired, and no award is made, the Court may extend the time for making the award. It is not necessary that the application to extend the time should be made *before* the expiry of the period originally fixed for making the award. The application may be made even *after* the expiry of the time originally fixed (q). But it must be made *before* the award is made. The Court has no power to enlarge the time for the making of an award after the time for making it has expired *and after the award has been made* (r). Sec. 148 of this Code does not alter the law laid down in this respect (s). An award made after the expiration of the period allowed by the Court may be set aside under paragraph 15, cl. (c).

Where by an order of reference power is given to the *arbitrator* to extend the time for making the award, he can only extend the time *before* the time originally fixed for making the award has expired (t).

(p) *Jamna v. Nasib Ali* (1902) 24 All. 312.
(q) *Harinarain v. Bhagwan* (1888) 10 All. 137.
(r) *Raja Har Narain v. Bhagwan* (1891) 13 All. 300, 18 I. A. 65; *Lakshminarasimham v. Somasundaram* (1892) 15 Mad. 384; *Ram Manohar v. Lal Behari* (1892) 14 All. 343.

(s) *Shib Krishna v. Satish Chunder* (1911) 38 Cal. 522. doubted in *Patto Kumari v. Upendra Nath* (1919) 4 Pat. L. J. 265, 270.
(t) *Co-operative Hindustan Bank v. Bhole Nath* (1914) 19 C. W. N. 165.

Arbitration.

Sch. II, paras. 8-10. Estoppel.—The parties to a reference may be *estopped* by their conduct from impeaching the validity of an award on the ground that it was made after time (u).

App:al.—An appeal lies from an order superseding an arbitration where the award has not been completed within the period allowed by the Court (s. 104, sub [s. (1), cl. (a)]).

9. [S. 515.] Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

Where umpire may
arbitrate in lieu of
arbitrators.

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

10. [S. 516.] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court together with any depositions and documents which have been taken and proved before them ; and notice of the filing shall be given to the parties.

Award to be signed and
filed.

It is not necessary that an award should be signed by the arbitrators in the presence of each other.—It is quite enough if all the arbitrators agree to the terms of the award and sign it. There is no provision of law requiring them to sign in the presence of each other (v). But the award must be signed by all the arbitrators before it is filed. An award signed by one of the arbitrators while it is on the file of the Court is invalid (w).

Necessity of arbitrator's presence at meetings.—When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and, above all, at the last meeting when the final act of arbitration is done, is essential to the validity of the award (x).

“Together with any depositions and documents.”—The Court has jurisdiction to compel arbitrators to give up documents that may have been filed before them as exhibits during the course of the arbitration. Also if the original records of the suit are handed to the arbitrators to enable them to proceed with the arbitration, and they fail to return them, the Court can compel them to return the records (y).

Notice of the filing shall be given.—It is a material irregularity within the meaning of s. 115, if the Court gives judgment without issuing notice, and the judgment will be set aside in revision (z).

(u) *Patto Kumari v. Upendra Nath* (1919) 4 Pat. L. J. 265, 270.

(v) *Muthukutti v. Acha Nayak* (1895) 18 Mad. 22.

(w) *Ramesh Chandra v. Karimamoyi* (1906) 38 Cal. 498; *Kanakk v. Nagalinga* (1906) 32

Mad. 510.

(x) *Nand Ram v. Fakir Chand* (1885) 7 All. 523.

(y) *Nursing v. Nuffer* (1890) 17 Cal. 832.

(z) *Rangasami v. Multusami* (1888) 11 Mad. 144; *Chaturbhuj v. Ganesh* (1898) 20 All. 474.

Arbitration.

Delivery of award.—The act of an arbitrator in delivering an award to the proper officer of the Court for the purpose of being filed in Court is not an “application” within the meaning of the Limitation Act. Hence there is no period of limitation within which an award should be delivered by an arbitrator to the Court (a).

**Sch. II,
paras.
10-12.**

Form.—For form of award see the Appendix to this Schedule, form no. 5.

11. [S. 517.] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Statement of special case
by arbitrators or umpire.

Appeal.—An appeal lies from an order on an award stated in the form of a special case [s. 104, sub-s. (1), cl. (b)]. Where the arbitrators differ on certain matters referred to them, but instead of referring their differences to an umpire as provided by the order of reference, they submit *their own opinions* in the form of a special case for the opinion of the Court, such submission is not an *award* stated in the form of a special case, and no appeal therefore lies from any order made upon such submission (b).

Form.—For form of “special case” see the appendix to this Schedule, form no. 4.

Power to modify or correct
award.

12. [S. 518.] The Court may, by order, modify or correct an award,—

- (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or
- (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Power to modify or correct.—The Court has no power to modify or correct an award except in the three cases mentioned in this paragraph. A Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator (c).

Where a part of the award is upon a matter not referred to arbitration.—Where the matters in dispute in a suit are referred to arbitration, but the question

(a) *Roberts v. Harrison* (1881) 7 Cal. 338. | (c) *Parma Dat v. Bippu* (1916) Punj. Rec. no. 78, p. 243.
(b) *Purshotamdas v. Ramgopal* (1910) 35 Bom. 130.

Arbitration.

Sch. II,
paras.
13, 14.

of costs is not referred, and the arbitrators make an award containing a direction that the defendant should pay the plaintiff's costs, the Court has power under this paragraph to modify the award by striking out the direction for the payment of costs, the case being one in which the part of the award upon the matter not referred could be separated from the other part (d). An award that goes beyond the terms of the reference is to that extent *ultra vires* (e). But where no such separation is possible, the Court should remit the award to the reconsideration of the same arbitrator under paragraph 14, cl. (a).

Clause (c).—This clause is new.

Appeal.—An appeal lies from an order modifying or correcting an award; see sec. 104, sub-sec. (1), cl. (c).

13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Order as to costs of arbitration.

14. [S. 520.] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

Where award or matter referred to arbitration may be remitted.

- (a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;
- (b) where the award is so indefinite as to be incapable of execution;
- (c) where an objection to the legality of the award is apparent upon the face of it.

Remission of award when the award has left undetermined any of the matters referred to arbitration.—The ground for holding an award to be invalid on account of its not disposing of *all* the matters referred, appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. Hence this condition may be waived by the consent of all the parties before the arbitrators (f).

Where the issues in a suit were referred to arbitration, and there was no distinct and separate finding by the arbitrators on *each* of the issues, but there was a decision on the whole matter in controversy between the parties, it was held that the award could not be said to have left undetermined any of the matters referred to arbitration, and it

(d) *Dagdusa v. Bhukan* (1884) 9 Bom. 82. See also *Amolak Shah v. Charan Das* (1913) *Punj. Rec.* v. 52, p. 202.
(e) *Mumtaz Ali v. Shakhawat Ali* (1901) 23 *All.* 394; *Buta v. Municipal Committee of*

Lahore (1902) 29 *Cal.* 854, 29 *I. A.* 168.
(f) *Makund Ram v. Saliq Ram* (1894) 21 *Cal.* 590, 21 *I. A.* 47; *Bhagwan Das v. Shiv Dial* (1913) *Punj. Rec.* no. 92, p. 325, at p. 332.

should not therefore be remitted to the reconsideration of the arbitrator (g). A separate finding on each issue is not necessary, when the whole matter in issue between the parties is decided by the arbitrators (h). But where several issues in a suit are referred to arbitration, and the arbitrator decides by the award only one issue, the award must be remitted to his reconsideration (i). If the arbitrator fails to reconsider the award, the award becomes void : see paragraph 15. Even if parties come to an agreement as regards some of the matters referred to arbitration, the award should contain a determination of those matters, though it be in terms of the agreement, otherwise the award would be open to the objection that it has left those matters undetermined (j).

Award patently illegal.—Where the only question in a suit was whether a Hindu was born blind and therefore not entitled to inherit, and the suit was referred to arbitration, and the arbitrator made an award whereby the blind man was declared to be entitled to a life-interest in a certain portion of the property, it was held on an objection to the award under cl. (c) of this paragraph that the award was not so patently illegal that it could be remitted to the reconsideration of the arbitrator (k).

Appeal.—No appeal lies from an order under this paragraph remitting an award to the reconsideration of arbitrators. Where an award is remitted to the reconsideration of the arbitrator, and the arbitrator submits a fresh award and a decree is passed in accordance with the revised award, no appeal lies from the decree on the ground that the order of remittal was wrong (r. 16) and that the original award ought to have been accepted and acted upon (l). But where an award is remitted to the reconsideration of the arbitrator, and the arbitrator refuses to reconsider the award (which consequently becomes void under paragraph 15), and the Court proceeds to try the case and passes a decree in the ordinary way [para. 15, sub-para. (2)], the legality of the order remitting the award may be challenged on appeal from such decree (m) : see sec. 105.

15. [S. 521.] (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely :—

Grounds for setting aside award.

- (a) corruption or misconduct of the arbitrator or umpire ;
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;
- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(g) *George v. Vastian Soury* (1899) 22 Mad. 202.
(h) *Ghulam Khan v. Muhammad Hassan* (1902) 29 Cal. 167, 186, 29 I. A. 51.
(i) *Jonardan v. Sambhu Nath* (1889) 16 Cal. 806.
(j) *Hari Kunwar v. Lakshmi Ram* (1916) 38 All.

380, 392-393.
(k) *Madepalli v. Madepalli* (1917) 41 Mad. 1022.
(l) *Subbiah v. Subramania* (1908) 31 Mad. 479.
(m) *George v. Vastian Soury* (1899) 22 Mad. 202.

Arbitration.

Sch. II, (2) Where an award becomes void or is set aside under
para. 15. clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

Points of distinction between s. 521 of the Code of 1882 and this paragraph :—

1. *Award made after expiration of period allowed by Court.* See notes below under the same head, p. 978.

When the award is otherwise invalid. See notes under the same head, p. 978.

3. Clause (2) is new.

Misconduct.—The term “misconduct” does not necessarily imply moral turpitude; it includes neglect of the duties and responsibilities of the arbitrators, and what Courts of Justice expect from them before allowing finality to their awards (n). Nor does it necessarily imply corruption (o).

Acts amounting to misconduct.—The following acts have been held to amount to “misconduct” on the part of an arbitrator affording a ground for setting aside an award :—

1. Irregularities in procedure which amount to no proper hearing of the matters in dispute (p), e.g., hearing and receiving evidence from one side in the absence of the other side without giving the other side affected by such evidence the opportunity of meeting and answering it (q).
2. Proceeding with arbitration in the absence of one of the arbitrators (r).
3. Refusing to hear witnesses produced by the parties (s).
4. Arbitrators improperly adding another to their number (t).
5. Where three out of five arbitrators were not present at the time the award was made and did not sign the award, although it purported to be signed by all of them, it was held that it amounted to misconduct, and the award was set aside (u).

Acquiescence in acts amounting to misconduct.—It is misconduct if some of the arbitrators are not present at some of the meetings. But if this procedure is adopted with the concurrence of all the parties or if it is acquiesced in by them, it is not open to any of the parties to impeach the award on that ground (v).

Acts not amounting to misconduct.—An arbitrator is not bound by technical rules of procedure. Hence it is not a valid objection to an award that the arbitrator has not acted in strict conformity with the rules of evidence (w). But the rule of the law of evidence which declares that letters written “without prejudice” should not be admitted in evidence, being a rule founded upon natural justice, is as binding upon arbitrators as upon Courts of Justice, and an arbitrator is wrong in receiving and acting

(n) *Ganga Sahai v. Lekhraj* (1887) 9 All. 253.

(o) *Kaly Charan v. Sarat Chunder* (1903) 30 Cal. 397.

(p) *Amir Begam v. Badr-ud-din* (1914) 36 All. 336, 343 [P. C.]

(q) *Cursetji v. W. Crowder* (1894) 18 Bom. 299.

(r) *Thammiraju v. Bapiraju* (1889) 12 Mad. 113;

(s) *Nand Ram v. Fakir Chand* (1885) 7 All. 523.

(t) *Rughoobur v. Maina Koor* (1883) 12 C. L. R. 564.

(u) *Phiran v. Bahoran* (1875) 7 N. W. F. 367.

(v) *Ram Narain v. Baij Nath* (1902) 29 Cal. 36.

(w) *Kunj Lall v. Banwar Lall* (1918) 4 Pat. L. J. 394, 407-408; *Cursetji v. Crowder* (1894) 18 Bom. 299.

(x) *Suppu v. Govindacharyar* (1888) 11 Mad. 85.

Arbitration.

Sch. II.
para. 15.

upon such a letter. But if no objections taken by the other side to the admissibility of such letter, and an award is made, the award will not be set aside on the ground of misconduct (x). Where it is provided in an agreement for reference that an adjustment relied upon by the plaintiff should not be taken into consideration by the arbitrator, a *bona fide* mistake on the part of the arbitrator in admitting the adjustment in evidence does not amount to misconduct. Such a stipulation is nothing but a rule of evidence introduced *pro hac vice* (y).

It is not misconduct on the part of the arbitrator to delegate to a third party the performance of acts of a ministerial character, so long as he exercises his own judgment on the matters referred (z). "Misconduct" cannot be presumed from the mere fact that the arbitrator is the relative of one of the parties (a). The mere fact that the arbitrator has failed to account for the delay in making the award is no ground for presuming fraud (b).

In *Buta v. Municipal Committee of Lahore* (c), certain matters in dispute between A and B were referred to arbitration. The agreement of reference was drawn up by A's counsel. The arbitrator, feeling doubtful as to the meaning of a certain clause in the agreement, wrote to A to obtain his counsel's opinion on the meaning of that clause. A obtained the opinion, and sent it on to the arbitrator. B was not informed of this until after the award was made. It was held that though it would have been prudent and discreet for the arbitrator to have written to A with B's knowledge and informed B of the opinion, the omission to do this did not amount to "misconduct," as there was no ground for impeaching the good faith of any of the parties concerned.

Evidence of arbitrator.—Where a charge of dishonesty or partiality is made against an arbitrator, any relevant evidence he can give is properly admissible. It is, however, necessary to take care that evidence admitted as relevant on such charges is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final (d).

Appeal from decree based on an award on ground of misconduct.—No appeal lies from a decree passed in accordance with an award, on the ground of misconduct of the arbitrator (e). The only remedy available to the party aggrieved by the award is to apply to have it set aside under this paragraph. See notes to paragraph 16, under the head "Invalid award," p. 981 below.

Fraudulent concealment of any matter which ought to have been disclosed.—Where the arbitrator was the retained pleader of the plaintiff, and this fact was not disclosed by the plaintiff to the defendant before the arbitrator was appointed, the award was set aside on the ground that that fact was one which ought to have been disclosed. Every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made (f).

(x) *Howard v. Wilson* (1879) 4 Cal. 231.
 (y) *Aishabai v. Fasaaji* (1913) 38 Bom. 60.
 (z) *Buta v. Municipal Committee of Lahore* (1902) 29 Cal. 854, 29 I. A. 168.
 (a) *Nainsukh v. Umadaï* (1885) 7 All. 278.
 (b) *Savalappa v. Deuchand* (1902) 28 Bom. 132.
 (c) (1902) 29 Cal. 854, 29 I. A. 168.
 (d) *Amir Begam v. Badar-ud-Din* (1914) 36 All.

336, 344 [P. C.].
 (e) *Walji v. Ebtji* (1905) 29 Bom. 285; *Ram Dhan v. Karan Singh* (1896) 18 All. 414; *Bihari Lal v. Chunni Lal* (1907) 29 All. 457; *Kombi v. Pangri* (1898) 21 Mad. 405.
 (f) *Kali Prosanno v. Rajani Kant* (1888) 25 Cal. 142.

Arbitration.

Sch. II. . Award made subsequent to order superseding arbitration.—If an order is made, superseding the arbitration under paragraph 5 or 8 or under cl. (2) of this paragraph, or if the period fixed for making the award has expired, the arbitrators have no longer seisin of the reference, and they are *functi officio*, and cease to have any more power to make an award than the man in the street (g). Similarly an arbitrator is *functus officio* after the award is made, and he cannot thereafter add to or alter the award (h).

Award made after expiration of period allowed by Court.—Clause (c) of s. 521 stopped at the words "the suit" which occur in cl. (1), sub-cl. (c), of this para. It was followed by another clause which ran thus: "And no award shall be valid unless made within the period allowed by the Court." The latter clause has now been omitted, and instead thereof, we have the words "or, after the expiration of the period allowed by the Court" added into sub-cl. (c). The effect of this alteration is that the only remedy now open to the party impeaching an award on the ground that it was made after the expiration of the period allowed by the Court is to apply under this paragraph to set aside the award. If no application is made to set aside the award under this paragraph, or if the application is made but refused, the award becomes final, and no appeal will lie from a decree based upon the award (i). [Under the Code of 1882 it was held that an appeal lay from a decree based upon such an award (j).] If the application to set aside the award is granted, and an order is made under sub-para. (2) superseding the arbitration, the order is appealable under s. 104, sub-s. (1), cl. (a). See notes to r. 16 below, "No appeal lies from a decree based on an award, etc.," p. 979, and notes to paragraph 3, "Making of award," p. 967 above.

Another consequence of the alteration is that whereas under s. 521 of the old Code an award out of time was a nullity (k), it is not so under the present rule. Under the present rule, it is merely voidable, and if not sought to be set aside within the period of limitation [Limitation Act, 1908, art. 158], it is binding upon the parties.

When the award is otherwise invalid.—The words "or being otherwise invalid" at the end of sub-cl. (c) are new. Under the Code of 1882 it was held that when an award was not a valid and legal award, an appeal would lie from the decree based upon such award, even though the decree might be in accordance with the award. The leading case on the subject was *Kali Prosanno Ghose v. Rajani Kant* (l) decided by the High Court of Calcutta in the year 1898. The object of adding the words "or being otherwise invalid" into sub-cl. (c) is to supersede the Calcutta and other decisions which allowed an appeal from a decree based upon an invalid award, and to give effect to the principle of finality in cases of arbitration enunciated by their Lordships of the Privy Council in *Ghulam Khan v. Muhammad Hassan* (m), and followed in recent cases (n). The result is that the only remedy now open to a party seeking to impeach an award as being invalid is to apply under this paragraph to have it set aside. If he fails to do so, or if an application is made but refused, the award becomes final, and no appeal will lie from a decree based upon the award. See notes to paragraph 16 under the head "Invalid award," p. 931. It is worth while noting that the Special Committee, which introduced these alterations intended to allow an

(g) *Ibrahim v. Mohsin* (1896) 18 All. 422, 425.

(h) *Jafr Begam v. Syed Ali Raza* (1901) 23 All. 883, 28 I. A. 111.

(i) *Shib Kristo Daw & Co. v. Satish Chandra* (1912) 39 Cal. 822.

(j) *Patto Kumari v. Upendra Nath* (1919) Pat. L. J. 285; (1912) 39 Cal. 822 *supra*; *Kahan Singh v. Mohan Lal*, 34 I. C. 177.

(k) *Chuha Mal v. Hari Ram* (1886) 8 All. 548; *Har Narain v. Bhagwant* (1891) 13 All. 300, 18 I. A. 65; *Lachman Das v. Abpur-kash* (1908) 30 All. 169.

(l) (1898) 25 Cal. 141.

(m) (1902) 29 Cal. 167, 183, 29 I. A. 51.

(n) See *Chairman of the Purnea Municipality v. Siva Sankar Ram* (1906) 33 Cal. 899, 902, 903.

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appeal from an order under this paragraph setting aside or refusing to set aside an award (o), but no such proviso is to be found in s. 104. **Sch. II.**

An award is not illegal merely because it is based on evidence given by one of the parties on a special oath administered under the Indian Oaths Act with the consent of the other party (p). **paras. 15, 16.**

Appeal from order under this paragraph.—Except in the case provided by s. 104, cl. (a), no appeal lies from an order under this paragraph setting aside or refusing to set aside an award. But if the order is made by a Chartered High Court, it amounts to a “judgment” within the meaning of cl. 15 of the Letters Patent, and is appealable under that clause. See notes to s. 104 under the head, “Letters Patent appeal,” p. 204. See also notes to paragraph 21 below under the head “Appeal,” p. 992.

It has been held by the High Courts of Calcutta, Madras and Bombay and by the Chief Court of the Punjab that though no appeal lies from an order setting aside an award, the legality of the order may be challenged on appeal from the decree that may be ultimately passed in the suit (q) [see s. 105]. A different view has been taken by the High Court of Allahabad (r).

Revision.—An order under this paragraph setting aside or refusing to set aside an award is not subject to revision (s).

16. [S. 522.] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration, for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

Judgment to be according to award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

“After the time for making such application has expired.”—That is, after 10 days from the date on which the award is submitted to the Court: see Limitation Act, 1908, sch. 1, art. 158.

No appeal lies from a decree based on an award except in so far as such decree is in excess of or not in accordance with the award.—In references to arbitration the general rule is that, as the parties choose their own arbitrator to be the judge in the dispute between them, they cannot object to his decision either upon the law or upon the facts. It is now well established that where a matter is referred to

(o) See *Gazette of India*, 1907, Part V, p. 183.

(p) *Bhagirath v. Ram Goolam* (1882) 4 All. 283.

(q) *Ambica v. Nadyar* (1885) 11 Cal. 172, 175, *Achuthayya v. Thimmayya* (1908) 31 Mad. 345; *Damodar v. Raghunath* (1902) 26 Bom. 551; *Juma v. Mubarak Kha*

(1912) Punj. Rec. no. 97, p. 337.

(r) *Ganga Prasad v. Kura* (1906) 28 All. 408;

(s) *Damodar v. Raghunath* (1902) 26 Bom. 551

Kali Charan v. Sarat Chunder (1903) 30

Cal. 397; *Ram Jawaya Mal v. Devi*

Dutta Mal (1916) Punj. Rec. no. 117, p. 361.

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para. 16. Thus where an award was impeached on the ground that it was against law, their Lordships of the Privy Council said: "They [arbitrators] may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award" (u). And this principle has been carried so far that if parties submit to an arbitrator the decision of a bare point of law, and he gives an erroneous decision, his award is binding notwithstanding (v). In all these cases the Court would say to the party seeking to set aside the award: "You have constituted your own tribunal; you are bound by its decision" (w). The present paragraph gives effect to "the principle of finality" of awards, by declaring that no appeal shall lie from a decree based on an award, except in so far as the decree is in excess of, or not in accordance with, the award (x). The only cases in which the Code allows an appeal from a decree based on an award are—

- (1) where the decree is *in excess* of the award, as where the decree gives interest which the arbitrators have not awarded (y); or
- (2) where the decree is *not in accordance with* the award.

In this respect there is no difference between a decree based upon a private award (para. 21) and a decree based upon an award made through the intervention of the Court (z).

Is a decree based on an award which has been *modified* by the Court under paragraph 12 a decree *in accordance with* the award? It has been held by the High Court of Allahabad that it is not, and hence an appeal lies from the decree. Thus where an award directed the defendant to make certain payments to the plaintiff by instalments, and the award was modified by the Court under paragraph 12 by omitting the direction as to payment by instalments, and a decree was passed on the award as so modified, it was held that an appeal would lie from the decree (a). The soundness of this decision is open to question. It is submitted that a decree is in accordance with an award within the meaning of this paragraph, if it is in accordance with the award as modified under paragraph 12, though it may not be in accordance with the *original* award. Paragraph 16 says: The Court shall proceed to pronounce judgment *according to the award*. "It is clear that when an award is modified under paragraph 12, the only award according to which judgment could be pronounced is the modified award. Moreover, the decision runs counter to "the principle of finality" which finds expression in the Code.

Where an application made under para. 15, cl. (c), to set aside an award on the ground that it was made after the expiration of the period allowed by the Court has been refused, and a decree is subsequently passed in accordance with the award, no appeal lies from the decree, the decree being in accordance with the award. Nor does any appeal lie from the decree under the Letters Patent (b). See notes to paragraph 15, "Award made after expiration of period allowed by Court," and notes, "Appeal from order under this paragraph," p. 979. See also notes to s. 104, "Letters patent appeal," p. 264 above.

(t) *Adams v. Great North of Scotland Ry. Co.* [1891] A. C. 81; *Montgomery and Co., & re* (1898) 78 L. T. 406.

(u) *Ghulam Khan v. Muhammad Hassan* (1902) 29 Cal. 167, 29 I. A. 51.

(v) *Steff v. Andrews* (1816) 2 Maddock, 6.

(w) *Per Williams, J., in Hodgkinson v. Fernis* (1867) 3 C. B., N. S. 189.

(x) *Ghulam Khan v. Muhammad Hassan* (1902)

29 Cal. 167, 29 I. A. 51; *Hansraj v.*

Sundar Lal (1908) 85 Cal. 648, 85 I. A. 88.

(y) *Mohan Lal v. Joy Narain* (1874) 23 W. R. 105.

(z) *Bahadur Singh v. Negi Puran Singh* (1908) 30 All. 151; *Kulsum v. Ali Akbar* (1917) 39 All. 401, 411.

(a) *Jawahar v. Mui Raj* (1886) 8 All. 449.

(b) *Shib Kristo Daw & Co. v. Saitah Chandra* (1912) 39 Cal. 822.

Invalid award.—Under the old section it was held by the Courts in India, that though a decree might be in perfect accordance with an award, an appeal would lie from the decree, if the award upon which the decree was based was *invalid*. The reason given was that that section presupposed a valid and legal award, and not an award upon which no decree could be passed (c). A different view, however, was taken by their Lordships of the Privy Council in *Ghulam Khan v. Muhammad Hussain* (d), decided in the year 1902. After that expression of opinion two of our High Courts held that no appeal lay under s. 522 from a decree passed on an award on the ground that the award was invalid (e). Under the present Code it is quite clear that no appeal lies from a decree, where such decree is passed in accordance with the award, though the award may be invalid. But the party aggrieved by the award may apply under para. 15, cl. (1), sub-cl. (c), to have the award set aside. If he does not avail himself of that remedy, the award becomes final, and no appeal lies from the decree based upon the award. This change has been introduced by the insertion of the words “or the award being otherwise invalid” in para. 15, cl. (1), sub-cl. (c). The object is to give finality to awards as stated in the notes to paragraph 15 under the head “Where the award is otherwise invalid”. The effect of this alteration is that no appeal lies under this Code when a decree has been passed under the present paragraph upon an award, except in so far as the decree is in excess of, or not in accordance with, the award (f). The result is that all those cases, in which it was held under the Code of 1882, that a decree though it be in accordance with the award may be challenged by way of appeal on the ground that there was no valid and legal award, are no longer law.

Illustrations.

(a) An order of reference made on the application of *some only* of the parties interested is illegal [see paragraph 1]. Therefore an award made in pursuance of such order is also illegal. According to the old section an appeal would lie from a decree upon such an award (g). But no appeal lies under this paragraph, and the only remedy open to the party aggrieved by the award is to apply to the Court under paragraph 15, cl. (1), sub-cl. (c), to set aside the award. Such an application should be made within 10 days from the date on which the award is submitted to the Court. See paragraph 1.

(b) An award made *after* the expiration of the period fixed by the Court under paragraph 3 or enlarged by the Court under paragraph 8, is invalid. According to the old section an appeal would lie from a decree based on such award (h). No appeal lies under the present paragraph, but the party aggrieved by the award may apply to have it set aside under paragraph 15. See notes to para. 15, “Award made after expiration of period allowed by Court”

(c) An award must be signed before it is filed and it must be signed by all the arbitrators. An award signed by *some only* of the arbitrators is illegal. Similarly an award signed by an arbitrator *after* the same has been filed in Court is illegal. According

(c) *Lachman v. Brijpal* (1884) 6 All. 174; *Sham Lal v. Mieri Kunwar* (1907) 29 All. 426; *Kali Prosanna Ghose v. Rajani Kant* (1898) 25 Cal. 142; *Nandram v. Nemchand* (1893) 17 Bom. 357; *Shib Lal v. Chatrabhuj* (1909) 31 All. 460.
(d) (1902) 29 Cal. 167, 29 I. A. 51.
(e) See *Chairman of the Purnea Municipality v. Siva Sanhar Ram* (1906) 33 Cal. 899, 902-903; *Kanakku v. Nagalinga* (1909) 32 Mad. 510.

(f) *Lutawan v. Lachya* (1913) 36 All. 99 [F. B.]; *Batchu v. Abdul* (1913) 38 Mad. 256; *Khudiram v. Chandioharan* (1916) 1 Pat. L. J. 306. See also *Shib Kristo Daw & Co. v. Satish Chandra* (1912) 39 Cal. 822.
(g) *Indur v. Kandada* (1903) 26 Mad. 47; *Joy Prokash v. Sheo Golam* (1885) 11 Cal. 87; *Shib Lal v. Chatrabhuj* (1909) 31 All. 460.
(h) *Chuha Mal v. Hari Ram* (1886) 8 All. 548; *Lachman Das v. Abparkash* (1908) 30 All. 169.

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Sch. II. to the old section an appeal would lie from a decree based on such award (i). No
para. 16. appeal lies under this paragraph, but the party aggrieved by the award may apply under paragraph 15 to have it set aside (j).

(d) The matters in difference in a suit between *A* and *B* are referred to the arbitration of *C*. *C* is the retained pleader of *A*, but this fact is not disclosed to *B* [see para. 15]. *C* makes an award. The award is illegal. According to the old section an appeal would lie from the decree (k). No appeal lies under the present paragraph, but *B* could apply to have the award set aside under paragraph 15.

An appeal lies from a decree based upon a judgment pronounced in contravention of the provisions of this paragraph, though the decree may be in accordance with the award.—It has been held by the High Court of Allahabad that if a decree is passed on an award *before the time for making the application to set aside the award has expired*, an appeal will lie from the decree, though the decree may be in accordance with the award (l). Similarly it has been held that where an application to set aside an award has been refused by the Court *without considering it*, and a decree is passed on the award, an appeal will lie from the decree, though the decree may be in accordance with the award. The reason given is that the word “refused” in this paragraph means refused *after judicial consideration* (m).

Second appeal.—A second appeal will lie to the High Court where the decree of the Court of first instance is in accordance with the award, and such decree is set aside by the first appellate Court. The reason is that no appeal lies from a decree passed in accordance with an award, and the first appellate Court acts *without jurisdiction* in entertaining the appeal and setting aside the decree passed in accordance with the award (n). In a similar case the High Court of Calcutta held that no second appeal lies, but that the High Court may *revise* the order under s. 115 (o).

A second appeal will also lie where the Court of first instance sets aside the award and passes a decree on the merits, and the first appellate Court sets aside the decree and passes a decree in accordance with the award. The mere fact that the decree of the first appellate Court is in accordance with the award is no ground for refusing the appeal (p).

Revision.—We have seen that no appeal lies from a decree passed in accordance with an award. Section 115 provides that where no appeal lies from a decision, an application may be made to the High Court for a *revision* of the decision. No such application, however, should be admitted in the case of an award. In the case of an award, revision would be more objectionable than an appeal. If an application for revision were admissible in a case where the decree is in accordance with the award, the finality of any award would be open to question (q). Thus where an application was made for revision on the ground that there was no valid order of reference and that the award was therefore a nullity and that no decree ought to have been passed on such an award, the High Court of Allahabad expressed the opinion that the application should not be entertained (r). In a recent Bombay case the High Court entertained

(i) *Nandram v. Nemchand* (1893) 17 Bom. 357; *Ramesh Chandra v. Karunamoyi* (1906) 33 Cal. 498.

(j) *Khudram v. Chandioharan* (1916) 1 Pat. L. J. 306.

(k) *Kali Prosanno Ghose v. Rajani Kant* (1898) 25 Cal. 141.

(l) *Najm-ud-din v. Albert Peuch* (1907) 29 All. 584.

(m) *Ibrahim v. Mohsin* (1896) 18 All. 422.

(n) *Krishnan v. Muthu* (1899) 22 Mad. 172.

(o) *Baikanta Nath v. Sita Nath* (1911) 38 Cal. 421.

(p) *Shyama Charan v. Prothad* (1904) 8 C. W. N. 390; *Ganga Prasad v. Kurra* (1906) 28 All. 408.

(q) *Ghulam Khan v. Muhammad Hassan* (1902) 29 Cal. 167 29 I. A. 51; *Batcha v. Abdul* (1913) 38 Mad. 256.

(r) *Ajudhia Prasad v. Badar-ul-Husain* (1917) 39 All. 489, 498-495.

an application for revision from a decree which was passed in accordance with the award, on grounds which the Court thought were of an exceptional character (a).

Where the Court acts as arbitrator.—Where a reference is made to the presiding Judge, the parties must be deemed to have agreed to accept his decision as final. Hence no appeal lies from the decision of the Judge in such a case (t), nor is the decision subject to the provisions of the present schedule so as to entitle either party to object to the decision as if it was an award under this schedule (u). A decree passed in accordance with such a decision must be regarded as a consent decree and it comes within the purview of O. 23, r. 3 (u). The same principle applies even if the reference is made to the presiding Judge and another person jointly (u).

It may here be noted that a Judge to whom a reference is made has no power to alter his decision once it is given. In this respect his position is that of an arbitrator who has no power to alter an award once it is made by him (v).

Another case in which the decision of a Court would be regarded as an award is where the Court has no jurisdiction to entertain the suit, and the suit is heard by the Court by the consent of parties (w). See notes to s. 21, "Absence of jurisdiction," p. 91 above.

Distinction between valuer and arbitrator.—A sues B for a declaration that he is entitled to one-half share of certain property. An order is made by consent that A should pay B a quarter of the value of the property to be settled by a certain referee nominated by the parties. The order is not one passed under paras. and 3, and the decision of the referee is not an award on which a judgment could be pronounced under the present paragraph (x). But the terms of the agreement between the parties may be such that the valuer may be invested with the power of an arbitrator in which case the valuation made by him may operate as an award. In *Jackson v. Barry Railway Co.* (y), the building contract contained the following clause: "In the event of any question or dispute arising between the company and the contractor as to [then followed the enumeration of several questions], such questions or disputes shall be referred to the engineer whose decision shall be conclusive and binding on both parties." It was assumed that the above clause was an agreement to refer to arbitration, and the only question argued was whether in view of a letter written by the engineer to the contractor after intimation to the parties to proceed with the arbitration the engineer had rendered himself incapable of acting as an arbitrator. It was contended on behalf of the contractor that the true inference from the letter was that the engineer had so completely made up his mind against him that he would not be patiently listened to and receive an honest decision, but this contention was overruled.

Order of reference on agreement to refer.

17. [S. 523.] (1) Where any person agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter

Application to file in Court agreement to refer to arbitration.

(a) *Merali v. Sheriff* (1911) 36 Bom. 105. See also *Kantha Lal v. Narain Singh* (1916) Punj. Rec. no. 28, p. 75.
(t) *Nidamarthi v. Thammana* (1903) 28 Mad. 76; *Sayad Zain v. Kalabhai* (1899) 23 Bom. 752.
(u) *Chinna v. Venkatasami* (1919) 42 Mad. 825, 828.

(v) *Baikanta Nath v. Sita Nath* (1911) 38 Cal. 421.
(w) *Ledgard v. Bull* (1867) 9 All. 191, 13 I. A. 134.
(x) *Chooney Money v. Ram Kinkur* (1901) 28 Cal. 155; *Macnaghten v. Rameshwar* (1903) 30 Cal. 831.
(y) [1893] 1 ch. 238; *Ives v. Williams* [1894] 2 ch. 478.

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para. 17. Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

Alterations in the paragraph.—In cl. 4 the words “ and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator ” are substituted for the words “ and shall make an order of reference thereon, and may also nominate the arbitrator when he is *not named* therein and the parties cannot agree as to the nomination.”

Does not apply—The procedure prescribed by this paragraph does not apply to cases to which the Arbitration Act applies. See notes to s. 89, p. 221 above.

Scope of the paragraph.—Paras. 1 to 16 deal with cases in which the parties to a suit agree to refer the matters in difference between them in the suit to arbitration and apply to the Court for an order of reference. The application in such a case must be made by all the parties to the suit interested in the matters in difference proposed to be referred to arbitration. This and the subsequent paragraph refer to cases in which persons themselves agree, independently of the Court, to refer the matters in difference between them to arbitration (z). In such a case any party to the agreement may apply to the Court to have the agreement filed and to have an order of reference made thereon. Where such an order is made, the provisions of paras. 2 to 16 apply to the proceedings in so far as they are consistent with the agreement so filed (a) [para. 19]. When a submission is filed in Court under this paragraph, the submission is said to be made a rule of the Court.

(z) *Ghulam Khan v. Mahammad Hasan* (1902) 29 Cal. 167, 29 I. A. 51.

(a) *Sheo Dai v. Sheo Shanker* (1905) 27 All. 58, 56.

Agreement to refer to arbitration matters in difference in a pending suit.—Under the Code of 1882 it was held by the High Court of Bombay that the provisions of s. 523 [this para.] and s. 525 [para. 20] applied as well to an agreement to refer to arbitration matters in controversy in a *pending suit* as to an agreement made before any suit had been instituted (*b*). The same view was taken by the Allahabad High Court (*c*). On the other hand, it was held by the High Court of Calcutta (*d*) and the Chief Court of the Punjab (*e*), relying on a passage in the judgment of their Lordships of the Privy Council in *Ghulam Khan v. Muhammad Hassan* (*f*) [p. 964 above], that those sections did not apply to an agreement to refer to arbitration where there was a suit pending with respect to the matters in dispute, and that if a reference was made during the pendency of a suit without an order of the Court and an award made, the award could not be taken cognizance of by the Court under those sections. In a case which arose under the new Code, the High Court of Madras agreed with the view taken by the Calcutta High Court, and held that neither the old sections 523 and 525 nor the present para. and para. 20 applied to an agreement to refer matters in difference in a pending suit (*g*). The same view was taken by the High Court of Bombay in two cases which arose under the present Code (*h*). In a later case, however, the same High Court held in a case where the parties agreed to refer to arbitration the matters in dispute between them in a pending suit, that paras. 20 and 21 applied to the case and that the correct procedure was to apply to the Court to file the award under paras. 20 and 21 (*i*). The above cases were reviewed in a recent case (*ii*) by Macleod, C.J., where the learned judge laid down the procedure to be followed in arbitration proceedings: see notes to O. 23, r. 3, "Adjustment: submission and award," p. 684 above.

The agreement must be in writing.—This paragraph does not apply unless the agreement to refer is in writing (*j*).

Agreement to refer future differences to arbitration.—Where a charter-party contains a clause that any disagreement that *may arise* [*i.e.*, arise in future] between the contracting parties as to the proper interpretation of the charter should be referred to arbitration, the agreement, though it refers to *future* differences, can be filed under this paragraph (*k*). Agreements to refer *future* differences are not outside the scope of this section.

"Sufficient cause."—Where an agreement is to refer to several specified arbitrators and one of the arbitrators dies before the application is made under this paragraph, the Court should not make an order of reference under this paragraph (*l*). But it is otherwise if the agreement contains an express provision that in case of death of any arbitrator, another arbitrator may be appointed in his place (*m*).

"Arbitrator appointed in accordance with the provisions of the agreement."—Thus where an agreement provides for a reference to a European merchant the Court has no power to appoint an Indian merchant (*n*).

Where the agreement to refer has been duly revoked.—Where an agreement to refer has been revoked for good cause by one of the parties thereto,

(b) *Harivalabdas v. Utamchand* (1880) 4 Bom. 1.
(c) *Sheo Dat v. Sheo Shankar* (1905) 27 All. 53, 56.
(d) *Tincowry v. Fakir Chand* (1903) 30 Cal. 218.
(e) *Dhan Singh v. Kahn Singh* (1912) Punj. Rec. no. 115, 390.
(f) (1902) 29 Cal. 167, 182, 29 I. A. 51.
(g) *Venkatachala v. Rangiah* (1911) 36 Mad. 353.
(h) See *Vyankatesh v. Ramchandra* (1914) 38 Bom. 687, 695, 696; *Harakhbai v. Jamnabai* (1913) 37 Bom. 639, 643.
(i) *Shavakshaw v. Tyab Haji Ayub* (1916) 40 Bom. 386.

(ii) *Manilal v. Goculdas* (1920) 22 Bom. L. R. 1048.
(j) *Tincowry v. Fakir Chand* (1903) 30 Cal. 218.
(k) *Fazulbhoy v. The Bombay and Persia Steam Navigation Co.* (1896) 20 Bom. 232.
(l) *Mohan Lal v. Damodar Das* (1918) Punj. Rec. no. 71, p. 238.
(m) *Sri Ram v. Sorabji* (1919) Punj. Rec. no. 155 p. 414.
(n) *Dreyfus & Co. v. Gurditta* (1911) Punj. Rec. no. 35, p. 123.

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the Court is not competent to order it to be filed under this paragraph (o). See notes to para. 1 under the head "Revocation of arbitrator's authority."

Umpire.—If an agreement filed under this paragraph does not contain any provision for the appointment of an umpire in the event of the arbitrators being unable to agree, the Court has no power under this paragraph to appoint an umpire (p).

Appeal.—An order under this paragraph filing or refusing to file an agreement to refer to arbitration is now appealable as an order [s. 104, sub-s. (1), cl. (d)]. Under the Code of 1882 it was appealable as a decree (q).

Revision.—The mere fact that the application is not numbered and registered as a suit as required by cl. (2) of this paragraph is no ground for interfering in revision; such an irregularity is not a material irregularity within the meaning of s. 115 (r).

18. [New. Cf. Arbitration Act 9 of 1899, s. 19.] Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

History of the section.—This paragraph is a reproduction with slight alterations of section 19 of the Indian Arbitration Act. The latter section is based on s. 4 of the English Arbitration Act, 1889, which again is based on the Common Law Procedure Act, 1854, s. 11.

By s. 28 of the Indian Contract Act agreements in restraint of legal proceedings are declared void. To that section there was an exception to the effect that if the parties have agreed to refer their disputes to arbitration, the existence of the agreement shall be a bar to seeking redress in the ordinary Courts. The exception also recognized the right to sue for specific performance of the agreement. Then came the Specific Relief Act of 1877 which by s. 21 took away the right to sue for the specific performance of the agreement, but preserved the right to the party who was willing to abide by the agreement to object to a trial of the suit filed by the other party. Lastly, we have paragraph 22 of this Schedule which has repealed that portion of s. 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit. In lieu thereof we have the present paragraph which enables a party who is willing to abide by the agreement to apply for a stay of the suit filed by the other party. But the application must be made at the earliest possible opportunity and in all cases where issues are

(o) *Coley v. Da Costa* (1890) 17 Cal. 200.
(p) *Muhammad v. Muhammad* (1886) 8 All. 64.
(q) *Ghulam Khan v. Muhammad Haseen* (1902) 29 Cal. 167, 29 I. A. 51. See also *Venkata-*

chala v. Rangiah (1911) 36 Mad. 533, 354, 355.
(r) *Wali Muhammad v. Bahawal Bakhsh* (1914) Punj. Rec. No. 28, p. 101.

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settled at or before such settlement. If the application is not so made, the suit will proceed, and any award made by the arbitrator after the institution of the suit is a nullity. The reason is that as soon as a suit is brought in respect of the subject-matter of the reference, the arbitrators become *functus officio* (s).

"At the earliest possible opportunity and in all cases where issues are settled at or before such settlement."—The corresponding words in s. 19 of the Indian Arbitration Act, 1899, are, "at any time after appearance and before filing a written statement or taking any other steps in the proceedings." It has been held under the English Arbitration Act, 1889, that where the defendant did not know what was the subject-matter of the action, and asked for a statement of claim, the mere request for the statement of claim was not a step in the proceedings (t). But where the defendant was unaware that the contract contained an arbitration clause and asked for an order of discovery and the order asked for was made, it was held that he had taken a step in the proceedings and therefore was not entitled to a stay (u).

"Institutes any suit."—These words show that the present rule refers only to suits instituted *after* the agreement to refer to arbitration has been made. A sues B in respect of certain matters. The parties then agree to refer the matters to arbitration. Subsequently A declines to proceed with the arbitration, and writes to B that he will proceed with the suit. B applies for an order staying the suit. The Court has no power under this paragraph to stay the suit, for the suit was instituted *prior* to the agreement (v).

"No sufficient cause"—The burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists (w).

"May make an order staying the suit."—The Court has a discretion under this paragraph as to staying a suit instituted by one party to a submission against the other party. At the same time it must be remembered that it is the *prima facie* duty of the Court to act upon the agreement between the parties (x). "If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament [that is, the Common Law Procedure Act, 1854, s. 11, which corresponds to the present paragraph] was passed, a *prima facie* duty is cast upon the Courts to act upon such an agreement" (y).

Denial of agreement.—Where one of the parties denies the agreement to refer set up by the other party, it is within the province of the Court to decide whether there is such an agreement (z).

Validity of agreement to refer.—To bring a case within this paragraph there must be a subsisting agreement to refer capable of being carried into effect. A suit therefore cannot be stayed under this paragraph if the submission has been revoked for good cause (a). Nor can it be stayed if the original contract containing the arbitration clause is followed by another agreement *materially* altering the original contract, the

(s) *Appavu v. Seeni* (1916) 41 Mad. 115; *Sheo Babu v. Udit Narain* (1914) 12 All. L.J. 747.

(t) *Ives v. Williams* (1894) 2 Ch. 478.

(u) *Parker, Gainer & Co. v. Turpin* [1918] 1 K.B. 358.

(v) *Ramjidas v. House* (1907) 35 Cal. 199; *Peruri v. Gullapudi* (1909) 34 Bom. 372, both cases under Sec. 19 of the Arbitration Act.

(w) *Dinabandhu v. Durgaprasad* (1919) 46 Cal. 1041; *Hodgson v. Railway Passenger's Assurance Co.* (1882) 9 Q. B. D. 188.

(x) *In re Carlisle, Clegg v. Clegg* (1890) 44 C. D. 200; *Lyon v. Johnson* (1890) 40 C.D. 570; *Dinabandhu v. Durgaprasad* (1919) 46 Cal. 1041.

(y) *Willesford v. Watson* (1873) *L. R. 8 Ch. 473, 479, per Lord Selborne.

(z) *Sheo Parshad v. Indore Malwa United Mills* (1917) Punj. Rec. no. 62, p. 220.

(a) *Randell v. Thompson* (1876) 1 Q. B. D. 748; *Deutsche Springstafel Actien Gesellschaft v. Briscoe* (1888) 20 Q. B. D. 177.

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reason being that in such a case the arbitration clause ceases, by virtue of the alteration, to have any effect. But a mere extension of time for the performance of that which a party under the original contract is bound to perform does not amount to a *material* alteration, and the arbitration clause does not cease to operate in such a case (b). See Pollock and Mulla's Indian Contract Act, notes to s. 28.

Stay refused.—Where an arbitration clause does not cover all the matters in respect of which the suit is brought, the Court will not, as a rule, split the suit into two parts, one to be tried by the arbitrator and the other to be tried in Court: the Court will, in such a case, try the whole suit (c). Where fraud is charged, the Court will in general refuse to refer the dispute to arbitration if the party charged with the fraud desires a public inquiry (d).

Appeal.—An appeal lies from an order staying or refusing to stay a suit when there is an agreement to refer to arbitration; see s. 104, sub-s. (1), cl. (e).

19. [S. 524.] The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

Provisions applicable to proceedings under paragraph 17.

Does not apply.—This paragraph does not apply to cases to which the Arbitration Act applies. See notes to s. 89, p. 221 above.

“So far as they are consistent with any agreement filed under paragraph 17.”—This paragraph provides that where an order of reference is made under paragraph 17 the provisions of paras. 3 to 16 shall apply to all proceedings under the order *only so far as they are consistent with the agreement filed under paragraph 17*. Thus under paragraph 8 the Court has the power to extend the period for the making of the award. But if the agreement filed under paragraph 17 provides that the arbitrators shall make their award within a fixed period and that they shall have no power to enlarge the time for making the award, the stipulation in the agreement will prevail to the exclusion of the provision in paragraph 8. But the words “so far as they are consistent with any agreement filed under paragraph 17” would not preclude the Court from setting aside an award for misconduct of the arbitrators, though there may be a clause in the agreement that the award should be accepted as “final” (e). Nor do they preclude the Court from appointing a new arbitrator under paragraph 5 in place of one who refuses to act, provided there is no clause in the submission expressly excluding the power of the Court to make such an appointment (f).

Arbitration without the intervention of a Court.

20. [S. 525.] (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction

Filling award in matter referred to arbitration without intervention of Court.

(b) *Lachminarain v. Hoars, Miller & Co.* (1913) 41 Cal. 85.
(c) *Turnock v. Sartoris* 1890) 43 C. D. 150.

(d) *Russell v. Russell* (1880) 14 C. D. 471.
(e) *Burla v. Kalapali* (1888) 6 Mad. 368.
(f) *Bala v. Seetharama* (1894) 17 Mad. 498.

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over the subject-matter of the award that the award be filed in Court. Sch. II.
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(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Old section.—This paragraph corresponds to s. 525 of the Code of 1882 except that in cl. (1) the words “any Court having jurisdiction over the subject-matter of the award” have been substituted for the words “Court of the lowest grade having jurisdiction over the matter to which the award relates.” See notes below, “Court to which application should be made under this paragraph.”

Does not apply.—This paragraph does not apply to cases to which the Arbitration Act applies; see notes to s. 89, p. 221 above.

Pending suit.—See notes to para. 17 above under the head “Agreement to refer to arbitration matters in a pending suit,” p. 985 above. See also notes to O. 23, r. 3, “Adjustment, submission and award,” p. 684 above.

Scope of this and subsequent paragraph.—The present paragraph and paragraph 21 refer to cases where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award (g).

This paragraph is no bar to a regular suit to enforce an award.—Under the corresponding section 525 of the Code of 1882 it was held that a party interested in an award may at his option avail himself of the summary remedy provided by that section to enforce the award, or he may bring a regular suit to enforce the award (h). There is nothing in the present Code to preclude such a suit. Rather, such a suit is saved by s. 89 as appears from the words “save in so far as is otherwise provided by any other law for the time being in force” (i). See notes to para. 21. “Res judicata,” p. 993 below.

A valid award constitutes a bar to a suit on the original demand.—An award duly passed in accordance with the submission of the parties is equivalent to final judgment. Hence if an award is made for a partition of joint property no party to the reference can sue for partition. The award is an answer to the suit, though no decree may have been passed on the award (j).

Court to which application should be made under this paragraph.—It is the subject-matter of the award, and not the subject-matter of the reference, that determines the jurisdiction of the Court under the present paragraph. Under the old section the application to file the award had to be made to “the Court of the lowest

(g) *Ghulam Khan v. Muhammad Hassan* (1902) 29 Cal. 167, 182, 29 I. A. 51.

(h) *Subbaraya v. Sadastava* (1897) 20 Mad. 490; *Bhajahari v. Behary Lal* (1906) 33 Cal. 881.

(i) *Nathu Mal v. Muhammad Shaif* (1917) Punj.

Rec. no. 12, p. 44, at p. 48.

(j) *Krishna v. Balaram* (1896) 19 Mad. 290; *Bhajahari v. Behary Lal* (1906) 33 Cal. 881; *Muhammad Nawas Khan v. Alam Khan* (1891) 18 Cal. 414, 18 I. A. 73.

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Sch. II. grade having jurisdiction over the matter to which the award relates," and these words
paras. were held by the High Court of Calcutta to mean "the Court of the lowest grade having
20, 21. jurisdiction over the subject-matter of the reference" (k). The words "subject-matter
of the award" have been substituted in this paragraph for the words "matter to which
the award relates" to make it clear that an application under this paragraph may be
made to any Court having jurisdiction over the subject-matter of the award.

Limitation.—The application under this paragraph should be made within 6 months from the date of the award: Limitation Act, 1908, sch. I, art. 178 (l).

Where an award is delivered in parts.—If the agreement to refer provides that the matters in dispute may be taken up and dealt with *serialim* and that the award may be delivered bit by bit, each portion decided may be dealt with as a distinct award under this paragraph (m).

"Where any matter has been referred to arbitration."—*Do the words "any matter" refer only to a matter in respect of which a suit can be entertained by a Civil Court under s. 9 of the Code?*—This paragraph provides that when *any matter* has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply that the award be filed in Court. Paragraph 21 provides for the passing of a decree on the award. Suppose now that the matter referred to arbitration is one as to which a Civil Court has no jurisdiction to entertain a suit under s. 9 of the Code, e.g., disputes about *man pān*, and an award is made thereon. Has the Court jurisdiction to file such an award, and pass a decree thereon under paragraph 21? It has been held by the High Court of Bombay, that it has, and that it is not against the policy of the law to give effect to such awards (n). The result is that rights which are not at all civil rights may be the subject-matter of an arbitration and award and of the decree of a Civil Court. It would be interesting to know how the decree, if disobeyed, would be enforced. However this may be, it is clear that where a matter is such that on grounds of public policy it can be disposed of only by a Court, it cannot form the legitimate subject of a reference, and if such a matter is referred to arbitration, and an award has been made thereon, the Courts should refuse to pass a decree thereon. Thus the right to succeed to the trusteeship of a public charitable trust is not a right which can be settled by arbitration. A Court therefore has no jurisdiction to entertain an application to file an award in such a matter under this paragraph (o).

Revocation of arbitrator's authority.—See notes under the same head, p. 986 above.

21. [S. 526.] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

Filing and enforcement
of such award.

(k) *Narsingh Das v. Ajodhya* (1904) 31 Cal. 203.

(l) *See Ram Ugram v. Achraj Nath* (1915) 38 All. 85, 91.

(m) *Shoshemukht v. Nobin Chunder* (1879) 4 C. L.

R. 92.

(n) *Raghavendra v. Gururao* (1913) 37 Bom. 472.

(o) *Muhammad Ibrahim v. Ahmad* (1910) 32 All. 508.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. Sch. II.
para. 21.

Points of distinction between s. 526 of the Code of 1882 and this paragraph :—

1. The words, "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon," have been added into cl. (1) to negative the view held by the High Court of Bombay under the old section that the Court had no power to determine questions relating to the factum and validity of the agreement to refer and of the award, and to give effect to the view held by the other High Courts. See notes below, "Where the Court is satisfied that the matter has been referred to arbitration," &c.
2. This word "proved" has been substituted for the word "shown." In fact it was held under the old section that the word "shown" meant "proved" (p). See notes below under the head "Proved."

Does not apply.—This paragraph does not apply to cases to which the Arbitration Act applies. See notes to s. 89, p. 221 above.

When the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon.—These words are new. In the absence of these words in the corresponding section of the Code of 1882 it was held by the High Court of Bombay that where an application was made under that section to file an award, and the other party raised objections to the factum or validity of the submission and award, the Court had no jurisdiction to inquire whether the parties had or had not referred the matters in dispute to arbitration, and the Court should therefore reject the application, and refer the applicant to a *regular suit* to enforce the award (q). On the other hand, it was held by the High Courts of Allahabad (r), Calcutta (s) and Madras (t) that the Court had the power under that section to determine all questions relating to the existence and validity of the alleged agreement to refer and of the award, and that the applicant must not be referred to a separate suit. The present paragraph supersedes the Bombay decisions, and gives effect to the decisions of the other High Courts.

"Proved."—It is not sufficient to "allege" grounds of objection under paras. 14 and 15. It is necessary that the ground of objection should be *proved*. See notes above under the head "Points of distinction," etc.

Grounds of objection under paras. 14 and 15.—Where a matter has been referred to arbitration *under an order of the Court*, the Court has power in the cases mentioned in para. 14 to remit the award to the reconsideration of the arbitrator. Thus if an award determines any matter not referred to arbitration, the Court may remit the award under para. 14; and if such matter can be separated without affecting the determination of the matters referred, the Court may amend the award by striking out that

(p) *Jagan Nath v. Mannu Lal* (1894) 16 All. 231 ;
Dhanjibhai v. Mathurbhai (1904) 23 Bom. 287.

(q) *Tejpur v. Mahomed* (1896) 20 Bom. 596.
 (r) *Amrit Ram v. Dasrat Ram* (1895) 17 All.

21; *Ganesh v. Kashi* (1906) 28 All. 621.

(s) *Mahomed v. Hakimian* (1898) 25 Cal. 757.

(t) *Chintunallayya v. Thadi Gangireddy* (1877) 20 Mad. 89.

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para. 21.

portion of the award which is in excess of the reference, and enforce the award as to the rest of it. But where a matter has been referred to arbitration *without the intervention of the Court*, the Court has no power to remit or to amend the award. The Court has under the present para. only two courses open to it, namely, to file the award or refuse to file the award. Hence if an award in a matter referred to arbitration *without the intervention of the Court* determines matters not referred to arbitration, the only course open to the Court under the present para. is to refuse to file the award, even where the portion of the award open to exception can be separated from the rest (u).

Award made after long delay.—Where the agreement to refer was made in 1905 and the award was not made until 1910 and the Court came to the conclusion that it would probably not have been made at all but for one of the parties having brought a criminal complaint against one of the arbitrators, the Court refused the application to file the award. The Court presumed from the circumstances of the case that the reference must have been abandoned (v).

Award made after revocation of submission.—An award made after the agreement to refer has been revoked by one of the parties thereto for good cause cannot be filed under this paragraph (w).

Appeal.—An appeal lies from an order under this paragraph filing or refusing to file an award: s. 104, sub-s. (1), cl. (f). But no appeal lies from the order passed on appeal (x); see s. 104 (z). But though an appeal lies from an order made under the paragraph, no appeal lies from a decree passed on an award except in so far as the decree is in excess of or not in accordance with the award (y) [see sub-para. (2)]. Suppose now that an order is made directing an award to be filed, and a decree is passed based on the award before an appeal is preferred from the order. Is the right to appeal from the order lost, because a decree is drawn up? It has been held that it is not, and it has been further held that if the Appellate Court sets aside the order, it is competent to it to declare that the decree based on the order is vacated (z). See notes to para. 15, "Award made beyond the period allowed by the Court," p. 978 above.

A applies to file an award under para. 20. B objects to the filing of the award on certain grounds. On the date fixed for the hearing of the objections B does not appear. Thereupon his objections are disallowed and an *ex parte* decree is passed against B in accordance with the award. B thereupon applies under O. 9, r. 13, to set aside the *ex parte* decree and to hear his objections to the award. The application is rejected. B then appeals from the order rejecting the application. Is the order appealable? Yes; it is appealable under O. 43, r. 1 (d), by which it is provided that an appeal lies from an order rejecting an application for an order to set aside an *ex parte* decree in a case open to appeal. The case is one open to appeal for the question between the parties was whether or not the award should be filed as a decree of the Court, and any order made upon it would be appealable under s. 104, sub-s. (1), cl. (f) (a).

- (u) *Allarakhia v. Jehangir* (1873) 10 Bom. H. C. 391; *Mustafa Khan v. Phulja Bibi* (1905) 27 All. 526; *Dandekar v. Dandekar* (1882) 6 Bom. 663; *Mana v. Mallichery* (1880) 3 Mad. 68; *Thiruvengada Thiengar v. Vaidinatha* (1906) 29 Mad. 303; *Dinabandhu v. Chintamani* (1914) 19 C. W. N. 476; *Kunj Lall v. Banwari Lall* (1918) 4 Pat. L. J. 394, 401-402; *Dhanpat Rai v. Kahan Devi* (1914) Punj. Rec. no. 30, p. 108.
(v) *Muhammad Ramzan Khan v. Sardar Begam* (1919) Punj. Rec. no. 71, p. 177.
(w) *Shoshomukhi v. Nobin Chunder* (1879) 4 C. L.

- R. 92.
(x) *Ahmad Din v. Atlas Trading Co.* (1915) P. R. no. 66, p. 287.
(y) *Bahadur Singh v. Negi Pura Singh* (1908) 30 All. 151; *Kulsum v. Ali Akbar* (1917) 39 All. 401, 411.
(z) *Khetra Nath v. Ushabala* (1913) 18 C. W. N. 881; *Soudamini v. Gopal* (1914) 19 C. W. N. 948; *Hari v. Lakshmi* (1916) 38 All. 380, 387; *Ram Dutt v. Amar Singh* (1912) Punj. Rec. no. 128, p. 420.
(a) *Nihal Singh v. Khushhal Singh* (1916) 38 All. 297.

Res judicata.—It has been held by the High Court of Allahabad that the refusal of a Court to file a private award on the ground of misconduct of the arbitrator does not operate as *res judicata* in respect of a suit subsequently brought to enforce the award, the reason given being that the doctrine of *res judicata* pre-supposes a former suit and a decree in that suit, and that the order of refusal is not a decree, but merely an order (b). This decision, it is submitted, is not correct. A proceeding under para. 20 is a "suit," [see para. 20 (2)], and the order refusing to file the award amounts to a decision which may operate as *res judicata* under s. 11. The words in s. 11 are "heard and finally decided": the expression "decree" does not occur in the section. Even if proceeding under para. 20 is not a "suit," it is a proceeding in a Court of Civil jurisdiction within the meaning of s. 141, and the provisions of s. 11 apply to it by virtue of s. 141. See preceding paragraph headed "Appeal."

Withdrawal of suit.—The fact that an application has been made under para. 20 does not preclude the applicant from withdrawing the application under O. 23, r. 1, at any time prior to the pronouncement of judgment and preparation of the decree. It is true that a suit alone can be withdrawn under O. 23, r. 1; but an application filed under para. 20 is numbered and registered as a suit (c).

22. [New. Cf. Arbitration Act 9 of 1899, s. 3.] The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this Schedule apply.

Exclusion of certain words in the Specific Relief Act, 1877.

Last thirty-seven words of sec. 21 of the Specific Relief Act.—The said words are—"but if any person who has made such a contract [that is, a contract to refer to arbitration] and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." These words have been omitted in view of the provisions of para. 18 above.

23. [New.] The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned.

Forms.

(b) *Kunj Lal v. Durga Prasad* (1910) 32 All. 484. (c) *Gauri Shanker v. Maida Koer* (1904) 31 Cal. 510

APPENDIX.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.

(Title of suit.)

1. This suit is instituted for (*state nature of claim*).
2. The matter in difference between the parties is (*state matter of difference*).
3. The applicants being all the parties interested have agreed that the matter in difference between them shall have referred to arbitration.
4. The applicants therefore apply for an order of reference.

A. B.
C. D.

Dated the day of 19 .

NOTE.—If the parties are agreed as to the arbitrators it should be so stated.

No. 2.

ORDER OF REFERENCE.

(Title of suit.)

Upon reading the application presented on the day of
19 , it is ordered that the following matter in difference arising in this suit, namely :—

be referred for determination to X and Y, or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire ; and such arbitrators are to make their award in writing on or before the day of
19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within
months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

Given under my hand and the seal of the Court, this day of
19 .

Judge.

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATION.

(Title of suit.)

Whereas by an order, dated the day of 19
[*state order of reference and death, refusal, etc., of arbitrator*], it is by consent ordered that Z be appointed in the place of X deceased (or as the case may be) to act as arbitrator

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with F, the surviving arbitrator, under the said order ; and it is ordered that the award **Sch. II**
of the said arbitrators be made on or before the _____ day of

19

Given under my hand and the seal of the Court, this _____ day of

19

Judge.

No. 4.

SPECIAL CASE.

(Title of suit.)

In the matter of an arbitration between A B of _____ and C D
of _____ the following special case is stated for the opinion of the
Court :—

[Here state the facts concisely in numbered paragraphs.]

The questions of law for the opinion of the Court are :—

First, whether _____

Secondly, whether _____

X.

Y.

Dated the _____ day of _____ 19 .

No. 5.

AWARD.

(Title of suit.)

In the matter of an arbitration between A B of _____ and
C D of _____ :—

WHEREAS in pursuance of an order of reference made by the Court of

and dated the _____ day of

19 _____ the following matter in difference between A B and C D, namely,

_____ has been referred to us for determination ;

Now we, having duly considered the matter referred to us, do hereby make our
award as follows :—

We award—

(1) that _____

(2) that _____

Dated the _____ day of _____ 19 .

X.

Y.

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS .. .. .	996—1004

1. [S. 321.] Where the execution of a decree has been transferred to the Collector under section 68, he may—
Powers of Collector.

- (a) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree ; or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium or by mortgaging, the whole or any part of the property ordered to be sold ; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary.

Clause (a).—See O. 21, r. 83.

Payment by instalments.—A Collector to whom a decree for sale of mortgaged property has been transferred for execution under s. 68 is limited to one of the three courses specified in this paragraph, and may not depart from them, much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments (d).

2. [S. 322.] Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

Procedure of Collector in special cases.

Execution by Collectors

- 3. [S. 322A.]** (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

Sch. III.

paras. 3, 4.

Notice to be given to decree-holders and to persons having claims on property.

- (a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;
- (b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the Court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit ; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

Power of Collector to hear objections to execution of decree transferred to him for execution.—Where a decree for money is transferred for execution to the Collector under s. 68, he is not authorized under this paragraph to hear any objection by the parties interested in the property advertised for sale to the sale of that property, nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached (e).

- 4. [S. 322B.]** (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem

Amount of decrees for payment of money to be ascertained, and immoveable property available for their satisfaction.

Execution by Collectors.

Sch. III. necessary for informing himself as to the nature and extent
paras. of such decrees and claims and of the judgment-debtor's im-
4-6. moveable property, and may, from time to time, adjourn such
 hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector who shall then draw up a statement as above provided in accordance with such decision.

5. [S. 322C.] The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court ; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

Where District Court may
issue notices and hold
inquiry.

6. [S. 322D.] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree.

Effect of decision of Court
as to dispute.

Execution by Collectors.

7. [S. 323.] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

Sch. III.
para. 7.

Scheme for liquidation
of decrees for payment of
money.

- (a) i it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property ; or,
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—
 - (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property ; or
 - (ii) by mortgaging the whole or any part of such property ; or
 - (iii) by selling part of such property ; or
 - (iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or
 - (v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the

Execution by Collectors.

Sch. III. purpose of providing funds to effect such discharge or compensation, may mortgage, let or sell any portion of the property **paras. 7-9.** which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.

The words "Local Government" have been substituted for the words "Chief Controlling Revenue Authority" which occurred in the corresponding s. 323, C. P. C., 1882.

8. [S. 324.] Where, on the expiration of the letting or mangement under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and if on the expiration of the said six weeks, the said balance is not so paid, the Collector shall such sell property or part accordingly.

Recovery of balance (if any) after letting or mangement.

9. [S. 324 A.] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

Collector to render accounts to Court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the

Execution by Collectors.

Property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him. **Sch. III. para. 9.**

(3) The balance shall be applied by the Court—

- (a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit ; and,
- (b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct ; or
- (c) where the Collector has proceeded under paragraph 2,—
 - (i) in keeping down the interest on incumbrances on the property ;
 - (ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit ; and
 - (iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

Accounts.—The Collector, though bound to render accounts under this paragraph, cannot be compelled to give up the account-books in Court ; nor does this paragraph require him to pay the balance into Court (f).

Execution by Collectors.

Sch. III.
paras.
10, 11.

Sales how to be conducted.

10. [S. 325.] Where the Collector sells any property under this Schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

- (a) fix a reasonable reserved price for each lot ;
- (b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property ;
- (c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

11. [S. 325 A.] (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

Restrictions as to alienation by judgment-debtor or his representative and prosecution of remedies by decree-holders.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

"Incompetent to mortgage."—A mortgage by a judgment-debtor of his property, while it is under the management of the Collector to whom decrees against the

Execution by Collectors.

judgment-debtor have been transferred for execution, is absolutely void, and not merely void as against the Collector and those claiming under him (g). Sch. III.
paras
11-13.

"Alienate."—The word alienate in this paragraph contemplates a transfer which is to take effect immediately and not after death. It does not therefore include a disposition of property by will (h).

Alienation subsequent to certification of adjustment.—An intimation by a decree-holder to the Collector to whom the decree is transferred for execution that his claim under the decree has been satisfied by the judgment-debtor, and the recording of such intimation by the Collector amounts to a due certifying of the adjustment of a decree within the meaning of O. 21, r. 2. After the adjustment has been so certified the prohibition against alienation imposed by this paragraph no longer subsists, and it is competent to the judgment-debtor to mortgage, sell or alienate his property (i).

12. [S. 325 B.] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

Provision where property is in several districts.

13. [S. 325 C.] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

Powers of Collector to compel attendance and production.

(g) *Gaurishankar v. Chinnumaya* (1918) 45 I. A. 219, 46 Cal. 183, dissenting from *Magniram v. Bakubai* (1912) 36 Bom. 510. The observations at the end of the judgment in *Ganga Prasad v. Ganga Baksh* (1907) 29

All. 415, can no longer be supported since the decision in *Gaurishankar's* case.

(h) *Muhammad Sayeed v. Muhammad Ismail* (1910) 33 All. 233.

(i) *Kushalchand v. Nandram* (1911) 35 Bom. 516.

THE FOURTH SCHEDULE.

(*See section 155.*)

ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment.
1870	VII	The Court-fees Act, 1870 . .	<p>In article I of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross objection" shall be inserted.</p> <p>From article 11 of Schedule II, the words "from an order rejecting a plaint or" shall be omitted.</p> <p>For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely :—</p> <p>"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."</p>

HIGH COURTS CHARTERS
AND
HIGH COURTS RULES.

APPENDIX I.

The High Courts Act or the Charter Act, 1861.

An Act for Establishing High Courts of Judicature in India (a).
(24 & 25 Vict., C. 104) ; [6th August 1861].

[Repealed and re-enacted with slight modifications by the
Government of India Act, 1913.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same as follows :—

1. It shall be lawful for Her Majesty, by Letters Patent under the great Seal of the United Kingdom, to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* Division of the Presidency of *Fort William* aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies, respectively. Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit, and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf.

2. The High Court of Judicature at *Fort William* in *Bengal*, and at the Presidencies of *Madras* and *Bombay*, respectively, shall consist of a Chief Justice and as many Judges, not exceeding fifteen as Her Majesty may, from time to time, think fit and appoint, who shall be selected from—

- 1st. Barristers of not less than five years' standing ; or
- 2nd. Members of the Covenanted Civil Service of not less than ten years' standing and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period ; or
- 3rd. Persons who have held Judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years ; or
- 4th. Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years, if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court.

Provided that not less than one-third of the Judges of such High Courts, respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service.

(a) By the terms of this Act the exercise of jurisdiction in any part of Her Majesty's Indian Territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council. An exercise of legislative authority by the Governor-General in Council, whereby any place or territory is removed from the jurisdiction of the High Courts is one expressly contemplated by this Statute, and by the Letters Patent issued under it. *Attorney-General v. Burah* (1879) 4 Cal. 172 ; L. R. 5 I. A. 178.

High Courts Act.

3. Provided always, that the persons who at the time of the establishment of such High Court in any of the said Presidencies, are Judges of Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, shall be and become Judges of such High Court without further appointment for that purpose; and the Chief Justice of such Supreme Court shall become the Chief Justice of such High Court.

4. All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure provided that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of India in Council or Governor in Council of the Presidency in which such High Court is established.

5. The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court, and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court, not transferred from the Supreme Court, and except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their Patents.

6. Any Chief Justice or Judge, transferred to any High Court from the Supreme Court, shall receive the like salary, and be entitled to the like retiring pension and advantage as he would have been entitled to for and in respect of service in the Supreme Court, if such Court had been continued, his service in the High Court being reckoned as service in the Supreme Court; and except as aforesaid it shall be lawful for the Secretary of State in Council of India to fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same. Provided always such alteration shall not affect the salary of any Judge appointed prior to the date thereof.

7. Upon the happening of a vacancy in the office of Chief Justice, and during any absence of a Chief Justice, the Governor-General in Council or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council or Governor in Council, as the case may be, to appoint a person, with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court, and the person so appointed shall be authorised to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council, or Governor in Council as aforesaid, shall see cause to cancel the appointment of such acting Judge.

High Courts Act.

"Upon the happening of a vacancy in the office of any other Judge of any such High Court."—These words refer to a Judge appointed to his office by *His Majesty* and not a person appointed under the section to act as a Judge (b).

Time for appointment of acting Judge.—There is no limit of time mentioned in this section within which the appointment of an acting Judge is to be made. Such an appointment, therefore, is not invalid because it was not made immediately upon, or within a reasonable time after, the occurrence of the vacancy which it supplied (c).

8. Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William in Bengal*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at *Calcutta*, in the same Presidency, shall be abolished :

Abolition of Supreme Courts and Sudder Courts.

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of the Sudder Adawlut and Foudjarry Adawlut in the same Presidency shall be abolished :

And upon the establishment of such High Court in the Presidency of *Bombay*, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Foudjarry Adawlut in the same Presidency shall be abolished :

And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency.

9. Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby ; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts.

Subject and without prejudice to legislative powers of the Governor-General in Council.—See notes to cl. 44 of the Letters Patent, *infra*.

10 *Until the Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras and Bombay, shall be exercised, by such High Courts respectively.*

(b) *Queen-Empress v. Ganga Ram* (1894) 16 All. 136, 152.

(c) *Balwant Singh v. Ram Kishori* (1897) 20 All. 267, 293.

High Courts Act.

Repealed by 28 Vict., c. 15, s. 2.

11. Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in *India* of Acts of Parliament or of any Orders of Her Majesty in Council, or Charters, or of any Acts of the Legislature of *India* which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at *Fort William* in *Bengal*, *Madras* and *Bombay*, respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council.

12. From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last-mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.

13. Subject to any laws or regulations which may be made by the Governor-General in Council, the High Courts established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

Original jurisdiction.—See notes to s. 115, "Appeal."

Rules.—An order made by a Judge in excess of the jurisdiction delegated to him by rules framed by the High Court under this section is a nullity (*d*).

14. The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Court

High Courts Act.

for which it shall think necessary that a form be provided, and also for keeping all books entries, and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts and from time to time to alter any such rule or form or table; and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Courts; provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of *Fort William* of the Governor-General in Council, and in *Madras* or *Bombay*, of the Governor in Council of the respective Presidencies.

High Court's power of superintendence: civil proceedings.—The High Courts have under this section not only administrative but judicial powers. In the exercise of its power of superintendence a High Court may direct a Subordinate Court to do its duty, and this power is not limited to cases in which the Subordinate Judge declines to hear or determine a suit or application within his jurisdiction. But a High Court is not competent, in the exercise of this power, to interfere with and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court has proceeded on an error of law or an error of fact (e). A High Court in the exercise of its superintending power will not ordinarily interfere except in cases of grave and otherwise irreparable injustice (f).

The power of revision conferred upon a High Court by s. 115 of the Civil Procedure Code is limited to cases in which no appeal lies to the High Court. There is no such limitation upon the power of superintendence conferred upon a High Court by the present section (g). All that is necessary is that the Court over which the power of superintendence is sought to be exercised should be subject to its appellate jurisdiction. If the subordinate Court is one from which an appeal lies to the High Court, though it be in certain specified cases only, then that Court is subject to the appellate jurisdiction of the High Court and that is sufficient to attract the power of superintendence conferred by this section and, that power may therefore be exercised over the subordinate Court even in cases where a direct appeal does not lie (h).

High Court's powers of superintendence: criminal proceedings.—In the exercise of its power of superintendence the High Court will interfere with an order under s. 145 of the Criminal Procedure Code, 1898, when the Magistrate has acted without jurisdiction, or has exceeded his jurisdiction, or where there has been a material irregularity in the proceedings which amounts to a refusal to exercise jurisdiction or to an usurpation of jurisdiction, or which has prejudiced a party to the proceedings (i).

High Court's power of superintendence: Defence of India Act.—The High Court has no jurisdiction to superintend the proceedings of commissioners appointed under the Defence of India Act, 1915 (j).

(e) *Tej Ram v. Hersukh* (1875) 1 All. 101; *Muhammad Suleman v. Fatima* (1886) 9 All. 104; *Abdullah v. Salaru* (1895) 18 All. 4; *Mudho Ram, In re* (1899) 21 All. 181; *Corporation of Calcutta v. Bhupati Roy* (1898) 26 Cal. 74, 76; *Sardhari v. Hukum Chand* (1914) 41 Cal. 876, 885.
(f) *Isma'ji v. Macleod* (1906) 31 Bom. 138; *Chandji Raj v. Kirpal Ray* (1909) 15 Cal. W. N. 682; *Amjad Ali v. Ali Hussain* (1909) 15 Cal. W. N. 353; *Braja Bhusan v. Sri*

Chandra (1919) 4 Pat. L. J. 20, 28.
(g) *Abdullah v. Salaru* (1895) 18 All. 4, 7.
(h) *Sheonandan v. King Emperor* (1918) 3 Pat. L. J. 581, 597; *Darbari v. Bhoji Roy* (1914) 41 Cal. 915; *Gopal Singh v. Court of Wards*, 7 W. R. 430.
(i) *Parmeshwar Singh v. Kailaspati* (1910) 1 Pat. L. J. 330.
(j) *Sheonandan v. King-Emperor* (1918) 3 Pat. L. J. 581.

High Courts Act.

When present section to be resorted to.—The special power of superintendence conferred by this section is not as a rule to be exercised in cases where there is an adequate remedy by other proceedings such as appeal or revision (l). That power is as a rule exercised in the following cases :—

- (1) where there is no remedy by revision or appeal (m) ;
- (2) where it is doubtful whether the High Court has the power to revise under s. 115 of the Code of Civil Procedure (n) ;
- (3) where the order passed is of an extraordinary character, and there has been a gross failure on the part of the Subordinate Court to do its duty (o).

Appeal.—No appeal lies under cl. 15 of the Letters Patent from an order made by a High Court in the exercise of the power of superintendence under s. 107 of the Government of India Act, 1915, which corresponds with the present section. See cl. 15 of the Letters Patent as amended in 1919.

16. It shall be lawful for Her Majesty, if at any time hereafter Her Majesty see fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time, may think fit and appoint; and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General or Governor of the Presidency in which such High Court is established, shall as far as circumstances may permit, be applicable to the High Court established, in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories.

17. It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit, of the Letters Patent by which such Court was established and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent, or, without any such revocation as aforesaid, by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.

(l) *Salig Ram v. Ramji Lal* (1906) 28 All. 554, 557;
Sheonandan v. King-Emperor (1918) 3 Pat.
 L. J. 581, 597-598.
 (m) See *Madho Ram, In re* (1899) 21 All. 181, 182 :

Sardhari v. Hukum Chand (1914) 41 Cal.
 876, 885 : (1918) 3 Pat. L. J. 581, 597, *supra*.
 (n) See *Siddeshwar, In re* (1899) 4 C. W. N. 36.
 (o) See *Abdullah v. Salaru* (1896) 18 All. 4, 9.

High Courts Act.

18. *It shall be lawful for Her Majesty from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet.*
- Territorial limits of jurisdiction of Court may be altered by order in Council.

Repealed by 28 Vict., c. 15, s. 2.

19. The word "Barrister" in this Act shall be deemed to include Barristers of *England or Ireland*, or Members of the Faculty of Advocates in *Scotland*; and the words "Governor-General and Governor" shall comprehend the officer administering the Government.
- Interpretation of terms.

GOVERNMENT OF INDIA ACT, 1915.

AN ACT TO CONSOLIDATE ENACTMENTS RELATING TO THE GOVERNMENT OF INDIA.

29th July 1915.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

* * * *

PART IX.

THE INDIAN HIGH COURTS.

Constitution.

101. [Ch. Act, ss. 2, 19.]—(1) The high courts referred to in this Act are the high courts of judicature for the time being established in British India by letters patent.

(2) Each high court shall consist of a chief justice and as many other judges as His Majesty may think fit to appoint : Provided as follows :—

(i) the Governor-General in Council may appoint persons to act as additional judges of any high court, for such period, not exceeding two years, as may be required ; and the judges so appointed shall, whilst so acting, have all the powers of a judge of the high court appointed by His Majesty under this Act ;

(ii) the maximum number of judges of a high court, including the chief justice and additional judges, shall be twenty.

(3) A judge of a high court must be—

(a) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing ; or

- (b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of a district judge ; or
- (c) a person having held judicial office, not inferior to that of a subordinate judge or a judge of a small cause court, for a period of not less than five years ; or
- (d) a person having been a pleader of a high court for a period of not less than ten years.

Ss.
102-104.

(4) Provided that not less than one-third of the judges of a high court, including the chief justice but excluding additional judges, must be such barristers or advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service.

(5) The high court for the North-Western Provinces may be styled the high court of judicature at Allahabad, and the high court at Fort William in Bengal is in this Act referred to as the high court at Calcutta.

102. [Ch. Act, s. 4.]—(1) Every judge of a high court shall hold his office during His Majesty's pleasure.

Tenure of office of judges
of high courts.

(2) Any such judge may resign his office, in the case of the high court at Calcutta to the Governor-General in Council, and in other cases to the local Government.

103. [Ch. Act, s. 5.]—(1) The chief justice of a high court shall have rank and precedence before the other judges of the same court.

Precedence of judges of
high courts.

(2) All the other judges of a high court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their patents.

104. [Ch. Act, s. 6.]—(1) The Secretary of State in Council may fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage of the chief justices and other judges of the several

Salaries, &c., of judges
of high courts.

Government of India Act.

S. 105. high courts, and may alter them, but any such alteration shall not affect the salary of any judges appointed before the date thereof.

(2) The remuneration fixed for a judge under this section shall commence on his taking upon himself the execution of his office, and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein.

(3) If a judge of a high court dies during his voyage to India, or within six months after his arrival there, for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, such a sum of money as will, with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary.

(4) If a judge of a high court dies while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office, the Secretary of State shall pay to his legal personal representatives, out of the revenues of India, over and above the sum due to him at the time of his death, a sum equal to six months' salary.

105. [Ch. Act, s. 7.]—(1) On the occurrence of a vacancy in the office of chief justice of a high court, and during any absence of such a chief justice, the Governor-General in Council in the case of the high court at Calcutta, and the local Government in other cases, shall appoint one of the other judges of the same high court to perform the duties of chief justice of the court, until some person has been appointed by His Majesty to the office of chief justice of the court, and has entered on the discharge of the duties of that office, or until the chief justice has returned from his absence, as the case requires.

(2) On the occurrence of a vacancy in the office of any other judge of a high court, and during any absence of any such judge, or on the appointment of any such judge to act as chief justice the Governor-General in Council in the case of

Government of India Act.

Ss.
106-107

the high court at Calcutta, and the local Government in other cases, may appoint a person, with such qualifications as are required in persons to be appointed to the high court, to act as a judge of the court; and the persons so appointed may sit and perform the duties of a judge of the court until some person has been appointed by His Majesty to the office of judge of the court and has entered on the discharge of the duties of the office or until the absent judge has returned from his absence or until the Governor-General in Council or the local Government, as the case may be, sees cause to cancel the appointment of the acting judge.

Jurisdiction.

106. [Ch. Act, s. 9.](1) The several high courts are courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdiction, powers and authority as are vested in those courts respectively at the commencement of this Act.

Jurisdiction of high courts.

(2) [21 Geo. 3, c. 70.]-The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

Sub-section (2).-This sub-section reproduces in effect the provisions of sec. 8 of the Statute 21 Geo. 3, c. 70, relating to the Supreme Court of Calcutta, cl. 23 of the Charter of the Supreme Court of Madras, 1800, and cl. 30 of the Charter of the Supreme Court of Bombay, 1823. There was no such provision in the High Courts' Act, 1861, nor in any of the High Courts' charters. See Despatch from Secretary of State, cl. 17, p. 1022 below.

107. [Ch. Act, s. 15.]-Each of the high courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

Powers of high court with respect to subordinate courts.

Government of India Act.

Ss.
108-109.

- (a) call for returns ;
- (b) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction ;
- (c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts ;
- (d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts ; and
- (e) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts ;

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any Act for the time being in force, and shall require the previous approval, in the case of the high court at Calcutta, of the Governor-General in Council, and in other cases of the local Government.

108. [Ch. Act, ss. 13, 14.]—(1) Each high court may by its own rules provide as it thinks fit for the exercise, by one or more judges, or by division courts constituted by two or more judges of the high court of the original and appellate jurisdiction vested in the court

Exercise of jurisdiction by single judges or division courts.

(2) The chief justice of each high court shall determine what judge in each case is to sit alone, and what judges of the court, whether with or without the chief justice, are to constitute the several division courts.

109. [28 & 29 Vict., c. 15, ss. 3, 4, 6.]—(1) The Governor-General in Council may, by order, transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, and authorise any High Court to exercise all or any portion of its jurisdiction in any part of British India not included within the limits for which the high court was established, and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty resident in any part of India outside British India.

Power of Governor-General in Council to alter local limits of jurisdiction of high courts.

Government of India Act.

(2) The Governor-General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section. **Ss. 110-111.**

(3) His Majesty may signify, through the Secretary of State in Council, his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor-General notifies that he has received intimation of the disallowance, but no act done by any high court before such notification shall be deemed invalid by reason only of such disallowance.

110. [13 Geo. III, c. 63, ss. 15, 17; 21 Geo. III, c. 70, s. 1; 37 Geo. III, c. 142, s. 11; 39 & 40 Geo. III, c. 79, s. 3; 4 Geo. IV, c. 41, s. 7.]—(1) The Governor-General, each Governor and each of the members of their respective executive councils shall not—

Exemption from jurisdiction of high court.

- (a) be subject to the original jurisdiction of any high court by reason of anything counselled, ordered or done by any of them in his public capacity only, nor
- (b) be liable to be arrested or imprisoned in any suit or proceeding in any high court acting in the exercise of its original jurisdiction; nor
- (c) be subject to the original criminal jurisdiction of any high court in respect of any offence not being treason or felony.

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the chief justices and other judges of the several high courts.

111. [21 Geo. III, c. 70, ss. 2, 3, 4.]—The order in writing of the Governor-General in Council for any act shall, in any proceeding, civil or criminal, in any high court acting in the exercise of its original jurisdiction,

Written order by governor-general: justification for act in any court in India.

be a full justification of the act, except so far as the order extends to any European British subject; but nothing in this section shall exempt the governor-general, or any member of his executive council, or any person acting under their

Government of India Act.

Ss. orders, from any proceedings in respect of any such act before
112-1114 any competent court in England.

Law to be administered.

112. [21 Geo. III, c. 70, s. 17; 37 Geo. III, c. 142, s. 13.]—The high courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.

Law to be administered in cases of inheritance and succession.

Additional High Courts.

113. His Majesty may, if he sees fit, by letters patent, establish a high court of judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another high court and confer on any high court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any high court existing at the commencement of this Act, and where a high court is so established in any area included within the limits of the local jurisdiction of another high court, His Majesty may, by letters patent, alter those limits, and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration.

Power to establish additional high courts.

Advocate-General.

114. [53 Geo. III, c. 155, s. 111; 21 & 22 Vjct., c. 106, s. 29.]—(1) His Majesty may, by warrant under His Royal Sign Manual, appoint an advocate-general for each of the presidencies of Bengal, Madras and Bombay.

Appointment and powers of advocate-general.

(2) The Advocate-General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England.

DESPATCH FROM SECRETARY OF STATE.

SIR CHARLES WOOD'S DESPATCH ACCOMPANYING FIRST
LETTERS PATENT OR CHARTER.

Judicial, No. 24.

INDIA OFFICE,
London, 14th May, 1862.

To

HIS EXCELLENCY THE RIGHT HONOURABLE
THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

MY LORD,

I HEREWITH transmit to you the Letters Patent or Charter (*p*), under the Royal Sign Manual, for the High Court of Judicature to be established in Bengal in accordance with the provisions of the Act 24 and 25, Victoria, Chapter 104, for establishing High Court of Judicature in India, and request that you will take immediate measure for instituting the Court, the first Judges of which, including those appointed under the 3rd section of the Act, are designated in the second clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court.

2. This Charter will accomplish the great object which has so long been contemplated, of substituting for the Supreme and Sudder Courts abolished by the Act one High Court of Judicature, possessing the combined powers and authorities of the abolished Courts, and exercising jurisdiction, both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court.

3. Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question.

4. It abolishes, in the first place (as soon as the Charter shall issue), the Supreme Court and the Court of Sudder Dewany Adawlut. It vests in the High Court (by the last provision of section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct. And (by the first part of the same section) it invests the High Court with such Civil, Criminal, Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, and all such powers and authority in relation to the administration of justice in the Presidency, as the same Charter may confer. With respect, therefore, to the fusion of the Supreme and Sudder Courts, it appears obvious that the Act itself speaks, and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous. It has been, consequently deemed unnecessary that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion as would have been the proper course if those powers and jurisdiction had been entirely new. Recourse has been had in some places in lieu of such explicit statement to reference to statutory provisions, and in others, to the Charter of the Supreme Court when the object of clearness appeared to require it. But wherever the Charter does not otherwise specify, the High Court will use the powers and administer the jurisprudence appertaining to those Courts respectively to whose authority it now succeeds.

(*p*) The Letters Patent dated the 14th May, 1862, forwarded with this despatch were afterwards revoked by further Letters Patent, dated 28th December, 1865, for which see *post*.

Despatch from Secretary of State.

5. But the Charter is intended positively to declare all such Civil, Criminal, and other jurisdictions above specified, as the Crown thinks proper by this Charter to confer on it supplementary or additional to its main purpose, namely, the fusion of the aforesaid Courts.

6. Moreover, the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may direct, appear very large and such as, in point of fact, invest the Crown with extensive legislative powers, so far as "the administration of justice," within the meaning of the sections, may require. It has been, however, thought best to use this power very sparingly and simply as ancillary to the real purpose of the Act, namely, the establishment of new Courts.

7. Another reason for the form which the present Letters Patent assume, is to be found in the provisions of section 17 of the Act of last Sessions. By that section power is given to the Crown to recall the Letters Patent establishing the Court, at any time within three years after its establishment, and to grant other Letters Patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of establishment of the Court, furnish me with any suggestions they make, or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad if, in proposing alterations, the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent.

8. I proceed to notice, in order, such of the provisions of the Charter as appear to me to call for special remark.

9. By clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries, subject, however, in both cases, to the approval and confirmation of the Governor-General in Council. This provision does not refer to the setting of tables of fees, where fees are allowed, which under section 15 of the Act, is required to be done by the Court.

10. The Supreme Court exercise an authority entirely independent of the Government in regard to its ministerial officers. The Government, however, has always considered itself at liberty to receive representations from any of the officers of the Sudder or Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities, and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases. It will be expedient for you to take the question into your consideration, and, after communication with the Court, to adopt some rule in regard to it, which, of course must be uniformly applicable to all the officers of the Court. Constituted as the High Court will be, it will merit all the confidence you can repose in it; but as a question of policy, the extension of the liberty of application to the Government to those who have not hitherto enjoyed it, appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it, as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive.

Despatch from Secretary of State.

11. In regard to the admission of Advocates, Vakeels, and Attorneys, the recommendations of the Law Commissioners have been followed.
Clauses 7-10.

Under the existing practice, the Advocate pleads, and the Attorney acts, for the suitors of the Supreme Court and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the Advocate and Attorney of the Supreme Court are *ex-officio* Vakeels. These terms are employed in the Charter simply to express the functions of these several classes of practitioners. The Advocate and Attorney will respectively plead and act in the High Court and the Vakeel will both plead and act in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or Vakeel, or Attorney under the rules which the Court is authorized by the Charter to make, and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12. The provisions in the Act, section 2, clause 4, which declares that Pleaders of the Sudder Court, "who shall have been admitted as Pleaders of the High Court," shall be eligible, under certain conditions, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleaders of the Sudder Court to the Bar of the High Court. This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless in any special cases, there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first Advocates, Vakeels, and Attorneys of the High Court.

13. With reference to the concluding sentence of clause 10, it is to be observed that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter, in the Insolvent Court, as newly regulated by clause 17. No such provision, however, is necessary, as the Insolvent Court is a separate tribunal not affected by the Act authorizing the Letters Patent and will continue a separate Court though, for the future, presided over by a Judge of the High Court. The Attorneys, therefore, will, as heretofore, practise in accordance with the rules of the Insolvent Court itself.
Clause 10.

14. By the important provisions contained in the clauses of the Charter, 11 to 38 inclusive, effect is given to the 9th section of the Act, respecting the jurisdictions and powers to be exercised by the High Court.

15. The original civil jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised under the Charter, by the High Court, including in that term (Clause 36 of the Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th section of the Act.
Civil Jurisdiction,
Clause 11.

16. As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency Town, but within the limits of the Presidency or Division subject to the authority of the High Court has not been vested in the High Court. The concluding

Despatch from Secretary of State.

provision of clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town, with power, however, to the Court, under clause 13, to call for and try any suit instituted in any Court subject to its superintendence, when, for reasons to be recorded, it shall think proper to do so.

17. The terms of clause 12, defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in section 5 of the Code of Civil Procedure (Act VIII of 1859), and are intended to include every description of case over which the Mofussil Courts have jurisdiction. By the 8th section of the 21st George III, C. 70, the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue. Further, a decision* of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court should administer a remedy in such cases on the Civil side. It is one object of the present Charter to do away with all such restrictions and limitations, as far as this can be done without trenching on the proper province of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter, and thus to place the Courts of first instance in the Presidency Towns and in the interior of the country in this respect, as nearly as may be, on the same footing.

18. I shall be glad to be furnished with your opinion, after consultation with the Judges of the Court, as to the concluding portion of clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt or damage or value of the property sued for does not exceed 100 Rupees. Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court; but should it appear that under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court, it may become a question for consideration whether the sum, excluding the jurisdiction of the High Court, might not be raised to, say, 300 or 500 Rupees.

19. It has been suggested that the Small Cause Court should be placed on the same footing as a Zillah Court in its subjection to the High Court as a Court of appeal and general superintendence. But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts. This subject, if desirable, is properly to be attained by legislation. Should you be of opinion that the Small Cause Court ought to be placed in the same relation to the High Court as any other Court subject to its appellate jurisdiction and general control, the measure can be carried into effect by an Act of the Governor-General in Council.

20. As already observed, the effect of clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the Civil jurisdiction exercised by the Supreme Court. By clause 13, however, the High Court is empowered

Clause 13.

*Reported in 6 Moo. I.A. 348.

Despatch from Secretary of State.

to call for and to try, as a Court of first instance, any suit which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

21. The introduction of the words "whether within or without the Bengal Division of the Presidency of Fort William" in this and in several other clauses, may appear to require explanation. The Court about to be established is called in section 2 of the Act, 24 and 25 Victoria, C. 104, a Court "for the Bengal Division of the Presidency of Fort William." That title is of course preserved in the Charter. By section 8, the Supreme and Sudder Courts are abolished and by section 9 all their jurisdiction, power, and authority, except when otherwise provided, are vested in the High Court. But the Supreme Court has various original jurisdictions, extending over the whole of the Presidency of Fort William, and also over some of the Non-Regulation Provinces under the Government of India, and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency, and also over the Province of Assam and others, which are not properly parts of the Presidency. The result is, that the High Court "for the Bengal Division," succeeding to the powers of both the Supreme and the Sudder Courts, has, in several respects, jurisdictions in territories not within the Bengal Division. As this is the result of the Act, it might not have been necessary to notice it in the Charter, But for the sake of clearness, and in order to show distinctly that the Charter is meant to apply to these extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal Division, it has been deemed advisable to introduce these words.

22. Clauses 14 and 15 give effect to the recommendation of the Law Commissioners, that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut, and a new appellate jurisdiction in civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the judges of the Court, the appeal shall lie to Her Majesty in Council.

23. It will appear, from a subsequent clause in the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India, of which Act XXIII of 1861 forms a part. By section 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however, may occur when two Judges, constituting a Division Court for the trial of cases in the exercise of original jurisdiction differ as to the judgment to be given. For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance presided over by single Judges only, contains no provision. To call in a third Judge, and to re-try the case, with a view to a judgment from which there may be an appeal to the High Court under clause 14 would be productive of unnecessary delay and expense to the parties; and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro forma*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose.

Despatch from Secretary of State.

24. The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts, respectively, will, until otherwise provided, continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect. And the clauses on which I am now commenting are probably superfluous. But they have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together, it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation, not only in the tribunals for administration of the law but of the law itself. I trust however, that measures may be taken ere long for effecting great improvements in this respect, by enacting for the British possessions in India a body of substantive law, by which all classes shall be governed, and all transactions shall be regulated, except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects.

25. Under clauses 21, 22, and 38, no change will be effected by the Charter in the administration of criminal justice in the Presidency Town, or in respect of persons subject to its criminal jurisdiction, residing in the interior of the country. It appears, however, to Her Majesty's Government that some modification of the existing practice, both at the capital and in the provinces, is necessary, and on these points, I shall address you in a separate despatch.

26. The Sudder Court exercises no original jurisdiction, but by clause 23, original criminal jurisdiction, throughout the territories subject to its authority, has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the Presidency Town, at which from their importance or for other specific cause, it may be expedient that a Judge or Judges of the High Court should preside.

27. The remaining clauses of the Letters Patent, on the subject of the criminal jurisdiction of the High Court, do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters patent that having been fully provided for by section 10 of the Act under the authority of which the High Court is established.

28. As in the case of the Small Cause Court, you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta.

29. Clause 30, respecting the exercise of the jurisdiction by the High Court elsewhere than at its ordinary place of sitting, is a very important provision and one which, I have no doubt, if judiciously carried into effect, will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the High Court. Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency. For such cases the clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court, who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties.

Despatch from Secretary of State.

30. With reference to this clause, it has been considered whether the precedence of section 14 of the Act of Parliament should not be followed and the authority to make the necessary arrangements for exercise of the Court's jurisdiction out of the usual place of sitting vested in the Chief Justice. On the whole, it was thought that acts partaking so much of an administrative character might be more perfectly performed by the Governor-General in Council. But it is scarcely for me to add that Her Majesty's Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter.

31. The Supreme Court exercise at present, Admiralty Jurisdiction under its Charter. The Chief Justice has Vice-Admiralty Jurisdiction under the commission of the 19th July, 1822, and all or any of the Judges of the Supreme Court may be appointed Commissioners, under the provisions of 39 and 40, George III, C. 79, section 25, for the trial and adjudication of prize causes and other maritime questions arising in India. By the present Charter, the whole of these jurisdictions and power will be vested in the High Court, and as in the Act above cited, the expression "other maritime questions" in general, mention is made of all the jurisdictions conferred as above-mentioned in the clauses of the Charter, providing both for the civil and criminal maritime jurisdiction of the High Court.

Clauses 33 and 34. 32. The clauses respecting testamentary and intestate jurisdiction do not call for any remark.

33. Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to "matters matrimonial" in general as they now are under the Supreme Court, and this they believe to be effected by clause 35 of the Charter. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of 20 and 21 Vic., C. 85, and in regard to which further provisions were made by 22 and 23 Vic., C. 61, and 23 and 24 Vic., C. 144. The Act of Parliament for establishing the High Court, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could not so import, such for instance as those which prescribe the period of re-marriage, or those which exempt from punishment clergymen refusing to re-marry adulterers. All these are, in truth, matters for Indian legislation, and I request that you will immediately take the subject into your consideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34. The object of the proviso at the end of clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within the divisions of the Presidency not established by Royal Charter, any jurisdiction which they might have in matters Matrimonial, as, for instance, in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere.

Despatch from Secretary of State.

35. Clause 36 refers to the powers of single Judges and Division Courts, appointed or constituted under the provisions of the 13th section of the Act. By section 14 of the Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, is placed in the hands of the Chief Justice. It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court, and it will be for the Chief Justice to consider whether, in cases exclusively between Natives, it will not be desirable to follow, as far as possible, the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Court of Judges trained in the country, whose knowledge of the Native language will obviate the expense and delay of translating the proceedings.

36. Clause 37 is a very important one, and there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Court, not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law, equity and admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment.

37. In regard to the rules respecting appeals to the Privy Council the object has been to avoid unnecessary innovation where so much of change, with its necessary inconvenience, is unavoidable. The existing rules which regulate these appeals are, therefore, left in force, with one or two additions only, which experience in the Court of the Judicial Committee has found advisable. For instance, clause 40 is introduced, as it had been commonly introduced, of late years in the appeal rules of other dependencies of Great Britain in order to remove all doubts as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38. It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion, and perhaps of uncertainty. They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several documents. You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament, will be of great advantage to the suitors and the public. I should wish, therefore, that one of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it, might be to prepare suggestions for such a Code of Rules, which might then be reduced into a complete shape by the authority of the Privy Council at Home.

39. In forwarding the Letters Patent to the Judges of the High Court, you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court, will be found to contain everything requisite for enabling the Court to proceed at once to the discharge of its important duties. It is possible that omissions may be discovered by the legal authorities in India, which may impede the proper action of the Court, and should the Judges represent to you that such is the case you will take immediate steps for supplying what is wanting by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration.

Despatch from Secretary of State.

40. I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure. The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the trained learning of the Judges selected from the Bar, and in the knowledge of the language, feelings, and habits of the Natives of that country possessed by the other members of the Court, combines the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertions and cordial co-operation of the Judges to place the administration of Justice in India, under the controlling authority of the Court in such a state of efficiency as will render it in every respect adequate to its ends, and satisfactory to the people and to the Government.

I have the honour to be,

My Lord.

Your Lordship's most obedient, humble Servant,

(Signed) C. WOOD.

APPENDIX II.

Letters Patent for the High Court of Calcutta.

(December 28, 1865.)

[N.B.—The Letters Patent for the High Courts of Madras and Bombay are *mutatis mutandis* in almost the same terms.]

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To, all to whom these presents shall come, greeting : Whereas by an Act of Parliament passed in the twenty-fourth and twenty-fifth years of Our reign, entitled “An Act for establishing High Courts of Judicature in India” it was, amongst other things, enacted that it shall be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, and that such High Court should consist of a Chief Justice and as many judges; not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who shall be selected from among persons qualified as in the said Act is declared : Provided always that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewany Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished.

And that the High Court of Judicature so to be established should have and exercise all such Civil, Criminal, Admiralty

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and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid, grant and direct subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Presidency Town as might be prescribed thereby: and save as by such Letters Patent might be otherwise directed subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts (a).

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third, dated the twenty-sixth March, one thousand seven hundred and seventy-four, establishing a Supreme Court of Judicature at Fort William in Bengal were revoked or determined thereby.

2. And We do by these presents grant, direct and ordain that notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid; and that the said Court shall be and continue a

(a) Certain paragraphs of the Preamble, which follow here have been omitted.

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Cls. 2-5. Court of record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court, immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority.

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of those Letters Patent, be the Chief Justice or Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges or acting Chief Justice or Judges, of the said High Court, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India.

Judges of the said High Court to be continued.

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two shall continue to hold and enjoy his office and employment with the salary thereunto annexed until he be removed from such office and employment ; and he shall be subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent.

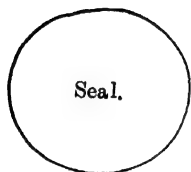
Clerks, &c., of the said High Court to be continued.

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it :—

Declaration to be made by Judges.

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"I, A. B., appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment." Cls. 5-8.



6. And We do hereby grant, ordain and appoint that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same with this inscription, "The Seal of the High Court at Fort William in Bengal."

And We do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of Chief Justice or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the recited Act ; and We do further grant, ordain, and appoint that whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

7. And We do hereby further grant, ordain, and appoint that all writs, summons precepts, rules, orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.

Writs, &c., to issue in name of the Crown and under the Seal.

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks

Appointment of Officers.

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Cls. 8-10. and other ministerial officers as shall be found necessary for the administration of Justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent (b). And it is Our further will and pleasure, and We do hereby for Us, Our heirs and successors, give, grant, direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall from time to time appoint for each office and place respectively, and as the Governor-General in Council shall approve of: Provided always and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules.

Admission of Advocates, Vakeels, and Attorneys.

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet; such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualifications and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be

Powers of High Court in admitting Advocates, Vakeels and Attorneys.

In making rules for the qualifications, &c., of Advocates, Vakeels and Attorneys.

(b) The words "And we do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council and shall be either confirmed or disallowed by the Governor-General in Council", which occurred in this clause, were omitted by the Amending Letters Patent dated 11th March 1919.

empowered to remove, or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-law; and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor. **Cls. 10, 11.**

Power to remove or suspend on reasonable cause.—The words “on reasonable cause” are not confined to purely professional misconduct, but embrace all causes which may afford reasonable ground for suspension or removal (c). As to what is reasonable cause, see the undermentioned cases (d)

An Attorney is an officer of the Court, and any person aggrieved by the misconduct of an Attorney has the right to invoke the disciplinary jurisdiction of the Court (e).

Professional etiquette affecting counsel.—It is unprofessional for counsel to cross-examine a witness as to facts about which he has no instructions but are within his personal knowledge.* When counsel during the hearing of a case calls for the production of a book, which is produced and handed to him by his opponent with certain pages marked as those only to which he may refer in respect of the subject-matter of his cross-examination, it is improper for counsel who calls for the book to inspect any of the other pages. There is nothing unprofessional in counsel giving evidence in a case in which he appears as counsel, though, as a general practice it is undesirable (f). Where counsel accepts a brief to appear at the trial of a case and is paid the consultation fee and the fee for attending the trial, he should return both the fees if after holding consultation he leaves for another place and is unable to attend the trial of the case; the consultation must be deemed to be held with a view to his attending the trial (g).

Appeal.—See notes to clause 39 below.

Civil jurisdiction of the High Court.

11. And We hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law made by competent legislative authority for India and until some local limits shall be so declared and prescribed within the limit declared and prescribed by the

(c) *Le Mesurier v. Wajid* (1902) 29 Cal. 890, 906.
(d) *Sarbadhicary, in re* (1906) 34 I. A. 41 [libel on Judges]; *An Advocate, in re* (1906) 4 Cal. L. J. 259 [accepting share of property sued for as a fee]; *Parbati, in re* (1895) 17 All. 498, 22 I. A. 193 [writing letters to Vakils practising in districts offering to share with them fees for work influenced by them]; *Rajendra Nath, in re* (1896) 22 All. 49 [conviction for fraudulently using as genuine a document known to be forged]; *Government Pleader v. Annaji* (1912) 37 Bom. 354 [a case under Bombay Regulation

II of 1827, s. 56]. See also *Romanjee Cowasjee, in re* (1906) 34 I. A. 55 [advising client to bribe a witness]; *In the matter of a Vakil of the High Court* (1916) 40 Mad. 60 [cheating the client].

(e) *An Attorney, in the matter of* (1913) 41 Cal. 113.

(f) *Weston v. Peary Mohan Dass* (1912) 40 Cal. 898.

(g) *An Advocate, in re* (1917) 44 Cal. 741 [practice for seniors to name their juniors and for juniors to name their seniors condemned].

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Cls. 11, 12. proclamation fixing the limits of Calcutta, issued by the Governor-General in Council, on the 10th day of September, in the year of Our Lord, one thousand seven hundred and ninety-four and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction (*h*).

Local limits.—Power is given by s 109 of the Government of India Act to the Governor General in Council to alter the local limits of the jurisdiction of High Courts.

Issue of warrant.—The High Court has no power in the exercise of its ordinary original civil jurisdiction to issue a warrant against the person of a judgment-debtor and appoint a special bailiff to execute it against the judgment-debtor *wherever he might be found in the Presidency* (*i*). Such an order, however, may be made for the arrest of a defendant who has been *guilty of a contempt of Court* (*j*), for an order for attachment for contempt is not an order made in exercise of the High Court's civil jurisdiction (*k*).

12. And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or, in all other cases, if cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees.

Scope of the clause.—Barring certain suits specified at the end of this clause, the High Courts of Calcutta, Madras and Bombay, are empowered to try the following suits in the exercise of their ordinary original civil jurisdiction, namely—

(*h*) In the Madras and Bombay Letters Patent the words are "by any law made by the Governor in Council." In the same Letters Patent, for the words "within the limits declared and proscribed," &c., are substituted "within the limits of the local jurisdiction of the said High Court of—
Bombay
Madras

at the date of the publication of these presents."

(*i*) *Rajah of Ramnad v. Seetharam* (1902) 26 Mad 120.

(*j*) *Harivallabhdas v. Utamchand* (1870) 7 Bom H. C. 172.

(*k*) *Narvahoo v. Narotamdas* (1882) 7 Bom. 5.

I. *Suits for land or other immoveable property.*—

CL. 12.

- (a) if the land or property is situated *wholly* within the local limits of the ordinary original civil jurisdiction of the said High Courts; or
- (b) where the land or property is situated in *part* only within the said limits, if the leave of the Court shall have been first obtained (1). See notes below, "Suit for land of which a part is within jurisdiction," p. 1038.

II. *Suits other than those for land*—

- (a) if the cause of action has arisen *wholly* within the said limits; or
- (b) where the cause of action has arisen in *part* only within the said limits, if the leave of the Court shall have been first obtained, or
- (c) if the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain within such limits.

"Suits for land or other immoveable property."—This expression has given rise to conflicting decisions. It has been held by the High Court of Calcutta, that a "suit for land" within the meaning of this clause is a suit *substantially* for land that is, for the purpose of acquiring title to or possession of land (a), or for declaring any interest in land (n). A agrees in Calcutta to sell to B land situated outside the original jurisdiction of the Calcutta High Court. If A fails to perform his contract and B sues A for *specific performance*, the suit is one for land, and it will not be entertained by the Court, the land being situated outside its jurisdiction. But if B fails to perform his contract, and A sues B for *specific performance*, the suit is not one for land, and hence the suit will lie in the Calcutta Court (o). Similarly, a suit by a mortgagee for *specific performance* of an agreement to execute a mortgage of land is a suit for land, and it will not be entertained by the Calcutta Court, if the land is situated beyond the original jurisdiction of the Court (p). And it has been laid down by the same Court that *suits for redemption or foreclosure or for sale of mortgaged property* are all suits for land, and they will not be entertained by that Court if the land is situated beyond its original jurisdiction (q). In a recent case the same Court held that a suit by a lessee for a declaration that the lease was a subsisting lease and for rents and profits is a suit for land, and it will not be entertained if the land is situated beyond its jurisdiction (r). In short, the Calcutta High Court would appear to hold that suits of the kind mentioned in cls. (a) to (c) of s. 16 of the Code are all suits for land (s). The same view has been taken by the Madras High Court (t). According to the latter Court, a suit in which a decree is asked for operating directly on the land is a suit for land. It has thus been held that a suit for maintenance in which the plaintiff prays that the amount may be charged on specific land is a suit for land, for if a charge is created by the decree, it can be enforced by a sale of the land (v). The High Court of Bombay has given a restricted meaning to the

(l) *Balaram v. Ramchandra* (1808) 22 Bom. 922, 925.

(m) *Delhi and London Bank v. Wordie* (1876) 1 Cal. 249, 263; *East Indian Railway Co. v. Bengal Coal Co.* (1876) 1 Cal. 95; *Hara Lal v. Nitambini* (1902) 29 Cal. 315.

(n) *Kanti Chander v. Kissori Mohun Roy* (1892) 19 Cal. 361, 365.

(o) *Land Mortgage Bank v. Sudurudeen* (1892) 19 Cal. 35.

(p) *Sreenath Roy v. Cally Doss* (1880) 5 Cal. 82.

(q) *Kanti Chunder v. Kissori Mohun Roy* (1892) 19 Cal. 361 at p. 365.

(r) *Ebrahim v. Provas Chunder* (1909) 36 Cal. 59.

(s) *Sudamdikh Coal Co. v. Empire Coal Co.* (1915) 42 Cal. 942, 951-952.

(t) *Nahum v. Krishnaswamy* (1904) 27 Mad. 157, 161.

(u) *Sundara Bai v. Tirumal* (1909) 33 Mad. 131

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Cl. 12. expression "suits for land." Thus it was held by that Court in *Holkar v. Dadabhai* (v) that it had jurisdiction under this clause to try a suit for *specific performance of an agreement to execute a mortgage* made in Bombay, though relating to land situate outside the original jurisdiction, and to order the mortgage-debt to be realised by *sale* of such land. Such a suit, according to the Bombay Court, is not a suit for land, though according to the Calcutta and Madras decisions it would be a suit for land. Similarly it has been held by the same High Court that a suit for *foreclosure* of a mortgage of land is not a suit for land, and that it could therefore be entertained though the land is situate outside the jurisdiction of the Court (w). According to the Calcutta and Madras decisions such a suit would be a suit for land. Similarly a suit by a purchaser for *specific performance of an agreement to sell land* situated outside the jurisdiction of the Court is not a suit for land according to the Bombay High Court (x). According to the Calcutta High Court, such a suit is a suit for land. In a recent case from Calcutta where the suit was one for sale on a mortgage and all the immoveable properties comprised in the mortgage were situated outside the local limits of the ordinary original jurisdiction of the Calcutta High Court, the Privy Council held that the suit was one for land within the meaning of cl. 12 and that the High Court therefore had no jurisdiction to entertain the suit (y).

Suits for *partition* of land and suits for a *declaration of title* to land, are suits for land not only according to the Calcutta (z) and Madras High Courts (a), but also according to the Bombay High Court (b); such suits will not be entertained by any of these Courts if the land is situated outside the jurisdiction of the Court. As regards suits for recovery of title-deeds of land, it has been held by the High Court of Calcutta, that such suits are *not* suits for land within the meaning of this clause, although the suit may involve question of title (c). On the other hand, it has been held by the High Court of Bombay that such a suit is a suit for land, if the substantial question to be decided is a question of title to the land (d). A suit for *damages for trespass* to land has been held by the High Court of Calcutta to be a suit for land (e). There seems to be no doubt that it would be treated as such by the High Courts of Bombay and Madras.

In *Holkar v. Dadabhai* (f), it was observed in effect by Sir Charles Sargent that the High Courts of India have all the powers of a Court of Equity in England for enforcing their decrees *in personam*; in other words, the High Courts in India can entertain all suits *in personam* which could be entertained by the Court of Equity in England. It is, however, a remarkable fact that the Courts of Equity in England do not entertain suits *in personam* unless the defendant resides or carries on business within the jurisdiction. In *Holkar v. Dadabhai*, the contract for mortgage was made in Bombay, but the defendant did not reside or carry on business in Bombay. The suit was one for specific performance and the Court held, applying the English law, that the suit was not one for land within the meaning of cl. 12, and that the suit being one other than a suit for land, the second part of cl. 12 applied, and that as leave to sue was obtained [part of the cause of action

(v) (1890) 14 Bom. 353.

(w) *Sorabji v. Rattonji* (1898) 22 Bom. 701.(x) *Hunseraj v. Runchordas* (1905) 7 Bom. L. R. 319.(y) *Harendra Lal v. Hari Das* (1914) 41 I.A. 110, 120, 41 Cal. 972, 988.(z) 1 Cal. 249 *supra*; 1 Cal. 95 *supra*; 29 Cal. 315, *supra*.(a) 27 Mad. 157, 161, *supra*.(b) *Jatram v. Atmaram* (1890) 4 Bom. 482;(c) *Vaghoji v. Camaji* (1905) 29 Bom. 249.(d) *Juggernath v. Brijnath* (1879) 4 Cal. 322.(e) *Zulekaba v. Ebrahim* (1912) 37 Bom. 494.(f) *Lodna Colliery Co. v. Bipin* (1912) 39 Cal. 739; *Sudamdikkh Coal Co. v. Empire Coal Co.* (1915) 42 Cal. 942; *British South Africa Co. v. Companhia de Mocambique* [1893] A. C. 602.

(g) (1890) 14 Bom. 353, 359.

having arisen in Bombay, namely, the making of the contract], it had jurisdiction to entertain the suit. With great respect, it is submitted, it is an entirely unwarranted extension of the doctrine "*Equity acts in personam*." See notes to s. 16 of the Code, under the heads "*Equity Acts in personam*," and "*Suits in personam*," p. 70 above.

We shall now turn to cases decided by the Calcutta High Court in which it was held that the suit was *not* one for land. From the point of view of the Calcutta High Court, to constitute a suit one for land, the suit must have been brought for the purpose of acquiring possession of, or of establishing a title to, or an interest in, the land which is the subject of dispute. But it does not necessarily follow that every suit which has any reference to land is therefore a suit for land (g). In the *Land Mortgage Bank v. Sudurudeen Ahmed, Trevelyan, J.* said: "I decline to hold that wherever land has anything to do with a suit it is therefore a suit for land" (h). Thus a suit by trustees against their co-trustees to enforce their right under a deed of trust to act jointly with the defendants as shebaita and managers of lands dedicated to an idol, in which neither the plaintiffs nor the defendants had any *beneficial interest*, is not a suit for land, and may be entertained by the High Court, though the lands may be situate beyond the local limits of its original jurisdiction (i). So a suit for an account and dissolution of partnership is not a suit for land, merely because one asset of the partnership happens to be a tea garden situate in the mufassal (j). And it has been held by the same Court that a suit for administration, and as incidental to that suit, for a declaration that certain leases granted by the executors of the estate cannot stand as against the plaintiff (the beneficiary), is not a suit for land (k). In a recent case where a suit was brought by three out of four executors against the fourth executor for his removal from the office of trustee and executor and for accounts of the assets of the deceased, and for administration of his estate, it was held by the Privy Council that the suit was not one for land, and that the High Court of Madras had jurisdiction to entertain the suit, though the property left by the deceased was outside its jurisdiction, as a part of the cause of action had arisen within the jurisdiction, and the defendant was dwelling in Madras at the time of the institution of the suit (l). In a recent Calcutta case, it was held that the High Court may entertain a suit by an executor for a declaration and injunction (though *not* for possession) in respect of the estate of the testator consisting of several immoveable properties, provided one at least of the properties is situated within its original jurisdiction, and leave of the Court is obtained. It is not necessary that the cause of action should arise within the local limits, or be specifically with reference to that property which is situated within those limits (m). The above cases would be decided the same way by the High Court of Bombay.

"All other cases"—suits for partition of moveable and immoveable property, the latter being situated wholly outside jurisdiction.—The words "all other cases" in this clause do not include cases of suits for immoveable *plus* moveable property. They refer to cases in which immoveable property is not involved. Hence if A sues B for partition of moveable and immoveable property, and the immoveable property is situated wholly outside the jurisdiction, the suit must be dismissed as to such property, even if the leave of the Court has been obtained. The reason is that the immoveable

(g) *Juggodumba v. Puddomoney* (1875) 15 B. L. R. 318, 329.

(h) (1892) 19 Cal. 358, 367.

(i) *Juggodumba v. Puddomoney* (1875) 15 B. L. R. 318.

(j) See *Kellie v. Fraser* (1877) 2 Cal. 445, 464.

(k) *Nistarini v. Nundo Lall* (1903) 30 Cal. 389, 383.

(l) *Srinivasa v. Venkata* (1906) 29 Mad. 239, affirmed in 34 Mad. 257, 38 I. A. 129.

(m) *Ganoda Sundary v. Nalini* (1909) 36 Cal. 28.

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property being situated *wholly* outside the jurisdiction, the Court has no power to grant leave to sue as regards such property (*n*). In such a case the plaint may be amended with the leave of the Court by omitting therefrom so much as relates to immoveable property, and the suit may be proceeded with so far as it relates to moveable property (*o*).

Suit for land of which a part is within jurisdiction.—Where there are several immoveable properties, then if even one of them is situated within the local limits of the ordinary original civil jurisdiction of a Chartered High Court, the Court can entertain a suit for a partition of all the properties including those situated without the said limits provided the leave of the Court has been first obtained. The reason is that though the suit is one for land, the Court may, by granting leave, entertain the suit, a *portion* of the land being within those limits (*oo*). If no such leave is obtained, the Court can proceed only with the suit so far as it relates to the immoveable properties situated within the said limits (*p*). For the same reason it has been held by the High Court of Calcutta that where some of the mortgaged properties included in the mortgage-deed are within, and some without, the local limits of the ordinary original jurisdiction of the Court, the Court has jurisdiction, on leave to sue being obtained, to entertain a suit on the mortgage in respect of all the properties including those situated beyond the said limits (*q*). See notes "Scope of the clause," p. 1034 above.

Leave of Court.—The leave under this clause is a condition precedent to jurisdiction, so that unless the condition is fulfilled by obtaining the necessary leave to sue, the Court will have no jurisdiction to entertain the suit (*r*). Such leave affords the very foundation of the jurisdiction: hence it must be obtained before the institution of the suit; it cannot be granted after the suit has been instituted. The leave granted is confined to the cause or causes of action set forth in the plaint at the time when the leave was granted: hence the plaint cannot be amended so as to alter the cause of action (*s*). But if the cause of action is not altered, there is no objection to an amendment (*t*). If a suit is brought in a Chartered High Court with leave of the Court, but there is nothing on the face of the plaint to show that any part of the cause of action arose within its jurisdiction, the plaintiff may be allowed to prove by evidence that part of the cause of action arose within the jurisdiction, and if it is necessary to amend the plaint by adding a statement that part of the cause of action arose within the jurisdiction, the amendment may be allowed, for such an amendment does not alter or add to the original cause of action (*u*). Where a defendant who does not reside within the jurisdiction and against whom the cause of action has arisen in part only within the jurisdiction, is added after the institution of the suit, leave under this clause must be obtained at the time of the application for adding him as a party, though leave was obtained when the suit was originally filed (*v*). The force of an order granting leave to institute a suit is exhausted when the suit is instituted in pursuance of the order. Hence if the suit is withdrawn with liberty to bring a fresh suit

(*n*) *Jairam v. Atmaram* (1880) 4 Bom. 482; *Hara Lal v. Nitambini* (1902) 29 Cal. 315; *Seshagiri v. Ram Rau* (1896) 19 Mad. 448.
 (*o*) *Abdul Karim v. Badrudeen* (1905) 28 Mad. 216.
 (*oo*) *Bachoo v. Nagindas* (1914) 18 Bom. L. R. 258, 269. See also *Ramaacharya v. Anantacharya* (1893) 18 Bom. 389 [a *mofussil* case, where a part of the property was situated at Gwalior outside British India: see s. 17 of the Code].
 (*p*) *Balaram v. Ramchandra* (1898) 22 Bom 922,

925; *Punchanun v. Shbb Chunder* (1887) 14 Cal. 835.
 (*q*) *Matigara Coal Co. v. Shragers, Ltd.* (1911) 38 Cal. 824; *Sarat Chandra v. Nahapiet* (1910) 37 Cal. 907, 911.
 (*r*) *De Souza v. Coles* (1867) 3 M. H. C. 384.
 (*s*) *Rampartab v. Premnath* (1891) 15 Bom. 98.
 (*t*) *Footibai v. Rampartab* (1893) 17 Bom. 466.
 (*u*) *Pink v. Buldeo Das* (1899) 26 Cal. 715.
 (*v*) *Ramkrata v. Footibai* (1896) 20 Bom. 767.

upon the same cause of action, and a fresh suit is brought, there is nothing to prevent the Court from granting fresh leave to institute the fresh suit (*w*). **Cl. 12.**

The leave under this section must be distinctly applied for and obtained; it cannot be implied from the fact that the plaintiff was granted leave to sue as a pauper (*x*).

Cause of action.—As to the definition of “cause of action,” see notes to s. 20 of the Code, “Cause of action,” p. 86 above.

Cause of action in suits on contract.—It is now settled that in the case of a suit on a contract, “the cause of action” within the meaning of the present clause, means the whole cause of action, and that it consists of the making of the contract and of its breach in the place where it ought to be performed. Thus to give jurisdiction to the High Court of Bombay, the plaintiff must show that the contract was made in Bombay, that Bombay was the place in which the contract was to be performed, and that the breach took place in Bombay. The making of the contract in Bombay constitutes part only of the cause of action. And so does the breach thereof occurring in Bombay. If part only of the cause of action arises in Bombay, the High Court has no jurisdiction to entertain a suit on a contract, unless the leave of the Court has been previously obtained (*y*). A suit on a promissory note which is neither made nor made payable in Bombay cannot be brought in the High Court of Bombay, though the note was passed for the balance of account in respect of transactions effected in Bombay (*z*). See also notes to s. 20 of the Code, “Cause of action in suits on contracts,” p. 86 above.

“If the cause of action shall have arisen in part.”—A in Bombay gave instructions to B, a commission agent carrying on business at Phulgaon, to enter into certain transactions on his behalf. Accounts were sent by B from Phulgaon to A in Bombay. B failed to pay the amount due to A at the foot of the account between him and A. Thereupon A sued B in the High Court of Bombay after obtaining leave under this clause on the ground that part of the cause of action had arisen in Bombay. On behalf of B it was contended that no part of the cause of action had arisen in Bombay, and that leave to sue ought not to have been granted at all. But this contention was overruled, and it was held that instructions having been sent to B from Bombay, and that accounts having been rendered to A at Bombay, and that the demand for payment having been made from Bombay, a material part of the cause of action had arisen in Bombay, and that the leave to sue had been rightly granted (*a*).

It has been held that the words “if the cause of action shall have arisen in part” refer to a material part of the cause of action (*b*). There is nothing, it is submitted, in the language of this clause to warrant such a construction, though the Court may, in the exercise of its discretion, refuse to grant leave to sue if a material part of the cause of action has not arisen within its jurisdiction. The reason is that in dealing with applications for leave to sue under this clause, the Court is not precluded from taking the question of convenience into consideration (*c*).

Part of the cause of action cannot be said to arise at a place where payment was not originally contracted for, merely because after performance of the contract and without any consideration a promise is made to pay at that place (*c*).

For other cases see notes to s. 20 above, “Cause of action in suits on contracts,” p. 86 above.

(*w*) *Sabhapathi v. Lakshmi* (1901) 24 Mad. 293.

(*z*) *Jayram v. Amaram* (1880) 4 Bom. 482.

(*y*) *Dhanjishaw v. Fforde* (1887) 11 Bom. 649, 652; *Mulchand v. Joharmal* (1875) 1 Bom. 23 [hundi]; *Daya v. Secretary of State* (1887) 14 Cal. 256; *Rampurtab v. Premsook* (1891) 15 Bom. 93 [hundi]; *Dobson v. Bengal Spg. and Wvg. Co.* (1897) 21 Bom. 126; *Sesha-*

giri v. Nawab Askar (1904) 27 Mad. 494.

(*z*) *Sewaram v. Bayrangdat* (1915) 40 Bom. 473.

(*a*) *Motilal v. Surajmal* (1906) 30 Bom. 167.

(*b*) *Kessowji v. Luchmidas* (1889) 13 Bom. 404;

Pragdas v. Dowlatram (1886) 11 Bom. 257, 267.

(*c*) *Seshagiri v. Askur Jung* (1907) 30 Mad. 438.

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Defendant.—The word “defendant” in this clause means all the defendants, where there are two or more defendants to a suit. It is not sufficient that one of the defendants dwells or carries on business within the jurisdiction (*d*).

Jurisdiction over non-resident foreigners.—If the cause of action has arisen within the jurisdiction of a Chartered High Court, the Court has jurisdiction over a foreigner defendant notwithstanding the fact that he did not dwell within the jurisdiction at the time of the institution of the suit (*e*). But the jurisdiction in such cases ought to be exercised with great caution (*f*).

It is doubtful, however, whether the mere fact of carrying on business through an agent within the local limits of the jurisdiction of a British Indian Court would give that Court jurisdiction over a non-resident foreigner (*g*).

Dwell—See notes to s. 16 of the Code, “Dwell within the meaning of clause 12 of the Charter,” on p. 80 above.

“Carries on business”—See notes to s. 16 of the Code, under the same head on p. 81 above.

“Personally works for gain.”—See notes to s. 16 of the Code, under the same head on p. 82 above.

Suits against companies.—See notes to s. 20, “Suits against corporations : Explanation II,” on p. 89 above.

“Ordinary jurisdiction.”—The “ordinary” jurisdiction of the High Court embraces all such as is exercised in the ordinary course of law, and without any special occasion or special order being necessary therefor (*h*).

Appeal.—The leave under this clause is granted on an ex parte application. If an order is made granting leave, the defendant may apply to have the order set aside, or he may wait until the hearing, or the legality of the order may be called in question as a separate issue for trial at the hearing of the suit (*i*). If the defendant does not wait until the hearing, and applies to have the order granting the leave set aside, and if the application is rejected, he may appeal from the order rejecting the application (*j*). Similarly if the plaintiff applies for leave, and leave is refused, the plaintiff may appeal from the order (*k*). The appeal would be one under cl. 15 of the Letters Patent.

The order granting or refusing leave by one Judge cannot be superseded by another Judge except on appeal from the order (*l*).

Waiver.—There are two classes of cases to be considered under this head, namely,—

- (1) where the plaintiff in his plaint alleges that portion of the cause of action arose outside the local limits of the ordinary original civil jurisdiction and fails to take leave of the Court and the case comes on for trial ;
- (2) where the plaintiff in his plaint alleges that the whole cause of action arose within the local limits of the ordinary original civil jurisdiction, but it turns out at the trial that portion of the cause of action arose within and portion outside the local limits of the ordinary original civil jurisdiction.

(d) *Hadjee Ismail v. Hadjee Mahomed* (1874) 13 B. L. R. 91.

(e) *Srinivasa v. Venkata* (1906) 29 Mad. 239, affd. in 34 Mad. 257, 38 I. A. 129.

(f) *Seshagiri v. Askur Jung* (1907) 30 Mad. 438.

(g) *Annamalai Chetty v. Murugasa Chetty* (1903) 28 Mad. 544, 30 F. A. 220.

(h) *Naveahoo v. Turner* (1891) 18 I. A. 156.

(i) *Kessowji v. Luckmidas* (1889) 13 Bom. 404 ;

Nagamoney v. Janakiram (1895) 18 Mad. 142.

(j) *Yaghaji v. Camaji* (1905) 29 Bom. 249 ; *Hadjee Ismail v. Hadjee Mahomed* (1874) 13 Beng. L. R. 91.

(k) *De Souza v. Coles* (1867) 3 M. H. C. 384 ; *Vithelipa v. Cundasawmy* (1875) 8 M. H. C. 21.

(l) *Vithelipa v. Cundasawmy* (1875) 8 M. H. C. 21.

In case (1), the defendant may by appearing and pleading waive the objection to the jurisdiction. Thus it was held by the High Court of Calcutta (m), following *Moore v. Gamgee* (n), in a case where the plaintiff alleged in his plaint that portion of the cause of action had arisen outside the local limits of the ordinary original civil jurisdiction but no leave was obtained by the plaintiff under clause 12, and the defendant without raising any objection to the jurisdiction filed his written statement and applied subsequently for a commission to examine witnesses, that the defendant had waived his objection to the jurisdiction. This decision proceeded on the ground that the absence of leave under this clause did not go to the root of the jurisdiction of the Court. This decision is hardly consistent with the observations of Sir Richard Couch in *Hadjee Ismail v. Hadjee Mahomed* (o), where the learned Judge said that an order under clause 12 was not a mere formal order or an order merely regulating the procedure in the suit, but one that has the effect of giving jurisdiction to the Court which it otherwise would not have, and the judgment of Telang, J., in *Rampurab v. Premsookh* (p), in which it was said that such leave affords the very foundation of the jurisdiction.

In case (2) where the plaintiff sets up a complete jurisdiction in the court to try the case and the defendant is called upon to plead to this, if it turns out that the Court had not complete jurisdiction, obviously the defendant cannot be held bound by the doctrine of estoppel on the ground that he waived the objection of want of jurisdiction (q).

S. 21 of the Code, which is a new section, is not one of the sections mentioned in s. 120. Does it therefore apply to Chartered High Courts? If it does, it follows that there can be a waiver of an objection as to the place of suing. But does not the word "revisional" in s. 21 show that the section was not intended to apply to Chartered High Courts, but to those Courts only to which ss. 16, 17 and 20 apply? See in this connection cl. 44 below.

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove and to try and determine, as Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice the reasons for so doing being recorded on the proceedings of the said High Court.

"When the High Court shall think proper to do so."—In a suit for immoveable property instituted in the Dinagepur Court, the defendant applied for its transfer to the Calcutta High Court under this clause, the grounds of the application being (1) that questions of difficulty arose in the suit; (2) that the defendant's witnesses lived in Calcutta, and that it would be impossible for her to go to Dinagepur and take her

(m) *King v. Secretary of State for India* (1908) 35 Cal. 394.
(n) (1890) 25 Q. B. D. 244. But see p. 247 of the Report.

(o) (1874) 13 Beng. L. R. 91.

(p) (1890) 15 Bom. 93.

(q) *Shama Kanta Chatterji & Co. v. Kusum* (1916) 44 Cal. 10.

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Cls. 13,14. witnesses there owing to the expenses ; (3) that the agreement upon which the suit was brought was executed in Calcutta ; and (4) that even the plaintiff resided and carried on business in Calcutta. It was held that the case was a proper one for transfer to the High Court (r).

" Subject to its superintendence."—Note that the words used in this clause are " subject to its superintendence," while those used in sec. 15 of the Charter Act [now s. 107 of the Government of India Act, 1915] are " subject to its appellate jurisdiction." The power of transfer contained in sec. 15 of the Charter Act has nothing to do with the power of removal conferred by the present clause, and the Letters Patent make superintendence, not appellate jurisdiction, the condition of the exercise of the power of removal conferred by this clause. It has accordingly been held that the Court of the Political Resident at Aden being a Court *subject to the superintendence* of the High Court of Bombay within the meaning of the present clause, the High Court of Bombay has power to remove a suit from that Court to itself for trial and determination, though the Aden Court is not subject to the *appellate* jurisdiction of the High Court (s).

Transfer of suit from Presidency Small Cause Court to High Court.

—The High Court has power to transfer to itself a suit from the Presidency Small Cause Court, and the order for such transfer can be made, if allowed by the rules of the High Court, by a single Judge of that Court (t).

Powers of High Court in dealing with suits transferred under this clause.—The powers of the High Court in dealing with suits transferred under this clause would seem to be confined to the powers which, but for the transfer, might have been exercised by the Court from which the suit is transferred (u). See cl. 20 below.

14. And We do further ordain that, where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

Joinder of several causes of action.

Joinder of causes of action.—Where a suit is founded upon two causes of action, one of which is alleged to have arisen *partly within* the jurisdiction of the Bombay High Court and the other *wholly outside* the jurisdiction, the High Court has power, after granting leave to sue in respect of the former cause of action under clause 12, to allow the plaintiff to join the latter in the same suit. There is nothing in the present clause to show that the power of the Court to make such an order under this clause is limited to cases where one of the causes of action has arisen *wholly within* the jurisdiction (v).

(r) *Harendra Lall v. Sarvamangala* (1896) 24 Cal. 183

(s) *Municipal Officer v. Ismail Hajeer* (1905) 30 Bom. 246 [P. C.] ; *Shehnardan v. King-Emperor* (1918) 3 Pat. L. J. 581, 608-607.

(t) *Mayanai v. Bombay Co.* (1905) 7 Bom. L. R. 143; *Pirbhai v. The Bombay Basoda and*

Central India Ry. Co. (1872) 8 Bom. H.C. 59.

(u) *Beant v. Narayaniah* (1914) 38 Mad. 807, 820, 41 I. A. 314, 322.

(v) *Dobson v. The Krishna Mills, Ltd.* (1910) 43 Bom. 564.

15. And We do further ordain that an appeal shall lie to **Cf. 15.**

Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction.

the said High Court of Judicature at Fort William in Bengal, from the judgment (*not being an order made in the execution of revisional jurisdiction and not being a sentence or order passed or made in the revision of the power of superintendence under the provisions of section one hundred and seven of the Government of India Act, 1915, or in the exercise of criminal jurisdiction*) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divided in opinion; and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided.

Alterations in this clause.—The words in italics have been substituted for the words “not being a sentence or order passed or made in any criminal trial” [Amended Letters Patent, 1919].

Whether this clause is controlled by s. 104 of the Code.—See notes to s. 104 of the Code, “Letters Patent appeal,” p. 264 above.

Meaning of “judgment” as used in this clause:—

1. *Calcutta High Court.*—Though there are many cases decided by the High Courts under this clause, there are only four or five in which an effort has been made to define the term “judgment” as used in this clause. The decision of the Calcutta High Court in the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Co. (w)*, stands at the head of them all. In that case Couch, C.J., said: “We think ‘judgment’ in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined.” “This definition is now of some antiquity, and is rapidly becoming, if it has not already become, almost classical” (x). The point actually decided in *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* was that no appeal lies under this clause from an order directing the issue of a mandamus to the Justices of the Peace for Calcutta to compel them to refer to arbitration a question of compensation. The above decision was followed by a decision of the same Court in *Haidjee Ismail*

(w) (1872) 8 Beng. L. R. 433, 17 W. R. 364.

(x) *Per Maclean, C.J., in Brij Coopers v. Ram-*

rick Dass (1901) 5 Cal. W. N. 781, 794.

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- CL. 15. *v. Hadjee Mahomed (y)*, where it was held that an appeal lies under this clause from an order refusing to set aside an order granting leave to sue to the plaintiff under cl. 12 of the Letters Patent. Referring to the said order, Couch, C.J., said: "It is not a mere formal order or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them, viz., the right to sue in a particular Court and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or, if they do not, to make them liable to have a decree passed against them in their absence." In a later case, Garth, C.J., said: "I think that the word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character which merely decides some isolated point, not affecting the merits or the result of the entire suit" (z).

The definition of "judgment" in the case of *Justices of the Peace for Calcutta (a)* was adopted by a majority of the same High Court in a later case where it was held that an appeal lies under this clause from an order made by a single Judge of that Court under O. 45, r. 15, refusing to transmit for execution an Order of His Majesty in Council (b). The decision was affirmed on appeal to the Privy Council (c). Referring to the judgment of the majority, their Lordships said: "These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under s. 610 now O. 45, r. 15] would or would not be a merely ministerial proceeding Mr. Justice Pontifex [whose order was appealed from] had in fact exercised a judicial discretion, and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kalisunderi for an execution in this suit. They held, therefore, that it was a judgment within the meaning of cl. 15." In a recent case, Sanderson, C.J., said that the definition of "judgment" given by Couch, C.J., had never been regarded as absolutely exhaustive, and that in every case where the Court was called upon to decide whether the decision under appeal was or was not a "judgment," regard must be had to the nature of the order (d).

2. *Bombay High Court*.—The definition of "judgment" as given in the two Calcutta cases cited above has been adopted by the High Court of Bombay. In *Miya Mahomed v. Zorabai (e)*, Scott, C.J., referring to the above Calcutta cases, said "For a considerable number of years in this Court those two decisions (f) have to my knowledge been regarded as the leading decisions to be followed on the question whether an order in any particular case is a 'judgment within the meaning of clause 15 of the Letters Patent.' The leading Bombay case is *Sonbai v. Ahmedbhai* decided in the year 1872 (g).

3. *Madras High Court*.—Turning now to the Madras decisions the earlier leading case on the subject was *De Souza v. Coles (h)* decided in the year 1868. The modern leading case is that of *Tuljaram v. Alagappa (i)* decided by a Full Bench of that Court in 1910. In the former case, Bittlestone, J., said: "The word 'judgment' cannot be limited to the final judgment in the suit, but must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suitor or

(y) (1874) 13 Bng. L. R. 91.

(z) *Abraham v. Fackhurunnissa* (1878) 4 Cal. 531.

(*) (1872) 8 Bng. L. R. 433.

(b) *Kally Soondry v. Hurrish Chunder* (1881)

6 Cal. 594.

(c) *Hurrish Chunder v. Kali Sunderi* (1882) 9

Cal. 482; 10 I. A. 4.

(d) *Budhu Lal v. Chathu* (1917) 44 Cal. 804, 811,

also p. 815 [per Mookerjee, J.]; *Ramendra*

Nath v. Brajendra Nath (1918) 45 Cal. 114.

128 [per Mookerjee, J.]. See also *Mathura v. Ewan* (1915) 43 Cal. 867, where the decisions are collected.

(e) (1900) 11 Bom. L. R. 241.

(f) 8 Bng. L. R. 438, and 13 Bng. L. R. 91,

supra.

(g) (1872) 9 Bom. L. R. 398, followed in *Narrandas*

Dhanji, in the matter of (1890) 14 Bom. 555.

(h) (1868) 3 Mad. L. R. 384.

(i) (1910) 35 Mad. L. R. 1.

applicant. When the language giving the appeal is so general in its terms as that contained in the 15th clause of the Charter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." This definition has now been rejected as too wide, and instead thereof, we have another definition of the term 'judgment' laid down in *Tuljaram's case*. In that case White, C.J., says as follows :—

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"The test seems to me to be not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding. I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent. I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained),—e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a 'judgment' within the meaning of the clause."

It will be seen that the above definition of 'judgment' is wider than that in *Justice of the Peace for Calcutta*, and narrower than the one in *De Souza v. Coles*. Referring to the former case, White, C.J., said that he was not prepared to say as was said in that case that 'judgment' within the meaning of this clause must be a decision which affects the merits by determining some right or liability. The learned Chief Justice added : "I think the decision may be a judgment for the purposes of the clause, though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding." Referring to the definition of 'judgment' in *De Souza v. Coles*, the learned Chief Justice said that it was too wide.

4. *Allahabad High Court*.—Clause 10 of the Letters Patent for the Allahabad High Court is in terms similar to cl. 15 of the Letters Patent for the other High Courts now under consideration. No serious attempt has been made by the Allahabad High Court to define the word "Judgment" in this clause, nor was it called upon to do so in view of the rulings of that Court that no order made under the Code from which an appeal was not allowed by s. 588 of the Code of 1882 [now s. 104] was appealable under the said clause (j). On the other hand, it was held by the other High Courts that such orders could be appealable under cl. 15 of the Letters Patent if they amounted to a "judgment," and hence it became necessary for those Courts to define the word "judgment" as used in cl. 15. It is conceived that the same necessity will soon be felt by the Allahabad Court, for the view taken by that Court is no longer tenable having regard to the change of law effected by s. 104 of the present Code [see notes to s. 104, "Letters Patent appeal," p. 264 above]. The only definition hitherto given by that Court of the word "judgment" is that it must be "such a judgment on the part of all the learned and honourable Judges who may constitute a Bench as disposes of the suit on the appeal before it" (k). An order granting probate has been held by that Court to be a "judgment" (l).

(j) *Banno Bibi v. Mehdī Husain* (1889) 11 All. 375; *Muhammad v. Ishak-ullah* (1892) 14 All. 226; *Mansab Ali v. Nihal Chand* (1893) 15 All. 359; *Bansidhar v. Gulab Kuar* (1894) 16 All. 443, 448.
(k) *Ghasi Ram v. Nuraj* (1875) 1 All. 31, 33.
(l) *Omrao Chand v. Bindradan* (1895) 17 All. 475.

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Orders merely regulating procedure in a suit.—All the High Courts are now agreed that no appeal lies under this clause from an order merely regulating procedure in a suit. It has thus been held that no appeal lies from an order directing a party to produce and give inspection of documents (*m*), or from an order directing the issue of a commission for the examination of witnesses (*n*), or from an order refusing to try certain issues as preliminary issues (*o*), or from an order refusing to frame an issue asked for by one of the parties (*p*). The decision in an earlier Madras case (*q*) that an appeal lies under this clause from an order fixing a distant date for the hearing of the suit has been disapproved in later decisions of the same Court (*r*): it is clear that such an order is one relating merely to the date of hearing. But an appeal lies from an order directing a plaintiff to give security for costs (*s*), as also from an order refusing a stay of execution (*t*).

Wrong exercise of discretion may be a ground of appeal.—The fact that the making of an order was a matter of discretion does not affect the appealability of the order, though it may be a good reason for refusing to set aside the order in appeal (*u*).

Orders in suits and appeals.—We have already noted in their proper place what orders made under the Code are appealable under this clause and what orders are not so appealable. The following is a list of such orders:—

- S. 115 [revision]—see notes, "Appeal," p. 292 above.
- O. 1, r. 3 [joinder of defendants]—See notes, "Appeal," p. 344 above.
- O. 9, r. 9 [restoring of suit]—See notes, "Appeal," p. 454 above.
- O. 11, r. 18 [inspection]—see notes, "Appeal," p. 482 above.
- O. 14, 3 [issues]—see notes, "Appeal," p. 499 above.
- O. 21, r. 58 [claims to property under attachment]—see notes, "Appeal," p. 610 above.
- O. 25, r. 1 [security for costs of suit]—see notes, "Appeal," p. 695 above.
- O. 26, r. 4 [evidence on commission]—see notes, "Appeal," p. 699 above.
- O. 37, r. 3 [leave to defend in a summary suit]—see notes, "Appeal," p. 787 above.
- O. 39, r. 1 [injunction]—see notes "Power of chartered High Courts to restrain a party from proceeding with a suit pending in another Court," p. 797 above.
- O. 41, r. 5 [stay of execution pending appeal]—see notes, "Appeal," p. 823 above.
- O. 41, r. 10 [striking out appeal for failure to deposit security for costs]—see notes, "Appeal from order dismissing petition praying security for costs to be received," p. 827 above.
- O. 41, r. 23 [remand]—see notes, "Letters Patent appeal," p. 840 above.
- O. 41, r. 25 [order directing trial of issue]—see notes, "Appeal," p. 842 above.

(*m*) *Sonbat v. Ahmedbhai* (1872) 9 Bom. H. C. 398; *Ahmed v. Ayesha Bai* (1909) 11 Bom. L. R. 248.

(*n*) *Miya Mahomed v. Zorabat* (1909) 11 Bom. L. R. 241.

(*o*) *Jehangir v. The Secretary of State* (1901) 11 Bom. L. R. 245, f. n.

(*p*) *Tuljaram v. Alagappa* (1910) 35 Mad. 1; *Ebrahim v. Ebrahim* (1878) 4 Cal. 531.

(*q*) *R. v. R.* (1891) 14 Mad. 88.

(*r*) *Tuljaram v. Alagappa* (1910) 35 Mad. 1, 16-17.
(*s*) *Seshagiri v. Nawab Askar* (1903) 28 Mad. 502;
Soonabai v. Tribhovandas (1908) 32 Bom. 802.

(*t*) *Brj Coomaras v. Ramrick Dass* (1900) 5 C. W. N. 781; *Tuljaram v. Alagappa* (1910) 35 Mad. 1, 8, 19-20.

(*u*) *Tuljaram v. Alagappa* (1910) 35 Mad. 1, 8-9, 17-18.

- O. 44, r. 1 [leave to appeal *in forma pauperis*—see notes “Appeal,” p. 856 above. **Cl. 15.**
 O. 45, r. 3 [leave to appeal to Privy Council]—see notes, “Appeal,” p. 858 above.
 O. 45, r. 7 [security for costs of appeal to Privy Council]—see notes, “Appeal,” p. 861 above.
 O. 45, r. 13 [stay of execution pending appeal to Privy Council]—see notes, “Appeal,” p. 864 above.
 O. 45, r. 15 [execution of order of Privy Council]—see notes, “Letters Patent appeal,” p. 867 above.
 O. 47, r. 7 [review]—see notes, “Appeal,” p. 879 above.

Orders in proceedings other than suits and appeals.—A “judgment” within the meaning of this clause need not be an adjudication in a *suit or appeal* as technically understood. An adjudication which terminates what may be called an original petition like an application for the custody of a minor may be a “judgment” so as to be appealable under this clause. The following is a list of such adjudications:—

1. *Habeas corpus*.—An appeal lies under this clause from an order deciding the claim of relatives to the custody of a minor on a writ of *habeas corpus* (v).
2. *Leave to sue*.—An appeal lies from an order refusing to set aside an order granting leave to sue under cl. 12 of the Letters Patent, and also from an order refusing to grant leave to sue. See notes to cl. 12, “Appeal,” p. 1040 above.
3. *Administrator-General's Act*, 3 of 1913.—An appeal lies from an order allowing to the Administrator-General commission at a certain rate (w).
4. *Probate and Administration Act*, 1881.—An appeal lies from an order purporting to be made under s. 90 of the Probate and Administration Act at the instance of a beneficiary in a case in which there is no restriction imposed by the will on the power of the executor to sell immoveable property forming part of the estate of the deceased. Such an order is really one without jurisdiction (x).
5. *Limitation Act*, s. 5.—No appeal lies from an order refusing to enlarge the time for preferring an appeal (y).
6. *Mandamus*.—It has been held by the High Court of Calcutta in the leading case of *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* (z), that no appeal lies from an order which directs a mandamus to issue to a public body to compel them to refer a question of compensation to arbitration, the reason given being that such an order does not determine any question whatever between the parties, but only initiates proceedings by which the liability of the public body to make compensation is to be ascertained and determined. This decision has been dissented from by White, C.J., in the recent Madras case of *Tuljaram v. Alagappa* (a).
7. *Contempt*.—An appeal lies from an order of committal for contempt (b), as well as from an order refusing an application to commit for contempt of Court (c).

(v) *Narrondas Dhanji, in the matter of* (1890) 14 Bom. 555.

(w) *Somasundaram v. Administrator-General* (1876) 1 Mad. 148.

(x) *Indra Chandra Singh, in the goods of* (1896) 23 Cal. 580.

(y) *Gobinda Lal v. Shiba Das* (1906) 13 Cal. 1323.
 (z) (1872) 8 Beng. L. R. 433.

(a) (1910) 35 Mad. 1, 9.

(b) *Navvahoo v. Nardam Das* (1883) 7 Bom. 5.

(c) *Mohendras Lall v. Anundo Coomar* (1897) 25 Cal. 236.

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8. *Vice-Admiralty jurisdiction*.—An appeal lies from the decision of a single Judge of a Chartered High Court exercising Admiralty or Vice-Admiralty jurisdiction (d).
9. *Arbitration Act 9 of 1899*.—An appeal lies under this clause from an order refusing to set aside an award made and filed under the Arbitration Act (e).
10. *Land Acquisition Act 1 of 1894*.—See notes below, "Land acquisition appeal."

Preliminary and interlocutory judgments.—An order refusing leave to sue under cl. 12 of the Charter is an instance of a *preliminary* judgment within the meaning of this clause (f). An order directing a plaintiff to give security for the costs of a suit, and an order refusing a stay of execution are instances of *interlocutory* judgments. See notes above "Orders merely regulating procedure in a suit," p. 1046.

Orders made in the exercise of revisional jurisdiction.—The words "not being an order made in the exercise of revisional jurisdiction" were added into this clause by the Amended Letters Patent of 11th March 1919. The addition of these words makes it clear that no appeal lies under this clause from orders made in the exercise of revisional jurisdiction. See notes to s. 115, "Appeal," p. 292 above.

Orders made in the exercise of the power of superintendence.—The words "not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section one hundred and seven of the Government of India Act, 1915," were added into this clause by the Amended Letters Patent of 11th March 1919. The addition of these words makes it clear that no appeal lies under this clause from orders made in the exercise of the power of superintendence under s. 107 of the Government of India Act, 1915.

New points.—It has been held by the High Courts of Allahabad (g) and Patna (h) that in appeals under the corresponding clauses of the Letters Patent for those Courts an appellant is not entitled to be heard on points which have not been raised before the Judge from whose judgment he is appealing. But the appeal given to the Full Court under those clauses is not confined to the points on which the Judges of the Division Court differ (i).

Land acquisition appeal.—The decision of the High Court in a land acquisition appeal is not a "judgment" within the meaning of this clause so as to enable a party to file a further appeal to the High Court under this clause (j). See notes to cl. 39 below under the head, "The decision must amount to a judgment, decree, or order."

Sentence or order in the exercise of criminal jurisdiction.—See the undermentioned cases (k).

Review.—It is competent to the High Court to review judgments in appeals preferred under cl. 15 above (l).

(d) *Champion, in the matter of the ship* (1889) 17 Cal. 66.

(e) *Campbell & Co. v. Jeshraj* (1917) 45 Cal. 502.

(f) See notes to cl. 12 "Appeal," p. 1040 above.

(g) *Brij Bhukhan v. Durga Datt* (1898) 20 All. 258.

(h) *Debi Chokran v. Sheikh Medhi* (1916) 1 Pat. 485, 490.

(i) *Ram Dial v. Ram Das* (1876) 1 All. 181.

(j) *Mynatikraman v. Collector of the Nilgiris* (1918) 41 Mad. 943.

(k) *Dasikachari, re* (1915) 39 Mad. 539; *Kuppu-*

swami Aiyar, re (1915) 39 Mad. 561; *Appadu*

v. Appadu (1915) 39 Mad. 472.

(l) *Venkata Subbarayudu v. Sri Rajah Krishna*

(1915) 40 Mad. 651.

16. And We do further ordain that the said High Court **Cls. 16-18.**

Appeal from Courts in the Province.

of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force.

17. And We do further ordain that the said High

Jurisdiction as to infants and lunatics.

Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, within the Bengal Division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta.

“Within the Bengal Division of the Presidency of Fort William.”—See the argument of counsel in *Besant v. Narayaniah (m)*.

Jurisdiction of Supreme Courts as to infants and lunatics.—See cl. 25 of the Charter of the Calcutta Supreme Court, cl. 32 of the Charter of the Madras Supreme Court, and cl. 42 of the Charter of the Bombay Supreme Court.

18. And We do further ordain that the Court for relief

Provision with respect to the insolvent Court.

of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction, and otherwise, as are constituted by the laws relating to insolvent debtors in India.

Laws relating to insolvent debtors in India.—The law relating to insolvent debtors in the presidency towns is now contained in the Presidency Towns Insolvency Act 3 of 1919. Note that cl. 12 does not control the provisions of this clause so as to limit the insolvency jurisdiction of the Court (n).

(m) 41 I. A. 314, 38 Mad. 807.

(n) *Abdul Khader v. The Official Assignee of*

Madras (1916) 40 Mad. 810. See s. 7 of Presidency Towns Insolvency Act 3 of 1907.

Let. Pat. [Cal., Bom., and Mad.]

Cls. 19-21. *Law to be administered by the High Court of Judicature at Fort William in Bengal.*

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case, if these Letters Patent had not issued.

By the High Court in the exercise of ordinary original civil jurisdiction.

Law or equity to be applied to each case.—See the undermentioned case (o). See also Pollock and Mulla's Indian Contract Act, 4th ed., pp. 2-5. The present clause is to be read with cl. 44 below.

Law or equity administered by the Supreme Courts.—See cls. 13, 17 and 18 of the Charter of the Supreme Court of Calcutta, cls. 21, 22 and 31 of the Charter of the Supreme Court of Madras, and cls. 28, 29 and 41 of the Charter of the Supreme Court of Bombay.

Quare whether the English law should be applied in cases arising within the original jurisdiction of the High Courts though contrary to the rule of justice, equity and good conscience (p).

20. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its extraordinary original civil jurisdiction such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

In the exercise of extraordinary original civil jurisdiction.

"The law which would have been applied by any local Court."—See notes to cl. 13 above, "Powers of High Courts in dealing with suits transferred under this clause," p. 1042 above.

21. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal to each case coming before it in the exercise

By High Court in the exercise of appellate jurisdiction.

(o) *Madhub Chunder v. Rajboomar Doss* (1874) 14 Beng. L. R. 76, at p. 83.

(p) *Gurusami v. Chinnia* (1882) 5 Mad. 37; *Mool Chand v. Alwar Chetty* (1915) 39 Mad. 548 550, 552-553.

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of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case. Cls. 21-24.

Criminal Jurisdiction.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary, original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction; and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of these Presents (q).

23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

24. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate or other officer specially empowered by the Government in that behalf.

(q) And also in respect of all such persons beyond such limits, or over whom the said Madras High Court of Judicature at Bombay

shall have criminal jurisdiction at the time of publication of these presents.—*Madras and Bombay Letters Patent.*

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Cls. 25-27.

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original Criminal Jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

No appeal from High Court exercising original jurisdiction.
Court may reserve points of law.

26.* And We do further ordain that on such point or points of law being so reserved as afore-said, or on its being certified by the said Advocate-General, that in his judgment there is an error in the decision of a point or points of law, decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Courts shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

High Court to review on certificate of the Advocate-General.

Review on certificate of Advocate-General.—See the undermentioned case (r).

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

Appeals from Criminal Courts in the Provinces.

Subject to its superintendence.—Note that the words used in s. 15 of the Charter Act [now s. 107 of the Government of India Act, 1915] are "subject to its appellate jurisdiction," while those in the present section are "subject to its superintendence" (s). Compare cl. 13 above.

(r) *Emperor v. Fateh Chand* (1916) 44 Cal. 477.
(s) *Sheonandan v. King-Emperor* (1918) 4 Pat. |

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28. And We do further ordain that the said High Court Clk. 28-31

Hearing of referred cases
and revision of criminal trials.

of Judicature at Fort William in Bengal, shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officer now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision, by the said High Court.

29. And We do further ordain that the said High Court

High Court may direct the
transfer of a case from one
Court to another.

shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it; though such belongs, in ordinary course, to the jurisdiction of some other Officer or Court.

30. And We do further ordain that all persons brought

Offenders to be punished
under Indian Penal Code.

for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference or revision charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.

31. And We do further ordain that whenever it shall appear to the Governor-General in Council

Judges may be authorized to
sit in any place or by way of
circuit or special commission.

convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act vested in the said High Court of Judicature

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Cls. 31,32. at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

• *Admiralty and Vice-Admiralty Jurisdiction.*

32. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India. as may now be exercised by the said High Court.

Admiralty jurisdiction of Supreme Courts.—See cl. 26 of the Charter of the Calcutta Supreme Court, cl. 41 of the Charter of the Madras Supreme Court, and cl. 53 of the Charter of the Bombay Supreme Court

Necessaries supplied to a ship.—It was settled to be the law in England that prior to the passing of 3 and 4 Vict., c. 65 the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship, though perhaps it occasionally purported to exercise the jurisdiction where not prohibited (*t*). The same view has obtained in India (*u*); but there is a difference of opinion as to whether the extended powers under 3 and 4 Vict., c. 65 and 24 Vict., c. 10, became vested in the Indian High Court by virtue of the several Letters Patent (*v*). Assuming that the High Court in its Admiralty jurisdiction had no jurisdiction over claims for maritime necessaries under any previous enactment, such jurisdiction would now rest on the Colonial Courts of Admiralty Act, 1890, which vests in it the power described in sec. 5 of the Admiralty Act, 1861 [24 Vict., c. 10]. The effect of the two Acts is to invest the Indian High Court with jurisdiction over claims for necessaries supplied to a ship elsewhere than in the port to which the ship Court belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the suit the owner is domiciled in British India or Burma (*w*).

(*t*) *The Two Ellens* (1872) 4 P. C. 116; *The Henrich Bjorn* (1886) 11 A. C. 270.

(*u*) *Murray v. Langford* (1842) 1 Fulton 95, 97, 131; *The Asia* (1868) 5 Bom. H. C. O. C. 64.

(*v*) *The Portugal* (187) 6 Beng. L. R. 3302; *The*

Asia (1868) 5 Bom. H. C. O. C. 64; *Bardot v. The Augusta* (1873) 10 Bom. H. C. 110.

(*w*) *Madras Steam Navigation Co. v. Shalimar Works* (1914) 42 Cal. 85 [suit for damages for wrongful seizure.]

Let. Pat. [Cal., Bom., and Mad.]

33. And We do further ordain that the said High Court **Cl. 33-35.**

Criminal

of Judicature at Fort William in Bengal, shall have and exercise criminal jurisdiction, as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize.

Testamentary and Intestate Jurisdiction.

34. And We do further ordain that the said High Court

Testamentary and intestate jurisdiction.

of Judicature at Fort William in Bengal, shall have the like power and authority as that which may now be lawfully exercised by the said High Courts, except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons, dying intestate, whether within or without the said Bengal Division (x), subject to the order of the Governor-General in Council, as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Ecclesiastical Jurisdiction of Supreme Courts.—See cl. 22 of the Charter of the Supreme Court of Calcutta, cl. 37 of the Charter of the Supreme Court of Madras, and cl. 47 of the Charter of the Supreme Court of Bombay.

35. And We do further ordain that the said High Court

Matrimonial jurisdiction.

of Judicature at Fort William in Bengal, shall have jurisdiction, within the Bengal Division of the Presidency of Fort William, in matters matrimonial between Our subjects,

(x) " And we do further ordain that the said High Court of Judicature at ^{Bombay} ~~Madras~~ shall have the like power and authority as that which may be now lawfully exercised by the said High Court in relation to the granting of probates of last wills and testaments, and

letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate whether ^{Bombay} ~~Madras~~ within or without the Presidency of ^{Madras} ~~Madras~~ —Madras and Bombay Letters Patent.

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Cs. 35, 36. professing the Christian religion: Provided always that nothing therein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof.

"Our subjects professing the Christian religion."—The High Court has no jurisdiction under this clause to grant a decree for restitution unless both parties are Christians. It has therefore no jurisdiction under this clause to grant such a decree when the petitioner is a Christian, but the respondent is a Parai. Nor is any such jurisdiction conferred upon it in suits for *restitution of conjugal rights* by the Indian Divorce Act, 1869 (y). See Indian Divorce Act, s. 4.

Respondent not within the Presidency.—The High Court has no jurisdiction to grant a decree for restitution against a respondent who was absent from the Presidency at the time the suit was instituted and remains absent. But residence at date of suit of both spouses, *whatever the domicile*, is sufficient to give jurisdiction in suits of this nature (z).

Powers of single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915 (a); and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any points, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.

Where the Judges are equally divided.—Where an application is made to the High Court under s. 195, clause (6), of the Criminal Procedure Code, to revoke a sanction granted by a lower Court or to give a sanction refused by it, and the judges composing the bench hearing the application are equally divided in opinion, the case is governed by the present clause and not by s. 429 or s. 439 of that Code (b).

See also notes to s. 98 of the Code, "Letters Patent appeal," on p. 253 above.

(y) *Nussephjee v. Elgnora* (1913) 38 Bom. 125.
See also *Ardaster v. Perozeboyee* (1856) 6 M. I. A. 348.

(z) *Ibid.*

(a) The words "in pursuance of section one hundred and eight of the Government of India Act, 1915," were substituted for

the words "under the provisions of the thirteenth section of the aforesaid Act of the Twenty-fourth and Twenty-fifth years of Our reign" by the Amended Letters Patent of 11th March 1919.

(b) *Bapu v. Bapu* (1911) 39 Mad. 750 [F. B.]

Civil Procedure.

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, respectively: Provided always that the said High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India. C. 15. 37-39.

38. And We do further ordain that the proceedings in all criminal cases, which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors in Our or Their Privy Council, in any matter not being of criminal jurisdiction from any final judgment, decree or order of the said High Court of Judicature at Fort William in Bengal made on appeal and from

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- Cl. 39. any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of these presents : Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rupees 10,000, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than Rupees 10,000 ; or from any other final judgment, decree or order made either on appeal or otherwise aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or Their Privy Council. Subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Decisions appealable to the Privy Council.—No appeal lies to His Majesty in Council under this clause, unless—

- (i) the decision from which an appeal is sought to be preferred amounts to a judgment, decree, or order ;
- (ii) the decision is a final one ; and
- (iii) the decision is passed on appeal, or in the exercise of original jurisdiction.

The decision must amount to a judgment, decree, or order.—No appeal lies to the Privy Council from an award made by a High Court on appeal from a District Court under s. 54 of the Land Acquisition Act, 1894. Such an award is not a judgment, decree or order within the meaning of this clause (c).

The judgment, decree or order must be final.—See notes to s. 109 of the Code under the head “ Final order,” p. 269 above.

The final judgment, decree or order must be one made on appeal or in the exercise of original jurisdiction.—Cl. 10 of the Charter empowers the High Court to deal with professional misconduct by suspension or removal. An order made under that clause is not in the exercise either of the original or appellate jurisdiction of the High Court, and is not therefore appealable to His Majesty in Council (d). But an order made in the exercise of the power of superintendence under s. 15 of the High

- (c) *Special Officer, Salsette v. Dosabhai* (1912) 37 Bom. 506, affirmed on app. t P. C. (1913) 17 C., W. N. 421 ; *Rangoon Botatung Co. Ltd. v. Collector of Rangoon* (1913) 40 Cal. 21, 39 I. A. 197 ; *Manavikraman v. Collector of the Nilgiris* (1918) 41 Mad. 943.
- (d) *An Attorney, in the matter of* (1914) 41 Cal. 734 ; *Ramachandra v. The President, Vakils' Association* (1914) 39 Mad. 128. *G. S. D. v. Government Pleader* (1907) 321 Bom. 106 ; *Bir Kishore v. King-Emperor* (1919) 4 Pat. L. J. 423.

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Courts Act (e) [now s. 107 of the Government of India Act, 1915], or in the exercise of revisional jurisdiction under section 115 of the Code (f), is appealable to the Privy Council. It may here be stated that cl. 15 of the Letters Patent was amended by the Amended Letters Patent of 11th March 1919 by adding into the clause certain words which make it clear that no appeal lies to the High Court under that clause from an order made in the exercise of revisional jurisdiction or from an order made in the exercise of the power of superintendence under s. 107 of the Government of India Act, 1915.

"Made on appeal."—An order made by the High Court rejecting an application to amend a decree passed by that Court on appeal is not an order "made on appeal" within the meaning of this clause (g); nor is an order made by the High Court rejecting an application to review a judgment passed on appeal (h). Such an order is not an order made on appeal against the judgment sought to be reviewed; it is an order in the appeal in which the judgment sought to be reviewed was given (i).

40. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations, as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

Appeal from interlocutory judgment.

Appeal from interlocutory judgment.—No appeal lies to the Privy Council from an interlocutory judgment or order of a Judge of a High Court until such judgment or order has been subjected to an appeal to the High Court under cl. 15, except in those cases in which by reason of the number of Judges who have made such order an appeal under cl. 15 is given directly to the Privy Council (j). The High Court will not, it seems, in the exercise of its discretion under this clause grant leave to appeal to the Privy Council upon a mere question of practice, such as an order for inspection of documents (k) or an order refusing the appointment of a receiver in a suit (l). But an order made by the High Court of Bombay under cl. 13 of the Letters Patent transferring to itself a suit from the Court of the Resident at Aden raises a question of jurisdiction, as distinguished from practice, and leave may be granted from such an order to appeal to the Privy Council (m).

(e) *Hurdeo v. Gridhari* (1874) 13 Beng. L. R. 103. But see *Sunder Koer v. Chandishwar* (1903) 30 Cal. 679, at pp. 681-682.

(f) *Secretary of State v. British India Steam Navigation Co.* (1911) 13 Cal. L. J. 90.

(g) *Sunder Koer v. Chandishwar* (1903) 30 Cal. 679.

(h) *Soudamoney v. Maharaj Dheraj* (1866) 6 W.

R. [Misc. R.] 102.

(i) *Rajah Enaet v. Ranees Rowshun* (1868) 10 W. R. [F. B.] 1, at pp. 2-3.

(j) *Sonbai v. Ahmedbhai* (1871) 9 Bom. H. C. 398.

(k) *Sonbai v. Ahmedbhai* (1871) 9 Bom. H. C. 398.

(l) *Chundi Dutt v. Pudmanand* (1895) 22 Cal. 928.

(m) *Municipal Officer, Aden v. Abdul Karim* (1904) 28 Bom. 292.

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Cls. 41-43.

41. And We do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the persons aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

Appeal in criminal cases, &c.

42. And We do further ordain that in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal, to Us, Our heirs or successors, in Our or Their Privy Council a true and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against.

Rule as to transmission of copies of evidence and other documents.

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute or cause to be executed, such judgment and orders as We, Our heirs or successors in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court should or might have been executed.

Calls for Records, &c., by the Government.

High Court to comply with requisition from Government for records, &c.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall

comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as such Government may deem proper. Cls. 43, 44.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section seventy-two of that Act and may be in all respects amended and altered thereby.

Powers of the Indian Legislature preserved.

Alterations in this clause.—This clause was substituted for the original clause 44 by the Amending Letters Patent of 11th March 1919. The material alteration consists in substituting the words "powers of the Governor-General in Legislative Council and also of the Governor-General in Council" for the words "powers of the Governor-General in Council."

Legislative powers of the Governor-General in Council.—The powers of the Governor-General in Council to make laws are derived from the Indian Councils Act of 1861 (24 and 25 Vict., c. 67). By sec. 22 of that Act the Governor-General in Council is given power to make laws in the manner provided, including power to repeal or amend existing laws, and including the making of laws for all Courts of justice and for all persons whatever, British or Native, foreigners or others. But a proviso to that section enacts that there is to be no power to repeal or in any way affect any Act passed in the same session of Parliament with the Indian Councils Act. The High Courts Act of 1861 (24 and 25 Vict., c. 104) is such an Act, and the Governor-General in Council therefore has no power to alter its provisions, unless such power is expressly given by the Act itself. Thus the Governor-General in Council has no power to alter the provisions of that Act as to the qualifications of the judges of the High Courts (sec. 3), or the provisions of sec. 15 thereof giving the High Courts superintendence over the Courts which are subject to its appellate jurisdiction (n). But the Governor-General in Council has power to remove any place or territory from the jurisdiction of a High Court, the reason being that such power is distinctly recognized by sec. 9 of the said Act, and it is also consistent with the Letters Patent (cl. 44) as required by the said sec. 9 (o).

Further, there is a proviso to sec. 22 of the Indian Councils Act, which enacts that there is to be no power to repeal or in any way affect any provision of the Government of India Act of 1858. Sec. 65 of the latter Act provides that all persons shall have and take the same suits, remedies and proceedings against the Secretary of State for India in Council as they could have done against the East India Company. Before the Government of India Act, 1858, a British subject could sue the *East India Company* to determine his claim to any right over land. The Governor-General in Council has therefore no

(a) *Queen v. Mears* (1874) 14 Bang. L. R. 106, 112.
(b) *Empress v. Burah* (1870) 4 Cal. 172, 177-179

5 I. A. 178; *James Currie, in the matter of* (1896) 21 Bom. 405, 409-410.

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Cls. 44, 45. power under the Indian Councils Act to pass an Act taking away the right of a British subject to sue the *Secretary of State* in a Civil Court to determine his claim to any right over land (p). See now the Government of India Act, 1915, s. 106 (2).

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date of such publication; and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty, King George The Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever.

Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

In Witness thereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster, the twenty-eighth day of December, in the twenty-ninth year of Our reign.

(Sd.) C. ROMILLY.

Letters Patent for the High Court of Allahabad.

(March 17, 1866.)

Cls. 1, 2.

[The two first paragraphs of the Preamble are similar to those of the Calcutta Letters Patent of 1865.]

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect, and establish a High Court of Judicature in and for any portion of the territories, within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said Presidencies, as We from time to time might think fit and appoint; and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts and to the Governor-General or Governor of the Presidency, in which such High Courts were established shall, as far as circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories;

And whereas We did upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent, under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the fourteenth day of May, in the twenty-fifth year of Our reign, in the year of Our Lord one thousand eight hundred and sixty-two, did accordingly, for Us, Our heirs and successors, erect and establish at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William, aforesaid, a High Court of Judicature which should be called the High Court of Judicature at Fort William in Bengal, and did thereby constitute the said Court to be a Court of Record:

1. Now know ye that We, upon full consideration of the premises and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly, for Us, Our heirs and successors, erect and establish, for the North-Western Provinces of the Presidency of Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature, for the North-Western Provinces, and We do hereby constitute the said Court to be a Court of Record.

2. And We do hereby appoint and ordain that the High Court of Judicature for the North-Western Provinces shall, until further or other provisions shall be made by Us, or Our heirs and successors, in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire, William Edwards, Esquire, William Roberts, Esquire, Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire, being respectively qualified as in the said Act is declared.

[Powers of Crown to appoint a sixth puisne Judge.—A question having arisen as to the validity of the appointment of a sixth puisne judge, it was held that under

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Cls. 2-15. clauses 1 and 2 it was quite competent to the Crown to appoint a sixth puisne judge (g). See High Courts Act, 1861, s. 16.]

3. And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature, for the North-Western Provinces previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it :—

"I, A. B., appointed Chief Justice [or a Judge] of the High Court of Judicature, for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

4-8. •[These clauses are similar to clauses 6 to 10 of the Calcutta Letters Patent of 1865.]

Civil Jurisdiction of the High Court.

9. And we do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purpose of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

Original jurisdiction.—Note that the High Court of Allahabad does not possess ordinary original civil jurisdiction.]

10-11. [These clauses are similar to clauses 15 and 16 of the Calcutta Letters Patent of 1865.]

12. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have the like power and authority with respect to the persons and estates of infants; idiots, and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force.

13-14. [These clauses are similar to clauses 20 and 21 of the Calcutta Letters Patent of 1865.]

Criminal Jurisdiction.

15. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have ordinary original criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal, shall have criminal jurisdiction over at the date of the publication of these presents; and the criminal jurisdiction of the said last-mentioned High Court over such persons shall cease at such date: Provided, nevertheless that criminal proceedings

which shall at such date have been commenced in the said last-mentioned High Court shall continue as if these presents had not been issued. Cls. 15-25

16. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

17. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlut, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf.

18. [This clause is similar to clause 25 of the Calcutta Letters Patent of 1865.]

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

20. And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall be a Court of Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlut for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlut by virtue of any law now in force.

21. And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

22. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigations or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

23. [This clause is similar to clause 29 of the Calcutta Letters Patent of 1865.]

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Cls. 24-29. *Exercise of Jurisdiction elsewhere, than at the ordinary place of sitting of the High Court.*

24. And We do further ordain that whenever it shall appear to the Lieutenant-Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of any Sudder Dewany Adawlut or the Sudder Nizamut Adawlut of the North-Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction.

25. And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last-mentioned High Court in relation hereto shall cease from the date of the publication of these presents; Provided always that any proceedings already commenced in relation to any of the matters aforesaid in the said last-mentioned High Court shall continue as if these presents had not been issued: Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

26-27. [These clauses correspond with clauses 35 and 36 of the Calcutta Letters Patent of 1865.]

Civil Procedure.

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council and being Act No. VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdiction respectively.

Criminal Procedure.

29. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made

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in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

30. And We do further ordain that any person or persons may appeal to us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature for the North-Western Provinces, made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by the Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provision contained in the 10th Clause of these presents: Provided, in either case, that the sum or matter at issue is of amount or value of not less than 10,000 rupees, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to, or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors in Our or Their Privy Council: subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Provinces, except so far as the said existing rules and orders, respectively, are hereby varied and subject also to such further rules and orders, as we may, with the advice of our Privy Council, hereafter make in that behalf.

31, 32, 33, 34, 35. [These clauses are similar to clauses 40, 41, 42, 43 and 44 of the Calcutta Letters Patent of 1865.]

By Warrant under the Queen's Sign Manual.

(Sd.) C. ROMILLY.

Letters Patent for the High Court of Patna.

(February 9, 1916.)

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India To all to whom these Presents shall come, greeting: WHEREAS

Recital of Act 24 and 25
Vict., c. 104.

by an Act of Parliament passed in the Twenty-fourth and Twenty-fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was, amongst other things, enacted, by section one, that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William;

and, by section two, that such High Court should consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act was declared;

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sadr Diwani Adalat and Sadr Nizamat Adalat at Calcutta, in the said Presidency, should be abolished;

and, by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty, and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency, as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency town, as might be prescribed thereby; and that, save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts:

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as were by the same Act required in persons to be appointed to the High Courts established at the Presidencies of Fort William in Bengal, of Madras, and of Bombay, as We from time to time might think fit and appoint; and that it should be lawful for Us, by such Letters Patent, to confer on any new High Court which might be so established any such jurisdiction, powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies; and that subject to the directions of the Letters Patent, all the provisions of the said recited Act relative to High Courts and to the Chief Justice and other Judges of such Courts, and to the Governor-General or Governor of the Presidency in which such High Courts were established, should, as far as circumstances might permit, be applicable to any new High Court which might be established in the said territories, and to the Chief Justice

and other Judges thereof, and to the persons administering the Government of the said territories :

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fourteenth day of May, in the Twenty-fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, and did constitute that Court to be a Court of Record.

And whereas Her late Majesty Queen Victoria, by Letters Patent under the Great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-eighth day of December in the Twenty-ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-five, did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord one thousand eight hundred and sixty-two, but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declared that the Court should continue to be a Court of Record :

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March, in the Twenty-ninth year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty-six, did erect and establish a High Court of Judicature for the North-Western Provinces, which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad, and did constitute that Court to be a Court of Record :

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1911, it was enacted, amongst other things, by section one, that the maximum number of Judges of a High Court of Judicature in India, including the Chief Justice, should be twenty ;

and, by section two, that Our power under section sixteen of the Indian High Courts Act, 1861, might be exercised from time to time and that a High Court might be established under the said section sixteen in any portion of the territories within Our Dominions in India, whether or not included within the limits of the local jurisdiction of another High Court ; and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for Us by Letters Patent to alter the local jurisdiction of that other High Court, and to make such incidental, consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits :

And whereas the said Indian High Courts Acts, 1861 and 1911, have been repealed and re-enacted by an Act of Parliament passed in the Fifth and Sixth Years of Our Reign, and called the Government of India Act, 1915 ;

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were by proclamation made by the Governor-General of India on the Twenty-second day of March in the Year of Our Lord One

Recital of establishment of High Courts at Fort William and Allahabad.

Recital of Act 1 & 2 Geo. 5, c. 18.

Recital of Act 5 & 6 Geo. 5, c. 61.

Recital of creation of Province of Bihar and Orissa.

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Cls. 1-4. thousand nine hundred and twelve, constituted a separate Province, called the Province of Bihar and Orissa, and are now governed by a Lieutenant-Governor in Council.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish, for the Province of Bihar and Orissa aforesaid, with effect from the date of the publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature at Patna, and We do hereby constitute the said Court to be a Court of Record.

2. And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf in accordance with section One hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Champs Chamiér, Knight, and the six other Judges being Saiyid Shurf-ud-din, Esquire, Edmund Pelly Chapman, Esquire, Basanta Kumar Mullick, Esquire, Francis Reginald Roe, Esquire, the Honourable Cecil Atkinson, and Jowala Persad, Esquire, being respectively qualified as in the said Act is declared.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant-Governor in Council may commission to receive it:—

"I, A. B., appointed Chief Justice [or a Judge] of the High Court of Judicature at Patna, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Patna shall have and use as occasion may require, a seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Patna." And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of



the Chief Justice, and in case of vacancy of the office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section One hundred and five of the Government of India Act, 1915; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorised and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession,

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5. And We do hereby further grant, ordain and appoint that all writs, *summonses, precepts, rules, orders and other mandatory* **Cls. 5-8.**

Writs, &c., to issue in name of the Crown, and under seal.

process to be used, issued or awarded by the High Court of Judicature at Patna shall run and be in the name and style of Us, or of Our heirs and successors, and shall be

sealed with the seal of the said High Court.

6. And We do hereby authorize and empower the Chief Justice of the High

Appointment of offices.

Court of Judicature at Patna from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the

Lieutenant-Governor in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant-Governor in Council and shall be either confirmed or disallowed by the Lieutenant-Governor in Council. And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively and as the Lieutenant-Governor in Council subject to the control of the Governor-General in Council, may approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerk to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Admission of Advocate, Vakils and Attorneys.

7. And We do hereby authorize and empower the High Court of Judicature at

Powers of High Court in admitting Advocates, Vakils and Attorneys.

Patna to approve 'admit and enrol such and so many Advocates, Vakils and Attorneys, as to the said High Court may seem meet; and such Advocates, Vakils and Attorneys

shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

8. And We do hereby ordain that the High Court of Judicature at Patna shall

Powers of High Court in making rules for the qualification, etc., of Advocates, Vakils and Attorneys.

have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-law of the said High Courts and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils

or Attorneys-at-law; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor.

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Cls. 9—14.

Civil Jurisdiction of the High Court.

9. And We do further ordain that the High Court of Judicature at Patna shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

10. And We do further ordain that an appeal shall lie to the High Court of Judicature at Patna from the judgment (not being an order made in the exercise of revisional jurisdiction in a case which has been called for by the said Court, and not being a sentence or order passed or made in the exercise of criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court constituted in pursuance of section One hundred and eight of the Government of India Act, 1915, and that an appeal shall also lie to the said High Court from the judgment (not being an order or sentence as aforesaid) of two or more Judges of the said High Court, or of any such Division Court wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court, in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

11. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

12. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Bihar and Orissa as that which was vested in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents.

Law to be administered by the High Court.

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Patna in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Patna to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of

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good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case. **Cls. 14-21.**

Criminal Jurisdiction.

15. And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents.

Ordinary original criminal jurisdiction of the Court.

16. And We do further ordain that the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

17. And We do further ordain that the High Court of Judicature at Patna shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf.

Extraordinary original criminal jurisdiction.

18. And We do further ordain that there shall be no appeal to the High Court of Judicature at Patna from any sentence or order passed or made by the courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such court to reserve any point or points of law for the opinion of the said High Court.

No appeal from the High Court exercising original jurisdiction.

Court may reserve points of law.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Patna shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

20. And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Criminal Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India.

Appeals from other Criminal Courts in the Province of Bihar and Orissa.

21. And We do further ordain that the High Court of Judicature at Patna shall be a court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Session Judges, or by any other officers in the Province

Hearing of referred cases, and revision of criminal trials.

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Cls. 21-26. of Bihar and Orissa who were, immediately before the publication of these presents, authorized to refer cases to the High Court of Judicature at Fort William in Bengal and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa, as were, immediately before the publication of these presents, subject to reference to or revision by the High Court of Judicature at Fort William in Bengal.

22. And We do further ordain that the High Court of Judicature at Patna shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

High Court may direct the transfer of a case from one Court to another.

Criminal Law.

23. And We do further ordain that all persons brought for trial before the High Court of Judicature at Patna, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Offenders to be punished under Indian Penal Code.

Admiralty Jurisdiction.

24. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa, all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal.

Civil

25. And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize.

• Criminal.

Testamentary and Intestate Jurisdiction.

26. And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Bihar and Orissa by the High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate; Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Testamentary and Intestate jurisdiction.

Matrimonial Jurisdiction.

27. And We do further ordain that the High Court of Judicature at Patna shall have jurisdiction, within the Province of Bihar and Orissa, in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts.

28. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section One hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority; but if the Judges be equally divided, then the opinion of the senior Judge shall prevail.

Civil Procedure.

29. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Criminal Procedure.

30. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, being an Act No. V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

31. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Patna made on appeal, and from any final judgment, decree or order made in the

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Cls. 31-34. exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents; provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council; but subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa, except so far as the said existing rules and orders respectively are hereby varied; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf.

32. And We do further ordain that it shall be lawful for the High Court of Judicature at Patna, at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors in Our or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

33. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa.

34. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Patna to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And we do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders

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as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the Cts. 34-39. premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Exercise of jurisdiction elsewhere than at the usual place of sitting of the High Court.

35. And We do further ordain that, unless the Governor-General in Council otherwise directs, one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit, whenever the Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court: Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant-Governor in Council otherwise directs: Provided also that the said High Court shall have power from time to time to make rules with the previous sanction of the Lieutenant-Governor in Council, for declaring what cases or classes of cases arising in the Division of Orissa shall be heard at Patna and not in that Division, and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division.

36. And We do further ordain that whenever it appears to the Lieutenant-Governor in Council, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

37. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers.

38. The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Cessation of jurisdiction of the High Court of Judicature at Fort William in Bengal.

39. And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court:

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Cls. 39-41. Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

- (a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question ; * and
- (b) in all proceedings [not being proceedings referred to in paragraph (a) of this clause] pending in that Court, on the date of the publication of these presents, under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th or 35th clause of the Letters Patent bearing date at Westminster the Twenty-eighth day of December, in the Year of Our Lord One thousand eight hundred and sixty-five, relating to that Court and
- (c) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court :

Provided, secondly, that, if any question arises as to whether any case is covered by the first proviso to this clause, the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final.

Calls for Records, etc., by the Government.

40. And it is Our further will and pleasure that the High Court of Judicature at Patna shall comply with such requisitions as may be made by the Lieutenant-Governor in Council for records, returns and statements, in such form and manner as he may deem proper.

High Court to comply with requisitions from Government for records, etc.

Powers of Indian Legislatures.

41. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative power of the Governor-General in Legislative Council, and also of the Governor-General in Council under section Seventy-one of the Government of India Act, 1915, and also of the Governor-General in cases of emergency under section Seventy-two of that Act, and may be in all respects amended and altered thereby.

Powers of Indian Legislatures preserved.

In Witness whereof we have caused these Our Letters to be made Patent. Witness Ourselves at Westminster the Ninth day of February, in the Year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our Reign.

By warrant under the King's Sign Manual.

(Signed) SCHUSTER.

* See *Ramgobind v Thakur Dayal* (1917) 2 Pat. L. J. 658.

LETTERS PATENT FOR THE HIGH COURT OF LAHORE.

March 21, 1919.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India. To all to whom these Presents shall come, greeting: Whereas by an Act of Parliament passed in the Fifth and Sixth years of Our Reign and called the Government of India Act, 1915, it was amongst other things enacted that it should be lawful for Us by Letters Patent to establish a High Court of Judicature in any territory in British India whether or not included within the limits of the local jurisdiction of another High Court and to confer on any High Court so established any such jurisdiction powers and authority as were vested in or might be conferred on any High Court existing at the commencement of that Act:

And whereas the Provinces of the Punjab and Delhi are now subject to the Jurisdiction of the Chief Court of the Punjab which was established by an Act of the Governor-General of India in Council, being Act No. XXIII of 1865, and was continued by later enactments and no part of the said provinces is included within the limits of the local jurisdiction of any High Court.

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our heirs and successors, erect and establish, for the Province of the Punjab and Delhi aforesaid, with effect from the date of the publication of these presents in the *Gazette of India*, a High Court of Judicature, which shall be called the High Court of Judicature at Lahore, and We do hereby constitute the said Court to be a Court of Record.

2. And We do hereby appoint and ordain that the High Court of Judicature at Lahore shall, until further or other provision be made by Us, or Our heirs and successors, in that behalf in accordance with section one hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Henry Adolphus Rattigan, Knight, and the six other Judges being William Chevis, Esquire, Henry Scott-Smith, Esquire, Shadi Lal, Esquire, Rai Bahadur, Walter Aubin leRossignol, Esquire, Leicester Hudson Leslie Jones, Esquire, and Alan Brice Broadway, Esquire, being respectively qualified as in the said Act is declared.

3. And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Lahore, previously to entering in the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant Governor of the Punjab may commission to receive it:—

“I, A.B., appointed Chief Justice [or a Judge] of the High Court of Judicature at Lahore do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment.”

Let. Pat. [Lahore].

Cls. 4-7.

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Lahore shall have and use as occasion may require, a Seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Lahore." And We do further



grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the Office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section one hundred and five of the Government of India Act, 1915; and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession.

5. And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Lahore shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court.

Writs, etc., to issue in name of the Crown, and under seal.

6. And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Lahore from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant-Governor of the Punjab, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent; And it is our further will and pleasure, and we do hereby, for Us, Our heirs and successors give, grant direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Lieutenant-Governor of the Punjab, subject to the control of the Governor-General in Council, may approve of: Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules.

Appointment of officers.

Admission of Advocates, Vakils and Attorneys.

7. And We do hereby authorize and empower the High Court of Judicature at Lahore to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

Powers of High Court in admitting Advocates, Vakils and Attorneys.

8. And We do hereby ordain that the High Court of Judicature at Lahore shall **Cls. 8-12**

Powers of High Court in making rules for the qualifications, etc., of Advocates, Vakils and Attorneys.

have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-sutor.

Civil Jurisdiction of the High Court.

9. And We do further ordain that the High Court of Judicature at Lahore shall

Extraordinary original civil jurisdiction.

have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

10. And We do further ordain that an appeal shall lie to the High Court of Judicature at Lahore from the judgment (not being an order

Appeal to the High Court from Judges of the Court.

made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the powers of superintendence under the provisions of section one hundred and seven of the Government of India Act, 1915, or in the exercise of criminal jurisdiction) of one Judge of the said High Court, or of one Judge of any Division Court constituted in pursuance of section one hundred and eight of the Government of India Act, 1915, and that an appeal shall also lie to the said High Court from the judgment (not being an order or sentence as aforesaid) of two or more Judges of the said High Court, or of any such Division Court, wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of any such Division Court, in such case shall be to Us, Our heirs or successors, in Our or their Privy Council, as hereinafter provided.

11. And We do further ordain that the High Court of Judicature at Lahore shall

Appeal from other Civil Courts in the Provinces of the Punjab and Delhi.

be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

12. And We do further ordain that the High Court of Judicature at Lahore shall

Jurisdiction as to Infants and Lunatics.

have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents.

Let. Pat. [Lahore].

Cls. 13-19.

Law to be administered by the High Court.

13. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Lahore in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of extraordinary original civil jurisdiction.

14. And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Lahore to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

By the High Court in the exercise of appellate jurisdiction.

Criminal Jurisdiction.

15. And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents.

Ordinary original criminal jurisdiction of the High Court.

16. And We do further ordain that the High Court of Judicature at Lahore, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Jurisdiction as to persons.

17. And We do further ordain that the High Court of Judicature at Lahore shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer specially empowered by the Government in that behalf.

Extraordinary original criminal jurisdiction.

18. And We do further ordain that there shall be no appeal to the High Court of judicature at Lahore from any sentence or order passed or made by the courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.

No appeal from High Court exercising original jurisdiction.

Court may reserve points of law.

19. And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Lahore shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right.

High Court to review cases on points of law reserved by one or more Judges of the High Court.

Let. Pat. [Lahore.]

20. And We do further ordain that the High Court of Judicature at Lahore shall **Cls. 20-24.**

Appeals from other criminal Courts in the Provinces of the Punjab and Delhi. be a Court of Appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India.

21. And We do further ordain that the High Court of Judicature at Lahore shall

Hearing of referred cases, and revision of criminal trials. be a court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Provinces of the Punjab and Delhi who were, immediately before the publication of these presents, authorized to refer cases to the Chief Court of the Punjab and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Provinces of the Punjab and Delhi, as were, immediately before the publication of these presents, subject to reference to or revision by the Chief Court of the Punjab.

22. And We do further ordain that the High Court of Judicature at Lahore shall

High Court may direct the transfer of a case from one Court to another. have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court.

Criminal Law.

23. And We do further ordain that all persons brought for trial before the High

Offenders to be punished under Indian Penal Code. Court of Judicature at Lahore, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860; called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Testamentary and Intestate Jurisdiction.

24. And We do further ordain that the High Court of Judicature at Lahore shall

Testamentary and Intestate Jurisdiction. have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Provinces of the Punjab and Delhi by the Chief Court of the Punjab in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate: Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

Let. Pat. [Lahore].

Cl. 25-29.

Matrimonial Jurisdiction.

25. And We do further ordain that the High Court of Judicature at Lahore shall have jurisdiction, within the Provinces of the Punjab and Delhi, in matters matrimonial between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Provinces, which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts.

26. And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Lahore, in the exercise of its original or appellate jurisdiction may be performed by any Judge, or by any Division Court, thereof appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there be a majority, but if the Judges be equally divided, then the opinion of the senior Judge shall prevail.

Civil Procedure.

27. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adapting as far as possible the provisions of the Code of Civil Procedure, being an Act, No. V of 1908, passed by the Governor-General in Council and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary intestate and matrimonial jurisdiction, respectively.

Criminal Procedure.

28. And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure, being an Act, No. V of 1898, passed by the Governor-General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by competent legislative authority for India.

Appeals to Privy Council.

29. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment decree or order of the High Court of Judicature at Lahore made on appeal, and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents: Provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or

Let. Pat. [Lahore].

respecting property amounting to or of the value of not less than 10,000 rupees ; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council ; but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi, except so far as the said existing rules and orders respectively are hereby varied ; and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf. Cis. 29-32.

30. And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders.

Appeal from interlocutory judgments.

31. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Lahore, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders, as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi.

Appeal in criminal cases.

32. And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Lahore to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments, decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

Rule as to transmission of copies of evidence and other documents.

Let. Pat. [Lahore].**Cls. 33-37.***Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court.*

33. And We do further ordain that whenever it appears to the Lieutenant-Governor of the Punjab, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the High Court of Judicature at Lahore should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

34. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 33rd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers.

35. The High Court of Judicature at Lahore may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi-judicial and non-judicial duties.

Calls for records, etc., by the Government.

36. And it is Our further will and pleasure that the High Court of Judicature at Lahore shall comply with such requisitions as may be made by the Governor-General in Council or by the Lieutenant-Governor of the Punjab for records, returns and statements, in such form and manner as he may deem proper.

Powers of Indian Legislatures.

37. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council, and also of the Governor-General in Council under section seventy-one of the Government of India Act, 1915; and also of the Governor-General in cases of emergency under section seventy-two of that Act, and may be in all respects amended and altered thereby.

In Witness thereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster the 21st day of March in the Year of Our Lord one thousand nine hundred and nineteen and in the ninth Year of Our reign.

By Warrant under the King's Sign Manual.

(Signed) SCHUSTER.

APPENDIX III.

Rules made by the High Court of Calcutta, under s. 122.

Schedule 1—Appendix G—Form No. 9.—In the form of “Decree in Appeal,” No. 9 of Appendix G to the First Schedule . . . , *cancel* the words from “Memorandum of Appeal” to “the following reasons, namely :—”(a).

O. 7, r. 3.—*After O. 7, r. 3, add the words—*

“and when the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same are in terms of the local measures.”

Schedule 1—Appendix A—Form No. 13.—In the form of “Breach of agreement to purchase land,” No. 13 of Appendix A to the First Schedule, *cancel* the word “bighas” and *substitute* there for the words *“acres.”*
“bighas”.

O. 16, r. (2)(i).—*Add the following proviso to O. 16, r. (2) (i) :—*

“Provided that when a Government officer is summoned on behalf of Government, the Court shall not require his travelling and other expenses to be paid under this rule.”

O. 16, r. (3).—*Add the following proviso to O. 16, r. 3 :—*

“Provided that money shall not be tendered under this rule to Government officers whose pay exceeds Rs. 10 per mensem, or whose head-quarters are situate more than 5 miles from the Court, when they are summoned to appear as witness in their official capacity in cases to which Government is a party.”

APPENDIX IV.

Rules made by the High Court of Bombay, under s. 122.

O. 3, r. 2, clause (a).—*O. 3, r. 2, cl. (a) be amended to read as follows :—*

“ Persons holding general powers-of-attorney (a) from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them to make and do such appearances, applications and acts on behalf of such parties.”

O. 5, r. 22.—*The following proviso be added to O. 5, r. 22 :—*

“ Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.”

O. 9, r. 5.—In r. 5 of O. 9, for the words “ one year ” the words “ six months ” shall be substituted.

O. 16, r. (2) (1).—*The following shall be inserted as proviso to sub-rule (1) of rule 2 of Order 16 :—*

“ Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness.”

O. 16, r. (3).—*The following shall be inserted as proviso to rule 3 of Order 16 :—*

“ Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him.”

No. 1628.—In exercise of the powers conferred by sub-rule (3) of rule 2 of Order 16, Civil Procedure Code, 1908, and all other powers enabling it in this behalf, the High Court is pleased to make the following rules and to direct that they be inserted as paragraphs 55A, 55B, 55C at page 19 of the Manual of Civil Circulars, 1912 :—

55A. A public officer whose salary does not exceed Rs. 10 per mensem, whether he is or is not entitled to travelling allowances under the Civil Service Regulations, shall

when summoned as a witness in his official capacity to give evidence or to produce a document before a Court, be paid travelling expenses in accordance with the scale prescribed by the rules in paragraph 55. App. IV.

And any public officer whose salary exceeds Rs. 10 per mensem but who is disentitled to travelling allowances under the Civil Service Regulations by reason of the fact that the Court before which he is summoned to give evidence or to produce a document is situated not more than five miles from his head-quarters shall be paid the said travelling expenses.

Any sum payable to such officer on account of subsistence allowance shall be credited to Government.

55B. Where the expenses of a public officer summoned as a witness in his official capacity who is entitled to travelling allowances under the Civil Service Regulations have to be deposited in advance by a private party under rule 2 of Order XVI, the term 'expenses' shall be interpreted to mean the travelling and halting allowances admissible under the Civil Service Regulations (but not subsistence allowance), and the sum so deposited shall be credited to Government.

55C. A public officer who has not been paid travelling expenses under rule 55A and who is entitled to receive travelling allowances under the Civil Service Regulations, shall obtain from the Court a certificate that he has attended in his official capacity for the purpose specified in the proviso to rule 3 of Order XVI, Civil Procedure Code, stating the date of his appearance, the period for which he has been detained, and that he has received no payment from the Court.

O. 21, r. 44A.—After r. 44 of O. 21, the following shall be inserted, namely:—

"44A. Where the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the Office of the Collector of the District in which the land is situate."

O. 21, r. 72A —After r. 72 of O. 21, the following shall be inserted, namely:—

"72A. If leave to bid is granted to the mortgagee of immoveable property, a reserve price as regards him shall be fixed of not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such sum as shall appear to be properly attributable to it in relation to the amount aforesaid."

O. 49, r. 4.—The following be added as r. 4 in O. 49:—

"Under section 128, paragraph 2, clause (1), of the Civil Procedure Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate Side, Bombay:

"Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to the register even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal"

App. IV. **Schedule I—Appendix B—Form No. 10,—Form No. 10 in Appendix B,**
Schedule I.....be amended to read as follows:—

(Title.)

Judge.

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner."

APPENDIX V.

Rules made by the High Court of Allahabad, under s. 122.

Order V.

27. *To O. V, r. 27, add the following as note 1 and note 2 :—*

1. A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these Provinces is given in Appendix (2) to the General Rules (Civil) of 1911.

2. In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI, simultaneously with the issue of the summons notice shall be sent to the head of the office in which the person concerned is employed in order that arrangements may be made for the performance of the duties of such person.

Illustration : If the Court sees fit to issue a summons to a kanungo or patwari it shall inform the Collector of the district, and if to a sub-registrar it shall inform the District Registrar to whom the sub-registrar is subordinate.

21. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court.

Order VII.

Add the following rules :—

" 19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately on being so added, file a proceeding of this nature.

" 20. An address for service filed under the preceding rule shall be within the local limits of the district court within which the suit or petition is filed, or of the district court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

" 21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

" 22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

Rules—All.**App. V.**

"23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the court directs service at the address for service given by the party.

"24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the court thinks fit.

"25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

"26. Nothing in these rules shall apply to the notice prescribed by Order XXI, rule 22.

Order VIII.

Add the following rules :—

"11. Every party, whether original, added or substituted, who intends to appeal and defend any suit or original petition shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

"12. Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be to addresses for service filed under the preceding rule."

Order XIII.

12. Every document not written in the Court vernacular or in English, which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

13. When a document included in the list, prescribed by rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in rule 4 (1) mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A1, B1, C1, &c., AA1, BB1, &c., and those of the second A2, B2, C2, &c., AA2, BB2, &c. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series.

Order XVI.

2. (4). This rule shall not apply, in cases to which Government is a party; in the case of witnesses who are Government servants whose salary exceeds Rs. 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters

22. (1) Save as provided in this rule and in rule 2, the Court shall allow travelling and other expenses on the following scale :—

- (a) In the case of witnesses of the class of cultivators, labourers, and menials, six annas a day ;
 - (b) In the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct ; and
 - (c) In the case of witnesses of superior rank, including officers of Government in receipt of salary of not less than Rs. 200 a month, from three to five rupees a day.
- (2) If a witness demand any sum in excess of what has been paid to him, such sum shall be allowed if he satisfies the Court that he has actually and necessarily incurred the additional expense.

*
Illustration.

A post office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs, and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the Court from which the summons was issued.

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule, as may seem to the Court to be reasonable and proper.

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

23. In cases to which Government is a party, Government servants, not being police constables, whose salary exceeds Rs. 10 per mensem, and who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses.

Order XIX.

4. Affidavits shall be entitled in the Court of _____ at _____ naming such Court). If the affidavit be in support of or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case it shall be entitled *In the matter of the petition of*

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly ; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

Rule—All.**App. V.**

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively, using the words "I affirm" or "I make oath and say."

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe to be true," and shall state the name and address of, and sufficiently described for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of document produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

12. No verification of a petition and no affidavit purporting to have been made by a *pardah-nashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

18. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made.

Order XX.

21. (1) Every decree and order as defined in section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

Order XXI.

Substitute the following for paragraph (2) in rule 25 :—

25 (2). "2. Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him, personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

Rules—All.**App. V.** *Substitute the following for rule 55:—*

55 (1). Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under section 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where—

- (a) the amount decreed (which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1), with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree (including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1), is otherwise made through the Court or certified to the Court, or
- (c) the decree (including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1), is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

104. When the certificate prescribed by section 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room.

105. Every attachment of moveable property under rule 43, of Negotiable Instruments under rule 51, and of immoveable property under rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed; in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application a certificate from the sub-registrar within whose sub-district such property is situated, showing that the sub-registrar has searched his book nos. I and II and their indices for the past twelve years and stating the encumbrances, if any, which he has found on the property.

107. Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 188711—238-10, dated 7th October 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary: and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the Court shall determine **App. V.** whether such land, or any, and what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108. When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

109. The certificate of the sub-registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

No fees are payable in respect of the report by the Collector.

110. The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the inquiry.

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

112. The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall wholly or in part be omitted therefrom.

113. When permission has been given to a decree-holder to bid for property, the Court ordering the sale shall inform the officer appointed to conduct the sale whether there are any persons, in addition to the decree-holder, entitled to share in the sale proceeds.

114. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military Cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

115. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act

Rules—All.**App. V.**

116. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

117. Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

118. If the Custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register—

- (a) the number and description of the animals;
- (b) the day and hour on and at which they were committed to his custody;
- (c) the name of the attaching officer or his subordinate by whom they were committed to his custody; and shall give such attaching officer or subordinate a copy of the entry.

119. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continue, according to the scale prescribed under section 12 of Act No. 1 of 1871.

And the sum so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act

120. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under section 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

121. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

122. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118.

123. For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

124. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

125. The fee for the services of each such person shall be payable in the manner prescribed in rule 116. It shall not be less than two annas, and shall ordinarily not be more than three and a half annas per diem. The Court may at its discretion allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

126. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him; and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge. Provided that, where the amount does not exceed Rs. 5, it may be paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

127. When in consequence of an order of attachment being withdrawn or for some other reasons, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

128. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments.

129. When any sum levied under rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

130. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

Order XXVII.

9. In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, he shall,

Rules—All.

App. V. In lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form :

TITLE OF THE SUIT, ETC.

1. A. B., Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be) Respondent (or &c.), in the suit :

or, on behalf of the Government [which under Order 27, rule 8 (1) of Act No. V of 1908, has undertaken the defence of the suit], respondent (or, &c.), in the suit.

Order XXXII.

4 (3). In r. 4 (3) substitute a comma for the full stop and add the following words :—
Unless a notice under rule 3 (4) of this order has been duly served on him and he has failed to reply to that notice within the time specified therein."

Order XLI.*Revised rule 3 (1).*

"3 (1). Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in rule 1 (1). It may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

38. (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings.

Order XLII.*Revised rule 1.*

" Appeals from Appellate Decrees.

" 1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees, subject to the following provision:—

" Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded, and also of the judgment of the Court of first instance."

Order XLIII.

3. In every appeal under rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid.

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Order XLVI.

8. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order.

Order XLVII.

10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order

Order LII.

1. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code.

FORMS.

APPENDIX B.

No. 7.

Form no. 7—an order for transmission of summons for service in the jurisdiction of another Court (Order 5, rule 21) is hereby cancelled.

APPENDIX B.

No. 10.

Form No. 10—a form to accompany return of summons of another Court (Order 5, Rule 23), is cancelled.

APPENDIX B.

No. 20.

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS.

No. OF SUIT.

Name of parties

In the Court of the

Ddte fixed for hearing

1	2	3	4		5		6
Number of witnesses to be summoned.	Name and full address of each person to be summoned.	Rank or occupation.	Distance of residence from Court		Cash paid for.		Name and address of person to whom unexpended travelling expenses and diet money should be returned.
			Rail.	Road.	Travelling expenses.	Diet expenses.	

Rules—All.

App. V.

APPENDIX E.

No. 43.

The security to be furnished under section 55 (4) shall be, as nearly as may be, by a bond in the following form:—

In the Court of _____ at _____
 Suit No. _____ of 19 _____
 against _____
 Plaintiff.
 Defendant.

C. D. of

WHEREAS in execution of the decree in the suit aforesaid, the said C. D. has been arrested under a warrant and brought before the Court of

; and whereas the said C. D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No. III of 1907, to be declared an insolvent, and the said Court has ordered that the said C. D. shall be released from custody if the said C. D. furnish good and sufficient security in the sum of Rs. _____

that he will appear when called upon, and that he will within one month from this date apply under section 5 of Act No. III of 1907, to be declared an insolvent. Therefore I, E. F., inhabitant of _____ have voluntarily become security, and do hereby bind myself, my heirs and executors, to _____ as Judge of the said Court and his successors in office that the said C. D., will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court, on its order, the sum of Rs. _____

Witness my hand at _____ this _____ day of _____ 19 _____
 (Sd.) E. F.,
 Surety.

Witnesses :

APPENDIX F.

No. 11.

The security to be furnished under Order XXXVIII, rule 9, shall be, as nearly as may be, by a bond in the following form :—

In the Court of _____ at _____
 Suit No. _____ of 19 _____
 .. Plaintiff.
 .. Defendant.

Amount of suit, Rupees

WHEREAS in the suit above specified the plaintiff _____ aforesaid, has applied to the said Court that the said defendant, _____, may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant, _____, may be attached :

And whereas, on the failure of the said defendant, _____, to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant, _____ has been attached by order of the said Court :

Therefore I _____, inhabitant of _____, have voluntarily become security and hereby bind myself, my heirs and executors, to _____

as Judge of the said Court, and his successors in Office, that the said defendant, shall produce and place at the disposal of the said Court, when required, the property hereinbelow specified, namely, (*here give description of property or refer to an annexed schedule*), or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to as Judge of the said Court and his successors in office on its order such sum to the extent of rupees (*here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment*) as the said Court may adjudge against the said defendant.

Witness my hand at this day of 19 . (Signed)

Witnesses :

Surety.
(Signed)

No. 12.

The security to be furnished under Order XXXIX, rule 2 (2), shall be, as far as may be, by a bond in the following form :—

In the Court of at
Suit No. of 19 .
.. Plaintiff.
.. Defendant.

WHEREAS, in the suit above specified, instituted by the said plaintiff, to restrain the said defendant, from (*here state the breach of contract or other injury*), the said Court has, on the application of the said plaintiff, granted an injunction to restrain the said defendant from the repetition (*or the continuance*) of the said breach of contract (*or wrongful act complained of*), and required security from the said defendant against such repetition (*or continuance*) :

Therefore I, , inhabitant of , have voluntarily become security and do hereby bind myself, my heirs and executors to as judge of the said Court and his successors in office that the said defendant shall abstain from the repetition (*or continuance*) of the breach of contract aforesaid (*or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right*), and in default of his so abstaining, I bind myself, my heirs and executors to pay into Court, on the order of the Court such sum to the extent of rupees , as the Court shall adjudge against the said defendant.

Witness my hand at this day of 19
Witnesses : Surety.

APPENDIX H.

No. 4.

Notice to show cause. (*General Form.*)

IN THE COURT OF

AT DISTRICT.

Civil Suit No. of 19

Miscellaneous No. of 19,

versus

resident of

resident of

App. V. To

has made application to this Court that
you are hereby warned to appear in this Court in person or by a pleader duly instructed
on the day of 19 , at o'clock in the forenoon
to show cause against the application, failing wherein, the said application will be heard
and determined *ex parte*, and it will be presumed that you consent to be appointed guar-
dian for the suit.

APPENDIX H.

(List of documents produced by plaintiff Order 13, rule 1.)
defendant

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant).

1	2	3			4
Serial number.	Description and date, if any, of the document.	What became of the document.			Remarks.
		If brought on the record the exhibit mark put on the document.	If rejected, date of return to party, and signature of party or pleader to whom the document was returned.	If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III, the date of enclosure in the envelope.	

Signature of party or pleader producing the list

APPENDIX H.

No. 11.

Notice to minor defendant and guardian.

IN THE COURT OF AT DISTRICT.

SUIT No. OF 19

resident of
plaintiff.

versus.

resident of
defendant.

To

Minor defendant.

Natural guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you (1) , are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you (1) or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint you or some other person to act as guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of the Court this
19

day of
Judge.

APPENDIX H.

No. 16.

The security to be furnished under Order XXV, rule 1, shall be as nearly as may be, by bond in the following form :—

In the Court of at

Suit No. of 19 .

.. Plaintiff.

.. Defendant.

WHEREAS a suit has been instituted in the said Court by the said plaintiff to recover from the said defendant the sum of rupees and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immoveable property within British India independent of the property in the suit :

Therefore, I, inhabitant of , have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and to his successors in office that the said plaintiff , his heirs and executors, shall, whenever called on by the said Court, pay all costs that may have been or may be incurred by the said defendant, , in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said Court on its order.

Witness my hand at this day of 19 .

(Signed)

Witnesses

Surety.

APPENDIX VI.

Rules made by the High Court of Madras under s. 122.

O. 3, r. 4.—*Add the following as sub-rule (4) to O. 3, r. 4:—*

“(4) Notwithstanding the termination of all proceedings in the suit so far as regards the client, the appointment of a pleader shall, unless otherwise provided therein or determined by the death of the client or the pleader or by revocation in accordance with the provisions of clause (2) of this rule, be deemed to authorise him to appear or to make any application or to do any act in connection with getting copies of documents and obtaining return of documents produced or filed in the suit or refund of money paid into Court in the suit.”

O. 4, r. 2.—*In O. 4, r. 2, number the present rule 2 (1), and add as rule 2 (2)—*

“Registers in accordance with Forms Nos. 14, 15, 16, 17 and 18^e in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits and cases specified therein.”

[NOTE.—*For the New Forms Nos. 14, 15, 16, 17 and 18, see below Appendix H.*]

O. 5, rr. 25, 26.—*Substitute the following for rr. 25 and 26 in O. 5:—*

25. Where the defendant resides out of British India and has no Agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Service where defendant resides out of British India and has no Agent.

Provided that, if, by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon.

26. Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

Service in foreign territory through Political Agent or Court or by special arrangement.

(b) the Governor-General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

substituted by Act XVIII of 1914.

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory

in which the defendant resides the summons can be served by an officer of the Government of such territory. App. VI.

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant; and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

O. 5, rr. 27, 28, 29 A.—*Make the following amendments and additions to O. 5 :—*

- (1) *In rule 27 after the words " send it " insert the words " by registered post prepaid for acknowledgment."*
- (2) *In rule 28 after the words " shall send " insert the words " by registered post prepaid for acknowledgment."*
- (3) *Insert as rule 29 A—*

" Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval forces or His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

O. 9, r. 13.—*Make the following amendments to O. 9, r. 13 :—*

- (1) Re-number rule 13 as rule 13 (1).
- (2) Add the following as sub-rule (2) to rule 13 :—

" (2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

O. 13, r. 7.—*Add the following proviso to rule 7 (2) :—*

" Provided that no document shall be returned which by force of the decree has become wholly void or useless."

O. 16 (4A). (1) Notwithstanding anything contained in the foregoing rules, in

Special provision for public servants summoned as witnesses in suits to which the Government is a party.

any suit by or against the Secretary of State for India in Council, no payment in accordance with rule 2 or rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters; and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed in the Civil Service Regulations and shall also pay any further sum that may be required under rule 4 according to the same scale; and the money so deposited or paid shall be credited to Government.

(3) In all cases where a Government servant appears in accordance with this rule; the Court shall grant him a certificate of attendance.

Rules—Mad.

App. VI.

ORDER XX

1.—*Make the following amendments to O. 20, r. 1 :—*

(1) Re-number rule 1 as sub-rule (1).

(2) Add the following as sub-rule (2) :—

“(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court.

3.—*For O. 20, r. 3, substitute the following rule :—*

“The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review, provided also that, where the presiding judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the judge.”

12.—*Add the following to O. 20, r. 12 :—*

“(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry ; and in every case the Court of first instance shall on the application of the decree holder, inquire and pass the final decree.”

ORDER XXI.

17.—*In O. 21, r. 17, add as r. 17 (5) :—*

“Registers in accordance with Forms Nos. 19, 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein.”

[NOTE.—*For the new Forms Nos. 19, 20 and 21, see below Appendix H.*]

25 (2)—(1) *Amend O. 21, r. 25 (2), as follows :—*

Insert the words “ or cause him to be examined by any other Court ” after the words “ examine him.”

(2) *Add the following proviso to r. 25 (2) :—*

“ Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause.”

40. *Add the following as a proviso to O. 21, r. 40 (5) :—*

“ Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.”

Add the following as sub-rule (6) to O. 21, r. 40 :—

“(6) No judgment-debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (2) unless and until the decree-holder pays into Court such sum as the judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort for the journey to and from the prison.

Sub-rule (5) of Rule 39 shall apply to such payments.”

For O. 21, r. 43, substitute the following rules, viz :—

“ 43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof.

provided that, when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43-B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.”

[NOTE.—An additional Form, being Form No. 15-A, has been inserted in Appendix E.]

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App. VI. 53. *Add the following as sub-rule 1 (c) to O. 21, r. 53 :—*

“(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it.”

5. *Add the following as a proviso to O. 22, r. 5 :—*

“Provided that an appellate Court before determining it may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question.”

11-A.—*In O. 22, after r. 11, add the following as r. 11-A :—*

“11-A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a quasi-judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal.”

Order XXVI-A.

O. 26-A.—*After O. 26, read the following O. 26 A. :—*

(1) The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court.

(2) The report of the Commissioner shall be evidence in the suit and shall form part of the record.

(3) Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Order XXVII.

5.—*For O. 27, r. 5, substitute the following rule :—*

“The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months’ time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion.”

Order XXIX.

1-A.—*Insert as Rule 1-A of Order 29—*

“In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months’ time between the date of summons and the date for appearance.”

Order XXXII.**3.—For O. 32, r. 3, substitute the following rule :—**

“ 3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. The affidavit shall further state the name of the person or persons on whom notice has to be served under the provisions of sub-rule (5).

(4) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The application shall be by separate petitions.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or, where there is no guardian, upon notice to the father or other natural guardian of the minor or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in form No. 11 set forth in appendix H hereto.”

4.—For O. 32, r. 4, substitute the following rule :—

“ 4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed as guardian for the suit unless the court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in form No. 11-A set forth in appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be the guardian, and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to

Rules—Mad.

App. VI. the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require.

(5) When a guardian for the suit of a minor defendant is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the suit on behalf of the defendant, and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance moneys to the guardian for the purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him."

7.—Add the following in O. 32, r. 7 :—

Rule.—" (1-A). Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in the following Form which shall be numbered as Form No. 24 in Appendix D to this Schedule."

14-A.—In O. 32 after r. 14, add the following as rule 14-A :—

" 14-A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a quasi-judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a judge for disposal."

17.—Add as rule 17 of Order 32—

" In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

ORDER XLI.

1.—(1) Add the following sentence to sub-r. (1) of r. 1 :—

" The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for for the purpose of appeal."

Add the following as a proviso to O. 41, r. 1 (1) :—

" Provided that, in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act, IX of 1908, do not apply and in which certified copies of such decrees or orders have not been granted

within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court." **App. VI.**

(2) *Add the following sentence to sub-r. (2) of r. 1 :—*

"The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court Fees Act."

9.—*Substitute the following for r. 9 (2) :—*

"Registers in accordance with Forms Nos. 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein."

[NOTE.—For the new Forms Nos. 22, 23, 24 and 25, see Appendix II below]

18.—*In O. 41, r. 18, after the words "cost of serving the notice" insert the words "or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice"*

31.—*Substitute the following for r. 31 :—*

"31. The judgment of the Appellate Court shall be in writing and shall state

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reasons for the decision ; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein ; provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall after such revision as may be deemed necessary, be signed by the Judge.

ORDER XLI-A (new).

Appeals to the High Court from original decrees of Subordinate Courts.

1. The rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Unless otherwise ordered the period prescribed by the notice for entry of appearance by the respondent shall be twenty-five days from the service of notice upon him.

3. (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filling in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate or print any part of the record.

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App. VI. Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4. (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice, order or process may be made on the party filing such memorandum.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred.

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court. Provided that, after a party has given notice of an address for service in accordance with Rule 4, service of any notice or process shall be made at such address.

6. All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 a.m. and 5 p.m. at the address for service of the party to be served.

7. Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered.

10. (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

11. When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court shall be

Rs. 15, and the costs of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs. 30. At the request of any party, the Registrar shall cause the order to be drawn up and the said costs to be inserted therein. App. VI.

Memorandum of Objections.

12. (1) If the acknowledgment mentioned in Rule 22 (3) of Order XLI is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in Rule 22 (3) of Order XLI, the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in Rule 12 (1).

14. Rule 31 of Order XLI shall not apply to the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary.

ORDER XLI-B (new).

1. The rules of Order XLI-A shall apply, so far as may be, to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court :

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

2. Notice of the appeal shall be given in manner prescribed by Order XLI-A, Rule 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said order.

ORDER XLII (new).

Appeals from appellate decrees.

1. The rules of Order XLI and Order XLI-A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order.

2. (1) The memorandum of appeal shall be printed or type-written and shall be accompanied by the following papers :—

A copy thereof ; one certified copy and one plain printed or type-written copy of the decrees of Court of first instance and of the Appellate Court ; and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy.

(2) If any ground of appeal is based upon the construction of a document, a printed or type-written copy of such document shall be presented with the memorandum of appeal.

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Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader, to be a correct translation shall be presented.

(3) If the appellant fails to comply with this rule, the appeal may be dismissed.

ORDER XLIII.

O. 43, r. 2.—*Substitute the following for r. 2 :—*

“ 2. The rules of Order XLI and of Order XLI-A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law :

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court.”

O. 43, r. 3.—*Add the following as r. 3 of O. 43 :—*

“ 3. A memorandum of appeal from an appellate order shall be accompanied by a printed or typed copy of the memorandum or application and of any papers filed therewith.”

Appendix B to Schedule I.

Form No. 1.—*Insert the following note in red ink in Form No. 1, namely :—*

“ Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out.”

Form No. 13A.—*Insert the following as form No. 13 A after form No. 13 in Appendix B of Schedule I :—*

No. 13A.

Certificate of attendance to an officer of Government summoned as a witness in a suit to which the Government is a party.

(ORDER XVI, r. 4A.)

(CAUSE TITLE.)

This is to certify that _____ (name)
(designation) being a Government servant was summoned to give evidence in his official capacity on behalf of the plaintiff in the above suit and was in attendance in this court from the day of _____ to the _____ day of _____ 19 _____ (inclusive) and that a sum of Rupees _____ has been paid into Court by the plaint defendant towards his travelling and subsistence allowance for _____ days according to article 1133 of the Civil Service Regulations and that the said amount has been will be remitted to the Government treasury at _____ to be credited to Government under the head “XVIA-Miscellaneous Fees and Fines.”

Dated the _____

day of _____

19 _____

Presiding Judge or Chief Ministerial Officer.

Appendix D to Schedule I.

Form No. 10-A.—*Insert in Appendix D the following as Form No. 10-A :—*

FORM No. 10-A.

FINAL DECREE FOR SALE [ORDER 34, RULE 5 (2), OR ORDER 34, RULE 8 (4)].

(Title).

Upon reading the preliminary decree passed in the above suit and the application of the plaintiff dated _____ and upon hearing Mr.

_____ for plaintiff and Mr.

for defendant and it appearing that the payment directed by the said decree has not been made.

It is hereby decreed as follows :—

(1) that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be applied in payment of what is declared due to plaintiff in the aforesaid preliminary decree together with subsequent interest and subsequent costs and that the balance, if any, be paid to the defendant or other person entitled to receive it; (2) that if the net proceeds of the sale is insufficient to pay such amount and such subsequent interest and costs in full the plaintiff be at liberty to apply for a personal decree for the amount of the balance; and (3) that the defendant do also pay plaintiff Rs. _____ for the costs of this application.

(Here enter description of mortgaged property in English or in the language of the Court.)

NOTE.—(1) In the case of a decree under Order 34, rule 5 (2), score out the words plaintiff and defendant below the lines and in the case of a decree under Order 34, rule 8 (4), score out the same words occurring above the lines.

(2) Direction No. (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist.

Form No. 10 B.—*Insert in Appendix D the following as Form No. 10-B :—*

FORM No. 10-B.

FINAL DECREE FOR REDEMPTION [ORDER 34, RULE 3 (1), ORDER 34, RULE 5 (1) AND ORDER 34, RULE 8 (1)].

(Title)

Upon reading the preliminary decree in the above suit on _____ and the application of the defendant I. A. No. _____, dated _____ and after hearing Mr. _____

and Mr. _____

pleader for the
pleader for the

and it appearing that the payment directed by the

aforesaid decree has been made :—

Rules—Mad.**App. VI.**

It is hereby decreed as follows :—

That the ^{plaintiff}_{defendant} do deliver up to the ^{defendant}_{plaintiff} or to such person as he appoints all documents in his possession or power relating to the mortgaged property and do also retransfer the property to the ^{defendant}_{plaintiff} free from the mortgage and from all incumbrances created by the ^{plaintiff}_{defendant} or any person claiming under him (or by those under whom he claims) and do also put the ^{defendant}_{plaintiff} in possession of the property.

SCHEDULE.

Description of the mortgaged property.

The costs of the ^{defendant}_{plaintiff} in this proceeding:—

Particulars.

Amount

NOTE.—(1) In the case of a decree under Order 34, rule 8 (1), score out the words plaintiff and defendant above the lines ; in the case of decree under Order 34, rule 3 (1) and rule 5 (1), score out the words plaintiff and defendant below the lines.

(2) The words “ or by those under whom he claims ” will be inserted only if the mortgagee derives title from an original mortgagee.

Form No. 24.—Add the following as Form No. 24 in Appendix D :—

FORM No. 24.

[DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR LUNATIC.

(Title.)

This suit coming on this day for final disposal in the presence of, etc., and C. D. the defendant, a minor by E. F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing, dated the _____ day of _____ and made between A.B., the plaintiff of the one part, and the said C.D. by the said guardian *ad litem* of the other part, (or, on the terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto : It is ordered as follows :—

(Set out the terms of the compromise.)

Appendix E to Schedule I.

Form No. 15.—For the word “ Dated ” substitute the words “ Given under my hand and the seal of the Court, this _____ day of _____

Form No. 15-A.—Add the following as Form No. 15-A in Appendix E :—

FORM No. 15-A.

BOND FOR SAFE CUSTODY OF MOVEABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF PERSON INTERESTED AND SURETIES.

(Order XXI, rule 43.)

In the Court of _____ at _____

Civil Suit No. _____ of _____

A. B. of _____

against

C. D. of _____

Know all men by these presents that we, I.J. of _____ etc., and K.L. of _____ etc., and M.N. of _____ etc., are jointly and severally bound to the Judge of the Court of _____ in Rupees _____ to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this _____ day of _____ 191 _____

AND WHEREAS the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the _____ day of _____ 19 _____, in execution of a decree in favour of _____ in suit No. _____ of _____ 19 _____ on the file of _____ and the said property has been left in the charge of the said I.J.

Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void: otherwise it shall remain in full force.

I.J.

K.L.

M.N.

Signed and delivered by the above bounden _____ in the presence of _____

Form No. 17.—Add the following as a 'Note' to Form No. 29—(Proclamation of Sale)—of Appendix E to Schedule I of the Code of Civil Procedure, 1908 :—

"Note.—The title-deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title-deeds, or mortgages not disclosed in the encumbrance certificate."

Appendix F to Schedule I.

Form No. 9.—For Form No. 9 of Appendix F, substitute—
FORM No. 9.

APPOINTMENT OF A RECEIVER.

(O. XL, r. 1.)

(Title)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the _____ day of _____ 191 _____ in favour of _____

It is hereby ordered that AB be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents, issues and profits thereof under Order XL of the Code of Civil Procedure, 1908, with all powers under the provisions of that order, except that he shall not without leave of the Court (1) grant leases for a term exceeding three years or (2) institute suits in any Court (except suits for rent) or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000 or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount shall not exceed Rs. 1,000.

Rules—Mad.

App. VI. And it is further ordered that the ^{parties} ~~defendants~~ to the above suit and all persons claiming under them do deliver up quiet possession of the properties, moveable and immoveable, specified below together with all leases, agreements for lease, kabuleats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the said immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said _____ and shall be entitled to retain in his hands the sums of Rs. _____ for current expenses, but subject thereto shall pay his net receipts, as soon as the same come to his hands, into Court to the credit of this suit. He shall once in every _____ months file his accounts and vouchers in Court, the first account to be filed on the _____ day of _____ and to be passed on the _____ day of _____. He shall be entitled to commission at the rate of Rs. _____ per cent. on the net amounts collected by him or to the sum of Rs. _____ per month (or as the case may be) as his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the estate in addition to his own office establishment the following further establishment :—

(Here enter specification of property.)

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____

Appendix G to Schedule 1.

Form No. 6.—Insert the following note in red ink in Form No. 6, namely:—

“Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance.”

Form No. 6-A.—In Appendix G, insert the following as Form No. 6-A :—

FORM NO. 6-A (Order XLI-A, rule 2).

NOTICE TO RESPONDENT.

(Cause title.)

Appeal from the _____ of the Court
of _____ dated the _____ day
of _____
To _____
Respondents.

Rules—Mad.

Take notice that an appeal from the above decree (order) has been presented by the abovenamed appellants and registered in this Court, and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 25 days after service of this notice on you. **App. VI.**

If no appearance is entered on your behalf by yourself, your pleader or some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

The address for service of the appellant is that of his pleader Mr. A. B. of (insert address) Madras.

(If the appellant appears in person, insert his address for service.)

Given under my hand and the seal of the Court, this
day of 19 .

Registrar.

[Interlocutory application No. of 19 has been made by appellant, and execution has been stayed (or other order made) by order dated the day of 19].

Form No. 6-B.—In Appendix G, insert the following as Form No. 6-B :—

FORM No. 6-B (Order XLI-A, rule 3).

MEMORANDUM OF APPEARANCE.

(Cause title.)

Take notice that the Respondent intends to appear and defend the above appeal, and that his address for service of all notices and process is (insert address.)

The said respondent requires a list of the papers which the appellant proposes to translate and print.

Dated the day of 19 .

(Signed) C. D.,
Vakil for Respondent.

To the Registrar, High Court of Judicature, Madras.

Appendix H to Schedule I.

Form No. 11.—Substitute the following for Form No. 11 of Appendix H :—

FORM No. 11.

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN, OR TO THE PERSON IN CHARGE OF THE MINOR.

[Order XXXII, rule 3 (5).]

(Title.)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

Rules—Mad.

App. VI. Whereas an application has been presented on the part of the in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within _____ days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as ^{his}_{her} guardian for the purposes of the said suit, the Court will proceed to appoint some other person to act as guardian of the said minor for the purposes of the said

Given under my hand and the seal of the Court this _____ day of _____ 191 _____

Form No. 11-A.—*In Appendix H, insert the following Form as Form No. 11-A :—*

FORM No. 11-A.

NOTICE TO PROPOSED GUARDIAN.

[Order XXXII, rule 4 (3).]

(Title.)

To

residing at

Take notice that the abovenamed petitioner has made an application to this Court to appoint you guardian for the suit of _____ minor defendant in _____ No. _____ of 19 _____ and that the said application will be heard on the day of _____ next.

Given under my hand and the seal of the Court, this _____ day of _____ 191 _____

Form No. 14.—*For Form No. 14 of Appendix H, substitute :—*

FORM No. 14.

REGISTER OF ORDINARY SUITS INSTITUTED.

Court—

Year—

Instructions.

If the suit has been received by transfer, or instituted under Order XXXVII, Schedule I, C.C.P., a note should be made to that effect at the head of the page.

2. If a suit is remanded under rule 23, Order XLI, or restored to file under rule 9 or rule 13, Order IX, Schedule I, C.C.P., note under item 2, the date of restoration to file.

3. Under the head "*Particulars of claim*" enter particulars required by clauses (g) and (h) of rule 1, Order VII, Schedule I, C.C.P., and also the value of the suit as required by clause (i) of that Order and with special reference to Judicial Statements Nos. VII and VIII and H.C. Circulars Nos. 1054 of 1870 and 2253 of 1894. Entries under heads 3, 4 and 5 should be full, for embodiment in the decree, as required by rule 6, Order XX, Schedule I, C.C.P.

4. Note carefully the new heads 8 and 10 and fresh additions to heads 9 and 12.

5. The certified copies of Judgment and Decree in Second Appeal sent to the lower Appellate Court should be forwarded by it to the Court of First Instance which will return them to the former Court after recording the necessary entries under head 9 of this Register.

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6. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P., and also of any withdrawal of the claim or a portion of the claim against any of the defendants. **App. VI.**

1. *Ordinary Suit No.* _____ of 19____

2. Date of { Presentation.
Filing.

4. DEFENDANT—Name, description and place of birth.

6. Date for *Defendant's first appearance*.

Vakil for { Plaintiff.
Defendant.

8. Number of application for review or re-hearing) with result and date.
Fresh Judgment, if any, with date.

9. First Appeal No. _____ of 191 . Result with date.
Second Appeal No. _____ of 191 Result with date.

11. Execution.—

No.	Date of application.	Order and date.	Against whom.	For what, and amount, if for money.	Amount of costs.		
					Rs.	A.	P.

MADRAS HIGH COURT RULES.

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Rules—Madras

App. VI.

1. *Small Cause Suit No.* of 191 .
2. Date of { Presentation.
Filing.
3. PLAINTIFF—Name, description and place of abode.
4. DEFENDANT—Name, description and place of abode.
5. PARTICULARS OF CLAIM—*Claim for*
Cause of action arose at on
6. Date for *Defendant's first appearance.*
- Vakil for • { Plaintiff.
Defendant.
7. JUDGMENT, date and result.
8. Number of application for review (or re-hearing) with result and date.
Fresh Judgment, if any, with date.
9. Revision Case No. of 191 with result and date.
10. Note proceedings, if any, taken under Rule 11. Order XX, Rule 2 etc., Order XXI, Schedule I, C.C.P.
11. *Execution.*—

No.	Date of application.	Order and date.	Against whom.	For what, and amount, if for money.	Amount of costs.		
					Rs.	A.	P.

12. *Return of Execution.*—

Amount paid into Court.			Person arrested.	Minute of other return than payment or arrest, and date of every return.
Rs.	A.	P.		

Rules—Mad.

App. VI. Form No. 16.—Add the following as Form No. 16 in App. H:—

FORM No. 16.
REGISTER OF SUITS DISPOSED OF

Court—
Year—

Instructions.

1. Separate register must be kept for ordinary and small cause suits.
2. If the presiding officer of the Court is invested with extended small cause powers, the remarks column should show whether the value of the suit is between Rs. 50 and Rs. 100 or between Rs. 100 and Rs. 200.
3. The date to be entered in column 3 will always be the latest date. In the case of suits restored to file, the date of original institution should be entered.
4. When a suit is, after contest, compromised or withdrawn, a note of the fact should be made in the column of remarks. It should also be stated whether the decree is appealable, and if so, to what Court.

Serial number	Number of the suit disposed of.	Date of institution or of receipt of order of transfer.	Date of disposal.	Transferred to another Court.	Disposed of.										Remarks.	Corresponding columns of Statement No. IX, Part I (c).		
					Without contest.				With contest.				Actual number of days intervening between institution and disposal.					
1	2	3	4	5	Without contest.		With contest.								19	30		
					Ex-parte.		Decreed on reference to arbitration.		Decreed on oath.		Decreed after trial.		Uncontested (columns 7 to 10).	Contested (columns 11 to 16).				
					Compromised.	Decreed on confession.	Decreed.	Dismissed.	In whole or in part for plaintiff.	For defendant.	For plaintiff.	For defendant.	In whole or in part for plaintiff.	For defendant.				
					7	8	9	10	11	12	13	14	15	16	17	18	19	30

MADRAS HIGH COURT RULES.

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Rules—Mad

Form No. 17.—Add the following as Form No. 17 in App. H :—

App. VI

FORM No. 17.

REGISTER OF CIVIL MISCELLANEOUS CASES RECEIVED.

(ON THE SIDE).

Court—

Year—

Instructions.

1. In this register must be entered all cases ordered by H. C. Circular No. 557 of 1888 to be shown as miscellaneous applications for purposes of Judicial Statement No. IX, Part 2, as well as cases of contempt of Court (*vide* H. C. Circular No. 2928 of 1892).

2. In the matter of references under the Land Acquisition Act, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference, in column 5 the name of the claimant, and in column 6 whether the reference is under section 18, 29, or 30 of the Act.

3. In the matter of references under section 16 of Madras Regulation III of 1802, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference and the name of the deceased, in column 5 the name of the claimant, if any, in column 6 the words "Section 16, Madras Regulation III of 1802," and in the last column the number and date of reference, if any, made to Government and its result.

Number of miscellaneous cases.	Date of presentation.	Number of connected case, if any.	Name of petitioner, if any, and of his vakil.	Name of defendant and of his vakil.	Purport of case and section of law.	Final order with date.	Number of appeal with result and date.
1	2	3	4	5	6	7	8

Rules—Mad.

App. VI. Form No. 18.—Add the following as Form No. 18 in App. H —

FORM No. 18.

REGISTER OF MISCELLANEOUS CASES DISPOSED OF.

Court—
Year—

Instructions.

1. This register will show all miscellaneous cases of every kind, whether instituted on the application of parties or of the Court's own motion, including cases of contempt of Court (H. C. Circulars Nos. 557 of 1888 and 2928 of 1892).
2. The date to be entered in column 3 will always be the latest date. In the case of petitions restored to file, the date of original institutions should be entered, and the date of restoration noted in the column of remarks.

Serial No.	Number of the miscellaneous case disposed of.	Date of institution, or of receipt of the order of transfer.	Date of disposal.	Transferred or registered as suit.	Disposed of										Actual number of days intervening between institution and disposal.	Remarks.	Corresponding columns to Statement No. IX, Part 2 (a).																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																						
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					Without trial.	Compromised.	Ordered on confession.	Ordered.	Dismissed.	Ex parte.	Order on reference to arbitration.	On oath.	After trial.	Party committed for contempt of Court.																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																									
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MADRAS HIGH COURT RULES.

1129

Rules—Mad

Form No. 19.—Add the following as Form No. 19 in App. H :—

App. VI.

FORM No. 19.

REGISTER OF EXECUTION PETITIONS RECEIVED

(ON THE

SIDE).

Court—

Year—

Instructions.

Applications for transmission of decree for execution beyond the jurisdiction of the Courts passing them should not be entered in this Register, but must be entered in the Register of Miscellaneous Cases Received (Form No. 17).

Number of Execution Petition.	Date of presentation.	Number of connected suit and of last previous application.	Name of decree-holder and of his pleader.	Name of judgment-debtor and of his pleader.	Items of decree or order to be executed, with date of any proceedings from which time runs for this application.	Mode of assistance, and section of Code, or law prescribing it	Order with reasons, for closing of proceedings under this application, and date.	Number of appeal with result and date.
1	2	3	4	5	6	7	8	9

Form No. 20.—Add the following as Form No. 20 in App. H :—

FORM No. 20.

REGISTER OF DECREES OF OTHER COURTS RECEIVED FOR EXECUTION UNDER SECTIONS 38 AND 39, C. C. P.

Court—

Year—

Date of receipt.	Serial number.	Name of the decreeing Court.	Number of suit on the file of that Court.	Number of connected execution or miscellaneous applications, if any presented in this Court.	Lower Court to which sent for execution.	Nature and date of communication to the decreeing Court (<i>vide</i> Section 41, C.C.P.).	Amount of postage, if any received.	Remarks.
1	2	3	4	5	6	7	8	9
							Rs. a. p.	

Rules—Mad.

App. VI. Form No. 21.—Add the following as Form No. 21 in App. H :—

FORM No. 21.

REGISTER OF EXECUTION PETITIONS DISPOSED OF.

Court—

Year—

Instructions.

1. The date to be entered in column 4 will always be the latest date. In the case of petitions restored to file, the date of original institution should be entered, and the date of restoration noted in the column of remarks.

2. Note in the remarks column the number of judgment-debtors imprisoned in each case, the value of decree under which judgment-debtor was imprisoned and date when sent to jail and date of release, for the purposes of columns 34 to 37 of Statement No. XI.

Serial Number.	Number of the execution petition disposed of.	Number of connected case.	Date of institution or of receipt of the order of transfer	Date when proceedings were finally closed.	Withdrawn, rejected or not prosecuted.	Transferred.	Application on which proceedings were finally closed.			Amount.		How the	
							Satisfaction obtained.	Execution wholly infructuous.	Involved in execution applications disposed of.	Realized.	Imprisoned.	Judgment-debtor	Arrested but re.
1	2	3	4	5	6	7	8	9	10	11	12	13	14
					6	7	8	9	10	15	16	17	18
										Rs.	Rs.		

decree was executed.

Moveable property.		Immoveable property.				Possession given of.		Specific performance enforced.	Partition effected (Section 54, C.C.P.).	Execution otherwise effected.	Actual number of days intervening between institution and disposal.	Remarks.
Sold.	Attached but released (Rule 55 or 60, Order XXI).	Sold.	Attached but released (Rule 55 or 60, Order XXI).	Otherwise dealt with (section 72; or Rule 83, Schedule Order I or Schedule III).	Moveables (Rule 31, Order XXI).	Immoveables (Rules 35 and 36, Order XXI).						
15	16	17	18	19	20	21	22	23	24	25		(If the petition is only for part satisfaction of the decree, note the fact.)
19	20	21		23	24	25	26	27	28	29	30	
												Corresponding columns to Statement No. XI, Part I.

MADRAS HIGH COURT RULES.

1131

Rules—Mad

App. VI.

Form No. 22.—Add the following as Form No. 22 in App. H :—

FORM No. 22.

REGISTER OF APPEALS RECEIVED.

Court—

Year—

Instructions.

Appeals from orders which have the force of decrees should be shown in this register and not in the Register of Miscellaneous Appeals Received (Form No. 24) in which appeals from other orders should be entered—vide H. C. Circular No. 3400, dated 22nd December 1893, and section 2 (2) and Rule 5, Order XXXVI, Schedule I C.C.P.

2. Under item "5. Particulars of suit and decree appealed from" enter also nature and value of appeal, with special reference to the information required by annual statement No. X, Parts 3 and 4 and H. C. Circulars Nos. 1054 of 1870 and 2253 of 1894. In cases of appeals against orders having the force of decrees substitute the word "Order" for "Decree" and add after date the words "passed under C.C.P. on M.P. No. of 1 ."

3. If the appeal has been received by transfer, a note should be made to that effect at the head of the page.

4. If an appeal is remanded under Rule 23, Order XLI, Schedule I, C.C.P., note under head 2 the date of restoration to file.

5. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P.

1. Appeal No. of 191 .

2. Date of { Presentation.
Filing.

3. APPELLANT—Name, description and place of abode.

4. RESPONDENT—Name, description and place of abode.

5. PARTICULARS OF SUIT AND DECREE APPEALED AGAINST. Decree of

the Court of dated 191
in Original Suit No. of 191
Value of relief

Particulars of relief.

Claimed.	Decreed.	Appealed against.
RS. A. P.	RS. A. P.	RS. A. P.

6. Hearing, if any, under Rule 11, Order XLI Schedule I, C. C. P., and result with date.

7. Date for respondent's first appearance.

Vakil for { Appellant.
Respondent.

8. JUDGMENT, result and date.

9. Objections, under Rule 22, Order XLI, Schedule I, C.C.P., if any, filed by whom and value.

10. Number of Application for review (re-hearing) with result and date.
Fresh Judgment, if any, with date

11. Second Appeal No. of 191 . Result with date.

Rules--Mad.

App. VI. Order No. 23.—Add the following as Form No. 23 in App. H —

FORM No. 23.

REGISTER OF APPEALS DISPOSED OF.

Court—

Instructions.

Year—

1. There must be three separate registers of appeals disposed of, viz., (1) for money or moveables, (2) under the Madras Estates Land Act, 1908, and (3) for title and other appeals.
2. The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institutions should be entered.

Serial number	Number of the appeal disposed of.	Date of institution or of the receipt of the order of transfer.	Disposed of										Remarks.	Corresponding columns of Statement No. X, Part I (a).				
1	2	3	4	5	6	7	Without contest.			With contest.			Actual number of days intervening between institution and decree.	Contested (columns 12 to 16).	Uncontested (columns 8 to 11).	Objection under rule 22, Order XII.	31	
							8	9	10	11	12	13						14	15	16	17	18	19
							Decree confirmed.	Decree modified.	Decree reversed.	Remanded.	On oath, or by arbitration or compromise.	Decree confirmed.	Decree modified.	Decree reversed.	Remanded.			
				8	10	11												
								8	9	10	11							
								Decree confirmed.	Decree modified.	Decree reversed.	Remanded.							
												Dismissed for default or otherwise not prosecuted.						
												Dismissed under Rule 11, Order XII.						

MADRAS HIGH COURT RULES.

1133

Rules—Mad.

Form No. 24.—Add the following as Form No. 24 in App. H :—

App. VI.

FORM No. 24.

REGISTER OF MISCELLANEOUS APPEALS RECEIVED.

Court—

Year—

Instructions.

Appeals from orders which have the force of decrees *should not be shown* in this register. Appeals from other appealable orders only should find place in this register.

2. If necessary, give value of appeal under head.

3. A note should be made of all parties brought on or struck off the record under Order for XXII, Schedule I, C.C.P.

1. *Miscellaneous Appeal No.* of 191

2. Date of {

3. APPELLANT—Name, description and place of abode.

4. RESPONDENT—Name, description and place of abode.

5. PARTICULARS OF ORDER APPEALED AGAINST—Order of the Court of
dated 191 passed
on M.P No. of 191, in Original Suit No.
of 191 .
*Appeal under of

6. Hearing, if any, under Rule 11, Order XLI, Schedule I, C.C.P., and result with date.

7. Date for Respondent's first appearance.

Vakil for, .. { Appellant.
Respondent.

8. JUDGMENT—Result and date.

9. Objections under Rule 22, Order XLI, Schedule I, C.C.P., if any, filed by whom.

10. Number of applications for review (or re hearing) with result and date.

Fresh Judgment, if any, with date.

Rules—Mad.

App. VI. Form No. 25.—Add the following as Form No. 25 in App. H :—

FORM No. 25.
REGISTER OF MISCELLANEOUS APPEALS DISPOSED OF.

Year—

Instructions.

Court—

The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institution should be entered.

Serial number.	Number of the miscellaneous appeal disposed of.	Date of institution or of the receipt of the order of transfer.	Date of disposal.	Transferred to another Court.	Dismissed under Rule 11, Order XII.	Dismissed for default or otherwise not prosecuted.	Without contest.				With contest.				Actual number of days intervening between institution and disposal.		Objections under Rule 22, Order XII.	Remarks.	Corresponding columns to statement No. X, Part 2 (a).	
							Order confirmed.	Order modified.	Order reversed.	Remanded.	On oath, or by arbitration or compromise.	Order confirmed.	Order modified.	Order reversed.	Remanded.	Uncontested (columns 8 to 11).	Contested (columns 12 to 16).			
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	

APPENDIX VII.

Rules made by the Chief Court of the Punjab and the High Court of Lahore under s. 122.

Order 2, rule 7.—After rule 7 of Order II, insert :—

8. (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court Fees Act.

Order 5, rule 10.—To rule 10, Order V, the following proviso shall be added :—

“ Provided that in any case if the plaintiff so wishes, the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule : and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this Order.”

Order 7, rule 2.—In the second paragraph of rule 2 of Order VII after the words “ and the defendant ” insert “ or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate ” after the words “ the amount ” insert “ or value.”

Order 9, rule (1).—To rule 9 (1) the following proviso shall be added :—

“ Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default.”

Order XVI.

2. Add the following as an Exception to rule 2 (i) :—

Exception—When applying for a summons for any of its own Officers, Government will be exempt from the operation of clause (i).

3. For Rule 3, substitute :—

3. (1). The sum so paid into Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2). When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

Exception (1).—In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court consider it necessary, be paid to them.

Rules—Punjab.

App. VII. *Exception (2).*—A Government servant, whose salary does not exceed Rs. 10 per mensem, may receive his expenses from the Court.

4. After the word "summoned," where it first occurs in rule 4 (1), insert :—
"or, when such person is a Government servant, to be paid into Court".

Order XXI.

29 A.—After rule 29 of Order XXI, the following rule shall be inserted :—

"29 A. When a suit under rule 63 of this Order is pending, the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided."

75.—In r. 75 after the word "stored" shall be added the words "or can be sold to greater advantage in an unripe state, such as green wheat or gram."

Order 30, rule 1.—To rule 1 of Order XXX the following explanation shall be added :—

Explanation.—"This rule applies to a joint Hindu family trading partnership."

Order 32, rule 1.—To rule 1 the following paragraph shall be added :—

"Such person may be ordered to pay any costs in the suit as if he were the plaintiff."

O. 42, r. 2.—Add the following as rule 2 :—

"2. In addition to the copies specified in Order XLI, rule 1, the Memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance."

Appendix B.

FORM No. 11.

Order V, rule 18, Schedule 1, App. B, Form No. 11.—For the 3rd and 4th parts of (3) in the form read :—

(3) The said _____ and his house in _____
which he ordinarily resides being personally known to me
pointed out to me by _____

I went to said house in _____ and there on
the day of _____ 19 , at _____ o'clock
n the ^{fore} noon, I did not find the said _____
_{after}

I enquired from { (a) _____ }
{ (b) _____ } neighbours

I was told that _____ had gone to
_____ and would not be back till _____

Signature of Process Server.

APPENDIX VIII.

Rules made by the High Court of Patna under s. 122.

Order XVI.

2. (1)—*Add the following proviso to O. 16, r. 2 (1) :—*

“ Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal in his public capacity.”

(3).—*Add the following proviso to rule 3 :—*

“ Provided that when the person summoned is an officer of Government who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge, or of matters with which he has had to deal, in his public capacity, then

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by rule 2 and recover the amount from the Treasury

(ii) if the officer's salary exceeds Rs. 10 a month and the Court is situated not more than 5 miles from his headquarters the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred :

(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than 5 miles from his headquarters no payment shall be made to him by the Court. In such cases any expenses paid into Court under Rule 2 shall be credited to Government.

APPENDIX IX.

Rules made by the Chief Court of Lower Burma under s. 122.

See for these rules the following notifications issued by the Chief Court :—

1.	Notification No. 3 (General), dated the	15th March 1910.
2.	.. No. 2	17th March 1910.
3.	.. No. 7	30th March 1910.
4.	.. No. 14	12th July 1910.
5.	.. No. 22	25th November 1910.
6.	.. No. 2	31st January 1911.
7.	.. No. 14	18th August 1911.
8.	.. No. 15	19th August 1911.
9.	.. No. 16	22nd August 1911.
10.	.. No. 19	19th October 1911.
11.	.. No. 20	do.
12.	.. No. 21	do.
13.	.. No. 23	do.
14.	.. No. 24	23rd October 1911.
15.	.. No. 6	4th April 1912.
16.	.. No. 11	15th October 1912.
17.	.. No. 3	14th March 1914.
18.	.. No. 1	18th February 1915.
19.	.. No. 3	12th March 1915.
20.	.. No. 1 (Schedule) ..	19th June 1915.
21.	.. No. 2	9th August 1915.
22.	.. No. 3 (Schedule- Corrigendum),,,	20th December 1915.
	..	8th March 1918.
	..	25th March 1918.
	..	16th August 1918.
	..	6th May 1919.
	..	27th October 1919.

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